Tribunals Service
Information Tribunal

Appeal Number: EA/2006/0027

Freedom of Information Act 2000 (FOIA)

Heard at Harp House, London, EC4
Decision Promulgated 20 July 2007

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN
David Marks
and
LAY MEMBERS
Rosalind Tatam
Gareth Jones

Between

MINISTRY OF DEFENCE

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

ROB EVANS

Additional Party

Representation:

For the Appellant: **Jonathan Crow QC and Kate Gallafent of Counsel**
For the Commissioner: **Timothy Pitt-Payne of Counsel**
For the Additional Party: **Aidan Eardley of Counsel**

Decision

The Tribunal dismisses the Appeal of the Appellant but substitutes the Decision Notice issued by the Commissioner in that the said Decision Notice shall require that the Ministry of Defence within 30 days of the date of promulgation of the Tribunal's decision to provide the Additional Party with the information requested on 13 January 2005 subject to the following information being redacted, namely:

(1) The names of members of staff belonging to Grades below B2 level; and

(2) The telephone numbers and the email addresses for all staff unless the same be already set out in the appropriate Civil Service Year Book or other similar and generally available publication.

Reasons for Decision

Introduction

1. This Appeal concerns the operation of a number of exemptions relied on by the Appellant, namely the Ministry of Defence (MoD) in relation to the disclosure sought by the Additional Party, Mr Evans. Mr Evans seeks disclosure of a complete copy of the 2004 edition of a Directory (the Directory) published by the Defence Export Services Organisation (DESO). Mr Evans is a journalist who writes for The Guardian.

2. DESO, although forming part of the MoD as a so-called Central Unit, is a discrete organisation involved in assisting UK based companies concerned in some way with the arms trade in obtaining contracts for the export of defence goods and services. The Directory sets out the structure of DESO and lists the first names and surnames, job titles, work addresses, telephone numbers and email addresses of DESO's staff. The MoD has provided a redacted copy of the Directory. However, it relies upon the following provisions of the Freedom of Information Act 2000 (FOIA 2000) with varying degrees of emphasis, namely sections 24, 36, 38 and 40.

3. Section 24 deals with national security. It is a so-called prejudiced-based exemption which provides as follows, namely:

"24.(1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.

(2) The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.

(3) A certificate signed by a Minister of the Crown certifying that exemption from section 1(1)(b), or from section 1(1)(a) and (b), is or at

any time was, required for the purpose of safeguarding national security shall, subject to section 60, be conclusive evidence of that fact.

(4) A certificate under subsection (3) may identify the information to which it applies by means of a general description and may be expressed to have prospective effect."

4. Section 1(1)(b) expresses one of the guiding principles of FOIA, namely that a person makes the request for information from a public authority and is entitled to have that information communicated to him. Section 60 entitles the Information Commissioner (the Commissioner) or an Applicant making a request for information to appeal to the Tribunal against the making of the certificate. Section 60, however, is not relevant to this Appeal.

5. Section 36 of FOIA deals with what is described in the Head Note as "Prejudice to effective conduct of public affairs". This also is a prejudiced-based exemption. By section 36(2), it is provided in relevant part that:

"(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –

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(c) would otherwise prejudice or would be likely otherwise to prejudice the effective conduct of public affairs."

6. Section 38, again, is a prejudiced-based exemption. It provides that:

"(1) Information is exempt information if its disclosure under this Act would, or would be likely to –

(a) endanger the physical or mental health of any individual, or

(b) endanger the safety of any individual."

7. Finally, section 40 which deals with personal information provides in relevant part that:

"(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if –

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or second condition below is satisfied.

(3) The first condition is –

(a) in a case where the information falls within any of the paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene –

(i) any of the data protection principles… "

Chronology

8. The request was made by Mr Evans by letter dated 11 January 2005. Mr Evans wrote on Guardian-headed notepaper. Under cover of a letter dated 10 February 2005, DESO supplied a redacted copy of the Directory having removed names of staff and related contact details, but leaving in the titles of the posts held. Organisational information including posts' titles was provided, but staff names and contact details were redacted as indicated, together with the locations of staff based in Saudi Arabia. No redaction was made as to the name of the Head of DESO. Reliance was placed on section 40 of FOIA as well as sections 44 and 38. Section 44 deals with exempt information being not disclosed if disclosure is otherwise prohibited by or under any enactment. No further reliance has been placed for present purposes on section 44. Reliance was placed on section 40 on the basis that the individuals whose names otherwise appeared in the Directory expected their data to be disseminated only "for use by DESO, for the wider MoD Department and security cleared members of the UK Defence Industry."

9. Mr Evans then asked for an internal review. The result of that review was reported to him by letter dated 5 May 2005 and signed by David Wray as "Director of Information (Exploitation), Ministry of Defence." Mr Wray gave evidence before the Tribunal and further reference will be made to that below. The following principal points were made in his letter, namely:

(1) the earlier redaction of the general locations of those serving with UK MoD teams in Saudi Arabia which should have appeared on page 25 of the Directory was confirmed;

(2) the main switchboard number of DESO previously redacted was released, being a switchboard number at its principal London premises at Castlewood House;

(3) the ranks of all military personnel listed in the Directory should not be redacted as had previously been done; and

(4) reliance was placed on section 21 of FOIA which exempted information if otherwise reasonably accessible by other means, but only insofar as the names and contact details of DESO staff

whose names appeared in other publications including the Civil Service Year Book and Vachers; Mr Wray maintained that the distribution of the Directory as a whole was not generally accessible since its distribution outside Government was said to be limited to the "business community which has a legitimate need for the information";

(5) the balance of the respective public interests inbuilt into section 36 militated in favour of not disclosing phone numbers since the public could contact DESO either directly by its own switchboard number or via a Public Enquiry Unit (PEU);

(6) in addition and in connection with (5), it was alleged that official business would be hindered if random calls were made to officials by members of the public and in particular by any anti-arms sale protestors, as well as if there were any deliberate attempt or attempts to disrupt business, e.g. by spam e-mail attacks;

(7) moreover, the Parliamentary Under Secretary of State for Defence had formed the view as a qualified person for the purpose of section 36(2)(c) that prejudice would be caused to the effective conduct of public affairs; and

(8) there was in particular a real danger to the health and safety of DESO staff in Saudi Arabia.

10. By the date of the internal review, the Commissioner's Office had been approached. By his letter of 30 April 2005, the Commissioner addressed in particular section 36(2)(c), i.e. dealing with prejudice to the effective conduct of public affairs, as well as section 38(1) which dealt with the endangering of health and safety. The Commissioner posed the question whether it would be possible to release staff names without the appropriate contact details such as e-mail addresses. He also asked for evidence to justify the likelihood of the occurrence of alleged disruption, e.g. spam e-mail attacks. As to section 38(1), and in particular section 38(1)(b), the Commissioner was inclined to accept that in relation to the operations of DESO in Saudi Arabia, both the names of the relevant staff as well as their whereabouts should be withheld.

11. In further exchanges with the Commissioner, Mr Wray in effect maintained the MoD's earlier position. Mr Evans, meanwhile, in his e-mails to the Commissioner, relied on the fact that military personnel whose names appeared in the 2004 Directory would have their names and details appearing in the appropriate military list or lists, whether it be Army, Navy or Air Force. The Commissioner continued to ask the MoD for evidence as to the "risk of direct endangerment" to DESO staff, in particular with regard to Saudi Arabia, as well as other questions including those raised by Mr Evans. Mr Wray wrote a lengthy response dated 16 January 2006 dealing with the above and other related issues. Without intending any discourtesy to the careful

manner in which these exchanges were framed, the Tribunal finds that the points that Mr Wray raised were all revisited during the appeal, and in those circumstances were referred to in connection with the arguments raised during the Appeal.

The Decision Notice

12. The Commissioner's Decision Notice is dated 19 April 2006. With regard to section 21, the Commissioner accepted that some information was exempt. However, since the Commissioner was minded to order disclosure of the remaining information, he noted that the MoD no longer needed to rely on this exemption. The Tribunal has not been asked to consider on this Appeal the applicability of the exemption in section 21.

13. With regard to section 36, the Commissioner provided five grounds which favour disclosure, namely:

    (1) the need for transparency, at least as much transparency as possible, between defence companies and the MoD especially on the grounds that such companies could receive substantial sums of public expenditure as contractors; the Commissioner added that disclosure of the Directory would guard against the risks of "inappropriate closeness between such companies and the MoD, which in extreme cases could lead to improper conduct or even to allegations of bribery and corruption"; he also added that the movement of officials from the MoD to jobs within the arms industry, or vice-versa, could also lead to Government arms export policy and wider military or foreign policy being "unduly skewed in favour of arms companies"; in short, disclosure of the information would "make movement of people more visible and help to ensure there is no improper conduct by officials.";

    (2) a better understanding of the MoD;

    (3) accountability and transparency of public officials generally;

    (4) improvement of public confidence in the integrity of DESO officials; and

    (5) the making of DESO staff more "accessible to the public, allowing them to contact the relevant officials about matters that concern them."

14. The Commissioner noted the MoD's response in the following terms, namely:

    (1) public interest and transparency were already satisfied by release of the redacted copy, together with accessibility to website information and a telephone enquiry service, in turn allowing members of the public to contact a central point in DESO;

(2) public interest in openness was satisfied by the publication of names and contact details of senior staff in "the public-facing roles" together with the publication of a more extensive list of contact details in the Civil Service Year Book;

(3) the existence of stringent rules governing the conduct and behaviour of staff whose roles brought them into contact with the commercial world;

(4) that the fact that public interest militated in favour of ensuring that the work of DESO could be conducted effectively without "unwarranted disruption or delay"; and

(5) publishing names and contact details to any greater degree than already occurred would not be in the public interest.

15. The Commissioner then stated at page 7 of his Decision Notice:

"The Commissioner accepts there is a risk that disclosure of contact details could cause some disruption to DESO staff and therefore he is satisfied that s.36 applies. However he considers the public interest arguments supporting the disclosure of the information are more persuasive than those articulated for withholding the information. The Directory is distributed widely within the arms industry including manufacturing, service and consultancy businesses. It is not protectively marked, e.g. as "classified". This suggests that the MoD has not assessed the content of the DESO Directory as warranting special protection. There is a strong public interest in improving the public's understanding of the relationship between the arms industry and the MoD. The Commissioner also considers that public authority employees should have an expectation that they will be publicly accountable and be identified in relation to their duties, depending on their seniority and the nature of their role. (The directory, by its very nature, contains contact details of staff in public-facing roles). He believes disclosure of the full DESO directory will deliver this accountability and will therefore be in the public interest."

The Tribunal should point out that the above quotation reflected the Commissioner's then understanding of matters and is subject to the information which was later provided by the MoD both before and during this Appeal.

16. With regard to section 38, the Commissioner stated that he was "not persuaded that there is sufficient evidence to suggest that in this case the disclosure of names or contact details of DESO employees would or would be likely to endanger the physical or mental health of any individual." Consequently, he considered that the MoD had not been able to persuade him that "a significant risk of endangerment" occurred with the result that section 38 was not engaged: it followed that he did not examine any of the relevant competing public interests.

17. Finally, with regard to section 40 and given the MoD's view that it rested its case "primarily" on section 36, the Commissioner expressed the view that it was "doubtful" that disclosure of the Directory would contravene any of the "data protection principles". The Commissioner therefore directed that the MoD produce the information requested.

18. The MoD appealed by notice dated 23 May 2006. The grounds of appeal were extensively developed by Mr Crow QC acting on behalf of the MoD during the course of the Appeal and reference will be made in further detail below to those grounds.

The Directory

19. The Directory sought in Mr Evans' request was the 2004 edition. In January 2005 a further edition was produced. Mr Evans was supplied with a redacted copy of that edition along with a redacted version of the 2004 edition. The MoD confirmed by the Treasury Solicitor's Office to the Tribunal that a Directory has not yet been provided in 2006 or 2007 pending the result of this present Appeal. The Tribunal was provided with an unredacted copy of the 2004 edition.

20. During the cross-examination of Mr Wray as one of the MoD's three witnesses, it was confirmed that some names other than those occupying Senior Civil Service grades were published in the Civil Service Year Book.

21. The contents of the Directory reflect the internal organisation of DESO. This was explained principally in the form of written evidence that was also amplified by the other witness from the MoD who appeared before the Tribunal, Mr John Millen, the present Director of Export Services Policy in DESO. The senior management of DESO comprises a Head of Defence Export Services (HDES), a Director General Defence Export Services and a Senior Military Advisor. DESO staff operate worldwide, principally through a structure of regional directorates reporting directly to the HDES. At the time of the 2004 Directory, there were four regional directorates, there now being three.

22. DESO's other directorates comprise the business development directorate, the Directorate of Export Services Policy (responsible for political and parliamentary issues, expert licensing and policy advice) the communications directorate and military advisors and specialists. As of April 2004, there were 506 DESO staff of whom 109 served abroad. The Directory includes all grades, even junior "back-office" staff.

23. Mr Millen confirmed that in 2004, about 2000 copies of the Directory were sent to "named individuals at external addresses, including other Government departments". The mailing list had been built up over many years and reflected predominantly contacts within and around the defence industries. DESO attended a number of trade fairs throughout the year and copies were provided to those parties and

persons which provided services to DESO, an occurrence which took place regularly. Other recipients included other Government departments, two Foreign Embassies and one High Commission in London. In the words of Mr Millen's own statement:

"A copy was provided if the request came from a member of the UK Defence Industry or if the requester concerned had an accepted reason for doing business with DESO."

24. Not surprisingly, the Directory was issued to all DESO staff.

25. In 2005, a revised version of the Directory was published and more recipients than had been the case in 2004 were supplied with copies, including three "specialist journalists" and employees of Newsdesk Communications Limited which is an entity dealing with the defence industry. For a while it seems, a copy was available on what was called the "partners' site" of the DESO internet (an area of that site accessible by password). During the period in question, DESO discovered that the Society of British Aerospace Companies had placed a copy of the Directory on their own website and it was immediately removed on request.

26. In consequence and in relation to the 2005 editions (there apparently being 2 or 3 in that year, although only 1 in the format of the 2004 Directory) DESO printed a reminder on the cover that the Directory was for Government and industry use only. As at the date of the hearing, plans for a 2007 edition were in abeyance as indicated above.

27. The effective questions before the Tribunal were therefore:

(1) whether all the names given in the 2004 Directory or whether no further names, or only the names of employees in a certain category or class should be released and if the latter, the proper extent of such category or class; and/or

(2) whether direct dial telephone numbers should be released; and/or

(3) whether email details should be released.

The evidence: Mr Wray

28. The Tribunal heard from Mr Wray. He was the person responsible for supervising the MoD internal review and as indicated above, signed the letter setting out the reasons underlying the findings of the review to Mr Evans. In his written statement, he referred to a number of matters which he regarded as relevant to the MoD's appeal. First, he stated and indeed stressed that in accordance with the so-called Osmotherley rules, civil servants were accountable to Ministers and not directly to Parliament. This formed one of the principal grounds of appeal by the MoD on this Appeal. He therefore maintained that to ask civil servants

to be "otherwise accountable would undermine their political impartiality and their ability to service all Governments with equal loyalty". He therefore contended that disclosing the identities of civil servants in the way requested would mean that in the future, civil servants would be reluctant to work on controversial or sensitive policies for fear of being identified publicly, and in his written evidence he gave some examples of civil servants being harassed, usually by phone, or their identities being revealed.

29. Secondly, he added that DESO staff had to adhere to the rules on Business Appointments to which all civil servants were subject, i.e. The Rules on the Acceptance of Outside Appointments by Crown Servants (The Business Appointment Rules) last issued in April 2006. These Rules are designed to ensure that proper procedures are followed with an appropriate degree of publicity whenever members of DESO leave DESO to work for outside and connected entities.

30. Thirdly, he explained that the general public and the Press could already contact DESO by means of an external website and by telephoning the MoD through its main switchboard, as well as in writing. In addition, at the time of the Commissioner's decision, the MoD had a Public Enquiry Office which has since been disbanded.

31. Fourthly, he dealt with the suggestion that there would be undue prejudice if the withheld information were disclosed, given the fact that much of the information was already publicly available. He explained that certain members of the DESO staff had their names in various other listings or directories, e.g. members of the Armed Services who served in DESO so that it could be said that some senior DESO employees were in the public domain to that extent, but he added "it by no means follows that all are or should be" (although the Tribunal noted that individuals on Armed Forces' lists cannot be identified from such sources as working for DESO). In particular, he said it did not follow that even a senior employee's telephone number and e-mail should be in the public domain. As a result, he contended that the likely prejudice would manifest itself in there being first a risk to the interruption of DESO's and therefore the MoD's business; secondly, by an attendant risk to national security; and thirdly by virtue of possible harassment to DESO staff. With regard to the second of these three factors, Mr Wray contended that there was a risk of both direct prejudice to DESO staff as well as the risk of interference with e-mail programmes. Although he cited examples of two "hacking attacks" in a US context, he provided no detailed evidence that any such attacks had been conducted with regard to the MoD, nor did he provide any direct evidence of a prior direct approach by a foreign intelligence service to a DESO employee (other than a report by a DESO member of staff that a known foreign intelligence service officer had made a direct request for a copy of the DESO Directory). He placed particular reliance on the policy effected by the United States Department of Defense which operated a policy whereby only the names, official titles, organisations

and telephone numbers for personnel only at office director level and above were disclosed, i.e. those in a so-called public facing role. Finally, he maintained that the evolution of the MoD's reply to the initial request from Mr Evans reflected a genuine attempt properly to recognise the appropriate public interest.

32. Many of the above points were revisited in Mr Wray's cross-examination, but a number of additional matters did emerge which are worthy of comment. In particular, Mr Wray expressed the belief that disclosure of the names of all staff (and to a greater extent, staff above a certain level) might lead to their being harassed at home. He accepted, however, that there was, and is, a legitimate public interest in understanding the activities of the MoD and of DESO in particular. He also accepted the very existence of DESO showed that there was, in his words, "a declared Governmental policy of … supporting exports within the control regime, because not every defence export is permissible …" and that DESO existed, and indeed exists, "to support the implementation of that policy". He further confirmed that communications emanating from within DESO might well disclose a direct e-mail address and/or a direct phone number in respect of the particular civil servant responsible for the communication in question. However, he rejected the suggestion that the publication of all names in the DESO Directory, especially the junior staff, necessarily helped reduce the risk of corruption particularly in view of the existence and effect of the Business Appointment Rules.

33. In answer to questions put to him by the Tribunal, Mr Wray gave a further explanation of the differing grades of civil servants in MoD. In brief, there are three management levels of senior civil servants below that of a Permanent Secretary, namely, management levels 1, 2 and 3. Mr Wray, and indeed the other DESO witness, Mr Millen, were members of this last class, i.e. level 3. A senior civil servant at level 1 (just below Permanent Secretary level) would typically be described as a director, while levels 2 and 3 would typically be called director general and director respectively. Below those three levels of civil servants, there are four further grades described as bands B, C, D and E respectively. Band B is further subdivided into yet two further levels, namely, B1 and B2, with the former being the more senior level. Band C would similarly be subdivided into C1 and C2, whilst band D would not be subdivided. Band E would also be split into E1 and E2. Mr Wray described those occupying E2 as the "most junior of the non-industrial civil servants".

34. He also explained that with regard to civil servants not only occupying the post of director, but also all levels below that, hospitality books were maintained in which offers of hospitality were recorded and required to be audited every year. This was to provide due protection against any risk of corruption and in particular to reveal whether any improper contacts had been established.

35. He accepted that some names within the DESO Directory, whilst redacted in relation to the request, would appear in other related listings, e.g. the Diplomatic List, though nothing in the latter list would act as any form of cross-reference to DESO. It is fair to say however that Mr Wray defended this apparently inconsistent policy on the basis that there was an active concern about what he called the "mosaic effect", i.e. the risk that pieces of information released in different contexts could be joined together in order to build up a larger picture. He remained adamant however that the DESO staff in Saudi Arabia were exposed to a particularly high level of risk to their personal health and safety so as to cause all references to their names and personal contact details to be redacted completely.

Evidence: Mr Millen

36. The Tribunal also received evidence from Mr Millen, a Director of DESO, who has served in the MoD since 1980.

37. Mr Millen, in his witness statement, was more specific in relation to the risks which could occur were the requested information to be disclosed. He referred in particular to the Campaign Against the Arms Trade (CAAT) and to a "stop DESO campaign" mounted by CAAT and related organisations in 2006. In March this year, on the day of a DESO symposium, CAAT was to hold (and in fact did hold) a peaceful demonstration at the relevant venue and visits were planned to take place in connection with the exhibition in question, i.e. the Defence Systems Exhibition International (DSEi), due to take place in September of 2007. Protests and demonstrations have occurred, and are planned to occur, outside a number of defence manufacturers in addition to those mentioned above. Although Mr Millen did not refer to the commission of any acts of violence or even of phone or private harassment directed to DESO employees at any time in the past, he stated in his written evidence that: "the risk of violence/intimidation is increased by the tendency for CAAT events to become a focus for those who do not subscribe to the … non-violent philosophy". He pointed to events that had taken place at previous DSEi events, though not in such a way as to implicate CAAT, and to the fact that prior to a 2005 exhibition, two defence companies had received threatening letters addressed to the business and to individual employees. The Tribunal interpreted Mr Millen's evidence as a whole as not suggesting that CAAT's activities would lead to the above risks should the information be disclosed: rather that other protestors who did not share CAAT's non violent philosophy might create risks as regards DESO employees by attending exhibitions and other DESO – related venues.

38. With regard to DESO staff based in Saudi Arabia, a poll had been conducted in 2006 which showed that some 79% of those who responded, representing in turn some 60% of the organisation, had answered by saying they declined to have their names and contact details made public.

39. In addition, Mr Millen pointed to the inherent risks to which all those based in Saudi Arabia were subject principally based on security concerns in that country. The Saudi Arabian staff were it seems, and still are, based in secure compounds.

40. Mr Millen was asked about a certain page on the Directory which prompted the question why the identity of all those whose names appeared on that page and who were, with one exception, members of the level 3 class of senior civil servant or higher or who were military officers of equivalent rank) should not have their names disclosed. He confirmed that despite the redaction of some of the names in question, at one time or another during those persons' terms of office, such persons would have undertaken some activity which involved their identity entering the public domain, albeit not to a wide public. He did not, however, appear to accept that even persons who occupied levels C and D might well have "significant responsibilities" to the extent that they would maintain contacts on behalf of DESO with outsiders, though their names had been redacted in the copy of the Directory supplied. The Tribunal is aware, however, that a distinction needs to be drawn between such "industry-facing" members of staff and those who are in effect "public-facing", ie staff likely to appear before Parliamentary Committees or give lectures etc and that the former would probably clearly outnumber the latter.

41. With regard to the January 2005 edition, he confirmed that it was distributed at the DESO Symposium for that year, being the first occasion that such a distribution had taken place at the venue in question. He added that he was not sure that any of the specialist journalists referred to in his witness statement who had received copies of the Directory were, to his knowledge, told of the limited use to which the publication was in principle subject.

42. He added that no record was kept as to how many directories were taken away. He admitted however that with regard to a possible 2007 edition, thought was presently being devoted to a system of distribution which was no longer dependent upon prior request, but was to be done on the basis of a fresh request and by registering an interest. He also admitted that at other trade events, e.g. Farnborough, no real examination was made into the true identity of the person who might make a request for a copy of the Directory. In such circumstances, a request would be made of the person manning the DESO stand who would generally, though not invariably, be an individual occupying a C or D level grade. He also confirmed that copies of the 2004 Directory were given to staff at hotels where overseas visitors having business with DESO would stay to facilitate the making of those arrangements.

43. In answer to further questions put to him by the Tribunal, and with regard to the possible 2007 Directory, Mr Millen stated that DESO currently planned to exclude nearly all London staff who were part of what he called the Saudi Project, but for the moment, only those staff occupying senior grades had been the subject of non-redaction.

Evidence: Superintendent Pearl

44. The Tribunal also heard from Superintendent Stephen Pearl who is head of the National Extremism Tactical Co-ordination Unit (NETCU). In his written statement Superintendent Pearl describes NETCU's remit as dealing with "UK single-issue domestic extremism" particularly with "the threat and consequences of Animal Rights Extremism (ARE)". He described ARE's tactics as creating a "climate of fear". He stopped short of attributing the same tactics to CAAT. However, in his witness statement he also states that the various protest groups including CAAT "have been and are starting to adopt a number of [ARE's] strategies and tactics" referring to incidents in 2005 against the employees of an arms manufacturer involving in this respect the targeting of home addresses.

45. Superintendent Pearl was cross-examined by Counsel both for the Commissioner and for Mr Evans. It is perhaps fair to say that as distinct from the content of his witness statement referred to above, his oral evidence went no further than saying that there was a risk (if not, some evidence to suggest) that members of CAAT might be engaged in tactics similar to those waged by ARE. He stated that some individuals engaged in ARE – related activities were present at other protests, eg the G8 summit in Scotland where individuals involved in anti-arms trade protest were also present. In addition there was a further discrepancy between the content of Superintendent Pearl's witness statement and his oral evidence in relation to the risks he felt were present with regard to the harassment of DESO employees: in his witness statement he attributed the risks in particular to those individuals who had "unusual names" whereas he stated in evidence that "all name combinations" could now face the same risks given the sophistication of electronic searches and other tracking or tracing mechanisms.

46. He was also asked by the Tribunal what his view was regarding the relatively wide dissemination of the 2004 Directory. In particular he was asked whether as far as that Directory was concerned, it could be said that the "cat was out of the bag", and he admitted to some extent that it was.

Evidence: Ann Feltham and Mr Leigh

47. Mr Evans tendered two witnesses, a Miss Ann Feltham on behalf of CAAT and a fellow journalist on The Guardian, David Leigh. Both were cross examined at length. Miss Feltham has been employed by CAAT since 1985 and is currently Parliamentary Co-ordinator. In her witness statement she confirms that CAAT has about 15,000 supporters, there being no formal membership. She claimed that CAAT supporters did not indulge in violent protest or similar acts and were not liable to use intimidatory or threatening behaviour of the kind attributed by Superintendent Pearl to the activities of ARE. CAAT itself was expressly committed to non-violent protest which usually took the form

of protests at trade fairs although it was not unknown for CAAT supporters to attend and protest outside DESO's offices. In cross examination she admitted that in the past CAAT's supporters had been "very supportive" of actions by others who had damaged a Hawk jet but that on behalf of CAAT she stated that she would have no hesitation in condemning home visits or damage to individual property. She refuted the suggestion that to her knowledge at least, any CAAT supporter would seek to follow a DESO employee to their home if they managed to obtain the employee's personal address or contact details.

48. Mr Leigh has been an investigative journalist for 30 years and is currently an Assistant Editor (Investigations) on The Guardian. He has worked alongside Mr Evans for some time regarding the activities of DESO. In his witness statement he quotes an answer given in Parliament by Adam Ingram MP to the effect that the Directory was, in Mr Leigh's words, "not classified in any way or secret". He referred to the so called "revolving door" policy within DESO reflecting not only the fact that the head of DESO was invariably recruited from inside the commercial arms industry but also the wider concerns that such a policy had caused regarding the potential for the inappropriate transfer of knowledge and influence relating to the movement of personnel beneath that level. He pointed to the resulting risk of a conflict of interest and he highlighted the overriding need for transparency generally in relation to the arms trade. He referred to two individual cases involving respectively the commission of a criminal offence and the alleged commission of a disciplinary offence by former DESO officials (as well as to an instance of DESO officials allegedly having been interviewed by the police under caution) where there had been a need to obtain further information and where contact details of the type redacted in answer to the request made in the present case had been necessary to verify or obtain the necessary factual information.

49. He admitted that The Guardian had itself obtained a leaked copy of the Directory. In the wake of obtaining it he stated in his witness statement that The Guardian had published several articles naming DESO officials without any subsequent complaint by or on behalf of DESO or the individuals involved. He added that with regard to national security The Guardian had never been asked to refrain from publishing what he described as "innocuous materials" merely on the ground that it might interest or attract members of foreign intelligence services.

50. In answers put to him on behalf of the Commissioner, Mr Leigh in describing DESO as "rather a weird department", pointed to its inherently changing nature, given the fact that the Government itself was formerly an arms manufacturer. However, DESO still worked "closely with and supported" companies who (at least according to Mr Leigh) "do sometimes engage in bribery". Of particular concern he said was the movement of individuals from DESO to jobs in related companies supplying arms or related defence services. Disclosure of

the Directory was, he said an "essential starting point" to any enquiry to know who was doing what, as reflected in particular in a case involving a John Porter, a DESO official who, it was alleged, had taken unauthorised free holidays from British Aerospace (BAe) between 2000 and 2002 and who retired before any action was taken. Mr Leigh claimed that The Guardian knew of the story at an early stage and was reluctant to publish without proper verification which might have been forthcoming had the Directory been publicly available.

The competing arguments on the Appeal: Section 36

51. The Tribunal now turns to the varying contentions made by the parties with regard to the sections of FOIA relevant to this appeal.

52. There is no dispute between the parties as to the relevant principles which govern the operation of section 36 of FOIA. See generally *Guardian Newspapers & Brooke v Information Commissioner and BBC* (EA/2006/0011 and EA2006/0013). Principally, the Tribunal is entitled to review the Commission's factual findings and reach its own conclusions on all the material before it. In such circumstances the Tribunal is entitled to reach its own views as to where the balance lies and it can, of course, consider it appropriate to differ from any conclusion or conclusions reached by the Commissioner. The *Guardian Newspaper* case also confirms that rather than there being a or any presumption in favour of disclosure under FOIA, "there could be said to exist what is sometimes to be called a "default" setting". See *The Guardian Newspaper* decision above at paras 81 to 85 inclusive. As to the manner in which the issue of public interest should be addressed, in the context of section 36 of FOIA see the *Guardian* decision supra, particularly at paragraphs 87 to 92 inclusive, especially at 92.

53. The Commissioner's decision highlighted five principal elements which are already referred to above but can be repeated here for the sake of convenience and which are said to militate in favour of disclosure, namely:

    (1) the need for transparency, especially as regards the manner in which personnel move between defence companies and the MoD;

    (2) apart from the matters set out in (1) disclosure of the Directory would promote a better understanding of DESO generally and its relationship with the arms industry in particular;

    (3) disclosure would further the accountability of public officials, i.e. those beneath ministerial level;

    (4) again and going beyond the point made in (1) above, disclosure would improve public confidence in the integrity of DESO's staff and officials generally; and

(5) disclosure would make DESO staff more accessible to the public through the medium of individual contact details.

54. Following the Commissioner's decision the MoD had contended that disclosure of the Directory in full would damage DESO's ability to function and would not help any accountability or any greater public understanding.

55. From what has been set out above with regard to the evidence which has been heard by the Tribunal, a number of general observations can usefully be made at this stage. First, there can be no serious doubt that there is a strong public concern if not some controversy about the arms industry and in particular about the movement of personnel between that industry and Government. It is enough to point to the continuing present public debate over allegations regarding the payment of bribes by or on behalf of BAe in favour of Saudi Arabian officials, a matter which was referred to in evidence before the Tribunal.

56. Secondly, the Tribunal has little doubt that in practical terms the Directory, ie the 2004 edition was very widely disseminated without any real form of restriction, in the sense that any person (including possibly members of foreign intelligence services) who had a serious intent to obtain a copy could easily have done so and most probably did in fact do so.

57. Thirdly, the Tribunal accepts the Commissioner's contention that again on a practical level the names of many of DESO's personnel who occupy the rank of Senior Civil Servants in the 2004 Directory are already sufficiently in the public domain given the fact that they are listed in other related Civil Service and military year books and similar listings. The Tribunal wishes to stress, however, that it does not regard information as being in the public domain merely because it was inadvertently put on a website for a short period: rather the Tribunal takes into account all the evidence regarding dissemination of the Directory referred to during the Appeal.

58. Finally, the Tribunal is not persuaded by the evidence it has heard that there is a substantial risk of violent or disproportionate protest at the moment against individual DESO staff members or personnel either at work or at home or to their families whether here or abroad. Clearly the question of security considerations affecting Saudi Arabian based staff involves somewhat different considerations given the political climate in that country. However, the Tribunal is equally open to the suggestion that no one can properly foresee the occurrence of a particular form of protest and there must be a risk, no matter how small, of there one day being the targeting of DESO staff in a way which was in general terms addressed by Superintendent Pearl. However, the fact remains that there is no evidence that that type of occurrence has occurred as yet, or is likely to do so in the foreseeable future.

59. The MoD advanced nine grounds of appeal with regard to the Commissioner's Decision Notice in the context of section 36.

60. The first relies on the contention that civil servants as distinct from Ministers are not accountable to the public. The Tribunal accepts that as a matter of strict constitutional principle that concept is undoubtedly correct. Reliance was placed on a section in one of this Tribunal's own judgments, namely *DfES v Information Commissioner and the Evening Standard* (EA/2006/006) at paragraph 84. However, the Tribunal there noted that such a principle did not, of itself, represent "an argument for withholding the names of Civil Servants but the wider impact point may require consideration in some cases". This Tribunal respectfully agrees. Questions of competing public interests raise issues which of necessity go beyond pure considerations of constitutional accountability. Those persons who expend public money must in general terms be expected to stand up and account for the activities they carry out in so doing, see eg *Corporation Officer of the House of Commons v Information Commissioner and Norman Baker MP* (EA/2005/0015 and 0016) particularly at paragraphs 77 and 78.

61. Reference was made in argument to the Nolan Committee's seven principles of public life which state in relevant part that:

    "Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office."

62. It is specifically stipulated that for those purposes "public office" should include "Civil Servants and advisers". Although the Tribunal would accept that the degree of scrutiny may vary according to the nature of the office held, there is certainly no immutable principle that civil servants should never be held accountable in the way contended for. Reliance was also placed on the applicable Business Appointment Rules. The Tribunal examined the relevant annual reports in respect of the Rules but feels that the effect of the Rules is in practice limited to the tracking of the careers only of those in a senior Civil Servant position as distinct from those who might occupy more junior grades.

63. The second ground advanced by the MoD was that the disputed information in the Appeal did not raise any matters which could properly be said to be the subject of any accountability. In the Tribunal's view there are at least 2 answers to this argument. First accountability is a general concept which may fasten on to the duty of a particular civil servant or as here upon the actions of a department, or even a wider constituency, such as the Government itself. What is here being sought is information which happens to consist of individual names and contact details. The latter can be just as much the subject of accountability in the wider sense of that term as the recounting of a specific policy carried out by an individual Civil Servant. Secondly, the notion of accountability even in its widest sense is no more than an element to be taken into account in striking the required balance

between the competing public interests for the purposes of FOIA and with regard to a section such as section 36.

64. The Tribunal agrees with a key element in Mr Leigh's evidence summarised above. Anyone with an interest in the activities of DESO would unquestionably be assisted by being provided with a copy of the Directory in largely unredacted form. There is an issue as to the degree of redaction and that will be referred to below. As a general principle, however, the second contention of the MoD is rejected by the Tribunal.

65. Thirdly, it was argued that the Commissioner's order could not be sustained by the Decision Notice. As indicated above, the Tribunal is in no way bound by the content of the Commissioner's Decision Notice and its reasoning. At the root of the MoD's case with regard to this ground is its concern that a line necessarily had to be drawn between some DESO staff who might occupy senior positions and/or those who held "public-facing" roles (as distinct from "industry-facing" roles) as against those who might not enjoy either of those responsibilities or functions.

66. Based on the evidence which this Tribunal has heard and as will be explained further below, insofar as the MoD is advancing a general proposition the Tribunal would agree. A line clearly has to be drawn somewhere both with regard to the identity of those in the Directory as well as with regard to the extent to which the relevant contact details of all members irrespective of seniority should be disclosed.

67. The MoD's fourth argument was to the effect that disclosure would not improve public understanding of the MoD's actions and those of DESO in particular. For this purpose reliance was placed on information as to the activities of the MoD already present on its website and the fact that disclosure of the Directory would say nothing about the underlying concerns which have been referred to above, namely the state of the relationship between the arms industry and Government. Reliance was also placed on the internal measures dealing with disciplinary matters referred to in particular by Mr Wray including but not limited to the Business Appointment Rules.

68. The Tribunal respectfully disagrees with this contention. As noted above, it is almost undeniable that disclosure of the appropriate names at least would facilitate enquiries into tracking the movements of those who moved from DESO to the arms industry or vice versa; moreover were there to be any enquiry into possible wrongdoing there could equally be little, if any, doubt that disclosure of all relevant names would facilitate proper enquiry being conducted by or on behalf of the public into such activities. Mr Leigh clearly indicated that there were other concerns which would be eased if some additional degree of disclosure were applicable. Moreover, the Directory has already undergone a wide degree of circulation.

69. The MoD relied upon the judgment of a US District Court in the District of Columbia dated 4 December 2006 which ordered the withholding of the names and duty stations of federal officers in the US Department of Defense by virtue of the US equivalent of FOIA. The Tribunal is not minded to place any reliance on such a decision when the parameters of the guidelines under FOIA are already clearly established under the Act itself as well as under the Tribunal's own evolving jurisprudence.

70. The fifth ground of appeal revisits the question already referred to above regarding the possible existence of a presumption of disclosure under FOIA. Whether or not the Commissioner erred in his Decision Notice in adopting an incorrect starting point, the Tribunal is not bound by his Decision Notice. Again reference is made for this purpose to the Tribunal's earlier decision of *The Guardian Newspaper and Brooke v Informational Commissioner* supra.

71. The sixth ground of appeal is that undue weight was given by the Commissioner to Mr Evans' arguments. Without intending any undue disrespect to the careful way in which the MoD has developed its arguments both before and during the Appeal this ground takes issue with the weight attached by the Commissioner to certain factors which have already been alluded to, in particular the extent to which the Directory has already been disseminated. The Tribunal feels that the contents of this sixth ground are sufficiently dealt with elsewhere.

72. The seventh ground alleges that the Commissioner gave insufficient weight to the objective risk of prejudice. The possible forms of prejudice have already been referred to in connection with and arising out of the evidence put before the Tribunal. They can usefully be summarised as follows:

    (1) physical disruption to DESO's operations, eg by preventing or restricting access to visitors attending trade exhibitions and symposia, etc;

    (2) the overloading of DESO's IT system by spam emails;

    (3) the use of a virus or series of viruses to corrupt the IT system;

    (4) the risk to staff of abusive phone calls or the sending of letters containing dangerous or poisonous substances;

    (5) the risk to national security insofar as not already covered by (1) to (4); and

    (6) the provision to foreign intelligence services of all contact details and the resultant impact on commercial confidence if all DESO staff or most of them were susceptible to approaches by foreign intelligence services.

Insofar as not touched upon already in this judgment, the Tribunal has carefully considered each of those potential risks but has come to the clear conclusion that in each case the risk of the prejudice identified is not so high as to justify maintenance of the relevant exemption in favour of non disclosure when weighed against the public interest in favour of disclosure particularly in the light of two matters which have already been referred to, namely the strong public interest in understanding the way in which the arms industry is run and the fact that the list has already been put into wide circulation.

73. With particular regard to the evidence regarding possible protest (see sub paragraphs (1) and (4) above), although the Tribunal is prepared to accept that the risk of personal harassment whether electronically created or otherwise does constitute prejudice, the likelihood at the moment is not so significant when weighed against all the other elements presented before it in evidence on the Appeal. The Tribunal is impressed by the argument put on behalf of Mr Evans that it should disregard any disruption to the internal workings of DESO which would or would be likely to be caused by disclosure except where such disruption would be so great as to have some appreciable impact on DESO's ability to meet its wider objectives or purposes. That purpose has been already sufficiently highlighted, namely the implementation of the Government's policy of supporting UK based companies to win contracts for the export of defence arms and services. Misdirected enquiries from the public cannot in any way, in the Tribunal's view, be regarded as impinging upon the proper ability of DESO to function in accordance with its mandate. Campaigners who are against the arms trade, whether taking action electronically or by means of abusive letters or even personal harassment have not, according to the observations made above, been shown to have conducted an intense campaign along those lines hitherto. Naturally, the Tribunal accepts that the risk is ever present. On the other hand the Tribunal is not convinced that the evidence so far given regarding the severity, extent and frequency of any disruption to DESO's ability to perform its functions is anything but "extremely limited" in the words of the written submissions submitted on behalf of Mr Evans. The Tribunal fully appreciates that criminal acts under cover of darkness to a person's property represent grave threats by any standards but Superintendent Pearl admitted that any "hard core" perpetrating such activities represented a very small group of people. The Tribunal feels that to restrict publication of all but a few names in the Directory would be an over-reaction: the severity, extent and frequency of such attacks are, therefore, viewed as low on the evidence that the Tribunal has heard. The Tribunal also agrees with the Additional Party that disclosure even on a limited scale, would considerably help to deter corruption, aid public reassurance as to whether any impropriety was taking place and would generally encourage and aid further relevant enquiries should they be required. The Tribunal therefore agrees that the public interest in maintaining the section 36 exception is heavily outweighed by the public interest in disclosure.

74. The eighth and ninth grounds raised by the MoD can be treated together. They both take issue with the fact that the Commissioner failed to give sufficient weight to the subjective assessment of risk by MoD and/or DESO itself. In particular reliance is placed on the views expressed by members of the staff of DESO. The Tribunal feels that although this is a relevant factor it must be measured against other more objective criteria although clearly the views of the Saudi Arabian staff are to be given particular weight in the context of the present case. The Tribunal finds, however, that there is relatively little persuasive evidence as to the subjective assessment of risk limited as it is to internal staff surveys. These grounds together reflect a complaint by the MoD that the Commissioner failed properly or at all to afford due importance to the MoD's overall concerns which reflect many of the facts already canvassed in evidence on the appeal. The Tribunal has already clearly indicated that in the light of the evidence it has now received, it has not been demonstrated that the public interest in maintaining the exemption outweighs the public interest militating in favour of disclosure subject to the qualification already noted as to where the line should be drawn in terms of redaction.

Section 38

75. Section 38 is a prejudice-based exemption but it has now been established by this Tribunal that the question whether disclosure would prejudice the subject matter of the exemption entails a consideration of whether the prejudice is more likely than not: that in turn involves a consideration of whether there is a significant and weighty chance of prejudice. See eg the recent decision of the Tribunal in *OGC v Information Commissioner* (Case No. EA/2006/0068 and EA/2006/0080).

76. The Commissioner considered the exemption was not engaged and therefore he did not consider the balance of public interest. This Tribunal disagrees, noting that with regard to the evidence which has been presented before it, there is a sufficiently serious suggestion that there is the requisite likelihood of prejudice in the form of endangerment to the physical or mental health of DESO personnel even though the risk of endangerment could be viewed as small, save in the case of Saudi Arabia based staff, such as to engage the provisions of Section 38. However, the Tribunal agrees with the contentions made on behalf of the Commissioner and Mr Evans that even if section 38 is engaged the risk of endangerment is, on the evidence, slight and yet again as in the case of section 36 any public interest in maintaining the exemption is easily outweighed by the public interest in disclosing the Directory.

77. With regard to the staff in Saudi Arabia the Tribunal finds that sufficient measures have already been taken by DESO to protect them against these risks, eg by ensuring that they live and operate within secure compounds and otherwise that proper security arrangements are taken in their regard. The Tribunal was informed that a tour of duty in Saudi

Arabia was normally 3 years and believes that in all the circumstances the existing safeguards are sufficient for the purposes of striking the balance which is required within the context of Section 38.

Section 40

78. If a person makes a FOIA request for personal data, as the latter term is defined by the Data Protection Act 1998, and disclosure would infringe a data protection principle as specified by that Act then there is an absolute exemption against disclosure. No question of balancing competing public interests arises even in relation to the applicability of the data principle which is in play. The first of the eight data protection principles set out in Part 1 of Schedule 1 has already been outlined and consists of personal data which is to be processed "fairly and lawfully" provided one of the conditions in Schedule 2 is met. The only potentially relevant condition is that set out in paragraph 6(1) of Schedule 2 which provides that:

"The processing is necessary for the purpose of legitimate interest pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

79. There is no doubt that the data in question in this appeal constitutes personal data. However, the Tribunal agrees with the Commissioner and with the submissions made on behalf of Mr Evans that the data here pertains to the public lives and activities of the data subjects and not to their private lives. See generally *Corporate Office of House of Commons v Information Commissioner and Norman Baker MP* supra especially at paragraph 78. The expectation of the DESO staff with regard to their professional lives cannot equate with the expectations they might have as regards their private lives although for almost all staff their names could be linked to their homes or to aspects of their lives outside work and indeed there may be some overlap in any given case. On the other hand the Tribunal recognises that even in the case of civil servants who might otherwise be expected to lose some degree of anonymity on taking up such employment, total loss of anonymity should not be considered without good reason. This view is subject to the effect of the wide dissemination of the Directory to date within the defence industry as well as to the publication of some names of DESO staff on the pages of The Guardian without apparent adverse effect. Moreover, paragraph 6(1) will only be satisfied where the legitimate interests of the public outweigh or are greater than the prejudice as to the rights, freedoms and legitimate interests of the data subjects which will arise if the information is disclosed. The public interest in disclosure has already been referred to above. Any prejudice to the rights, freedoms or legitimate interests of DESO staff which might occur through disclosure of the Directory could only be minimal, if only because the data sought is effectively only professionally related and must be viewed subject to the wide dissemination of the Directory to

date. Moreover, as has been said more than once above, the targeting of the anti-arms trade movement has not so far been directed in any meaningful sense against individuals who in this case happen to be individual civil servants (as distinct from employees of companies within the arms industry who have been targeted by certain anti arms trade campaigners), and although there is a risk attendant upon the same, the Tribunal finds that there is no basis for suggesting that there is a real risk that disclosure of the Directory would lead to harassment of individuals either at work or at their home addresses. In the circumstances the Tribunal is satisfied that the conditions set out in Schedule 2(6) are satisfied.

Section 24

80. Reliance is placed on Section 24 although such reliance occurred fairly late in the day. The MoD did not seek to rely upon Section 24 until 10 January 2007 at a time when almost two years had passed since the request was first made. It is clear to the Tribunal that the national security aspect was raised only after these proceedings were being prepared. No ministerial certificate has been obtained certifying that exemption is required for the purpose of safeguarding national security. Furthermore, as is sometimes the practice in such cases the Tribunal has not been given on a closed basis any evidence which pertains to national security issues. The Tribunal also considered that national security issues were not sufficiently strong in the case of DESO given that DESO was an entity predominantly, if not wholly, concerned with sales rather than with matters of security.

Qualifications to the Decision Notice

81. In the light of the evidence it has heard, particularly from Messrs Wray and Millen, the Tribunal is, however, persuaded that there remain cogent reasons for redacting some names and contact details, ie email and telephone contact details from the Directory but not on the level which was eventually settled upon by the MoD.

82. The task facing the Tribunal is perhaps no less susceptible to a degree of arbitrariness than that which faced the MoD itself. Overall the Tribunal has determined that the "bar" should be placed between B2 and C grades. This would result in practice (and reflecting material published elsewhere) in the disclosure of the identities of the following persons, namely:

(i) all Senior Civil Servants;

(ii) all those at Director or Director General level and above in organisational terms;

(iii) all those who appear in the Diplomatic Service List even if they are below the B2 level;

(iv) all those appearing in Dods Companion and/or the Civil Service Year Book, again even if below B2 level;

(v) all those who are likely in general terms to give evidence before a parliamentary select committee or before the public accounts committee; and

(vi) insofar as not covered by (i) to (v) above those who occupy and administer managerial positions and functions.

The Tribunal feels that this approach reflects the same form of realism which finds expression in *Secretary of State for Work and Pensions v Information Commissioner* (EA/2006/0040) especially at paragraphs 92 and 93. The Tribunal notes although that DESO is not itself an Executive Agency (even though the DSA, which in 2004 was part of the DESO, is such an Agency) it is, therefore, subject to an organisational structure which differs in make up from that which might obtain in an orthodox Government department. The intent of the qualifications listed above is to reflect this feature of DESO's structure. The Tribunal also feels that placing the "bar" at the B2 level would allow the public and/or the media to contact persons who generally speaking might be seen to be potentially somewhat more susceptible to adverse influences than those occupying a more junior level.

83. Mr Crow QC on behalf of the MoD informed the Tribunal that 44 individuals occupied Grades B1 and B2 within DESO. In particular the Tribunal feels that placing the bar at the suggested level would be reasonably consistent with the deployment of public servants in other comparable departments. For example, Superintendent Pearl referred to the Police Almanac and the Tribunal is aware that local authority officers of a senior level are in general terms accountable to local authority committees.

84. The Tribunal is not satisfied with Mr Wray's suggestion that the bar should be set at senior civil servant level and no lower. In setting the bar at the level suggested, the overall aim of the Tribunal has been to ensure that junior staff otherwise more vulnerable than their senior colleagues be protected.

85. The Tribunal entirely appreciates that many staff even at D level Grades might well be occupying so called industry-facing roles both by their possible attendance at trade exhibitions and the like and by virtue of their official responsibilities. Overall, however, the Tribunal feels that the arguments against disclosure in such cases resonate more strongly than in the case of more senior staff.

86. It follows the Tribunal rejects Mr Evans' call that all names be published. The Tribunal emphasises that it is not setting any binding precedent: it is of necessity having to address the specific terms in the 2004 Directory. Nor is the formula the Tribunal now suggests appropriate so as to be treated as in some way transmissible to or

operable within the setting of any other Government Department, even the MoD itself outside the confines of DESO. The "mix" within DESO is unique: there is an amalgam of staff drawn from the forces, the arms industry and the MoD itself. No real parallel can be drawn, especially when it comes to the movement of personnel between the arms industry and DESO, with the transfer or movement of staff between other Government Departments or between such departments and the outside world. In particular the Tribunal sees no resultant useful analogy between DESO and the manner in which a private company informs the shareholders of the identity and personal characteristics of its employed staff, if nothing else since a private company is by definition not a public authority and is subject to a completely different set of statutory regimes.

87. The Tribunal is sensitive to the fact that DESO did not consider placing any form of security marking on the Directory until reasonably early in 2005. This clearly constitutes some evidence that overall there is now a heightened sensitivity to electronic interference of some sort to the activities of DESO. Moreover, the placing of a bar at the level suggested by the Tribunal seeks to strike a suitable balance between the types of risk as to which it has heard evidence and as to the likelihood of such risks occurring. The fact that the 2005 Directory has borne a description dealing with its confidentiality does not mean that an all-or-nothing disclosure exercise should be carried out.

88. The Tribunal is not minded, however, to sanction the disclosure of all telephone and email contact details, save for those contact details which appear in the Civil Service Year Book and similar publications. If there is a public interest inherent in the public's ability to contact anyone, even those above B2 level directly by email, the same is outweighed first by the risk of increasing, if not undue, interference in the carrying out of those individuals' responsibilities. As indicated above it was argued on the Appeal that the means of electronically disrupting business are continuously evolving and becoming more sophisticated and that the MoD, for example, is becoming or might become increasingly unable to counter such increasingly sophisticated techniques. Overall, however, the Tribunal sees no strong arguments militating in favour of disclosure of telephone and email contact details, save as indicated above. The Tribunal does appreciate that no doubt as a matter of course email contact addresses will go out on correspondence emanating from DESO but then that does not in the Tribunal's view constitute a very strong pointer in favour of disclosure of blocks of email addresses as in the Directory.

89. In particular, countervailing risks such as the speed of disruption, the fact that there is likely to be continuous interruption and the risk of inadvertent loss or leakage of information constitute in the Tribunal's view substantial factors militating against disclosure of such details. The sophistication of electronic intrusion grows daily and the more that

can be done to restrict access to email details, perhaps the better, in circumstances such as these.

90. The Tribunal was sufficiently impressed by evidence provided during and after the appeal by the MoD as to its switchboard's response rates and figures. These show that access to DESO is largely guaranteed by the existing system in a way which meets the demands of the public on the one hand and the needs of DESO to conduct its business internally, efficiently and effectively on the other.

91. With respect to staff based in Saudi Arabia, the Tribunal is not persuaded that the risks attendant upon the release of names as distinct from telephone and email details are in any way substantially different to the risks attendant upon staff elsewhere. In his witness statement Mr Millen suggests that Saudi staff names may not be published in future but this is a matter for the MoD and not for the Tribunal. Neither is the Tribunal persuaded that London-based staff working on the so called Saudi Project require any additional protection other than those which would be provided by the Tribunal's reformulation of the Commissioner's Decision Notice.

Conclusion

92. For all these reasons the Tribunal dismisses the appeal but substitutes the Decision Notice in the terms set out at the beginning of this Judgment.

David Marks

Deputy Chairman

Date 20 July 2007