

**EXPORT CONTROL
ORGANISATION**

Transparency in Export
Licensing – Discussion Paper

MARCH 2012

Contents

Introduction 3

 How to Respond..... 4

 Reporting on Open Licences..... 4

 Questions 5

 Making more routine licensing information public 6

 Questions 7

 The role of the ‘Independent Reviewer’ 8

 Questions 9

 What happens next? 9

 Confidentiality and Data Protection..... 9

 Annex 1: Transparency in Export Licensing – Response Form 10

Introduction

Transparency is a key theme of the Coalition Government and plays a vital role in enabling the public to hold the Government to account. It is particularly important in a high profile area such as export control – confidence in the workings of the export licensing system needs to be shared by Parliament and by the public. The system should not just be working properly, it should also be seen to do so.

On 7 February 2012, Vince Cable, Secretary of State for Business, Innovation and Skills made a Written Ministerial Statement to Parliament in which he set out a number of proposals to increase the transparency of the export licensing system. The three proposals are:

- To insert into all open export licences a provision requiring the exporter to report periodically on transactions undertaken under these licences. The Government will then publish this information.
- To explore ways of making additional information (contained in standard export licence applications) public while protecting any sensitive material.
- To appoint an independent person to scrutinise the operation of the Export Control Organisation's licensing process. The role of this independent person would be to confirm that the process is indeed being followed correctly and report on their work.

The full statement is available online at:

<http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120207/wmstext/120207m0001.htm#1202076700002>

This paper explains the background to each of the commitments made by the Secretary of State, sets out the key issues and asks a number of questions regarding implementation. The answers to these questions will help us to decide what additional information it would be beneficial for us to make public, to better understand why certain information is considered sensitive and to obtain evidence of the burdens and costs for exporters in providing that information.

How to Respond

We will accept responses to this document until 20 April 2012. Responses can be completed online, or submitted by email or by post.

If completing by post or email, please use the response form attached in the [annex](#) to this document, or download a Word version from <http://www.bis.gov.uk/assets/biscore/eco/docs/12-682rf-transparency-export-licensing-discussion-paper-form>.

To complete the online survey, please go to:
<https://www.surveymonkey.com/s/export-licensing-transparency>

When responding, please state whether you are responding as an individual or are representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the response form and, where applicable, how the views of members were assembled.

Reporting on Open Licences

Since 1997 the Government has published Annual Reports, and since 2004 Quarterly Reports, which provide details of individual export and trade licensing decisions. The information covers individual licences issued, refused and revoked by destination and gives the rating, a generic description (the “annual report summary” or ARS) and total value of items licensed to that destination. The Quarterly Reports are published 3 months after the end of the quarter to which they refer.

Recognising that the published reports do not always meet the needs of readers the Government launched the Strategic Export Controls: Reports and Statistics website in April 2009 (<http://www.exportcontroldb.bis.gov.uk>). This provides a user-friendly searchable database of data published from 1 January 2008 onwards. Users can create bespoke reports covering one or more destinations, specific ratings or ARS, and user-defined time periods (with a minimum 30-day period). The reports are available in a variety of formats and can be downloaded and saved to the user’s own computer. The database is believed to be unique¹.

The level of detail and timeliness of the reports means that the UK is recognised as having one of the most transparent export licensing systems in the world. However, there are a number of significant limitations to the information we provide in the reports:

- (i) the information only covers individual licences² – no information is provided regarding open general licences³ other than the number of registrations;

¹ We are not aware of any other Government making data available in this way, however Campaign Against the Arms Trade have developed their own web app allowing searches of the data published by the UK Government; see <http://www.caat.org.uk/resources/export-licences/>

² i.e. Standard Individual Export Licence (SIEL), Standard Individual Trade Control Licence (SITCL), Open Individual Export Licence (OIEL) and Open Individual Trade Control Licence (OITCL)

- (ii) there is no information on the quantity and value of items licensed under OIEL/OITCL since these licences are not limited by value or quantity and applicants do not have to provide this information in their licence applications;
- (iii) the reports only provide information on the items licensed for export, not on quantities/values actually exported;
- (iv) the reports give no information on end-use or end-users for the items licensed for export or trade.

While information on certain transactions could – in theory – be extracted from Her Majesty’s Revenue and Customs (HMRC)’s CHIEF system there are limitations on the transactions that would be covered, on the type and quality of data available, and also a number of technical difficulties that would need to be overcome. For example, customs declarations only contain information regarding consignee countries, not end-users, and the Harmonised System (HS) codes used to classify goods are not at all consistent with the control list entries against which controlled goods are classified. Furthermore, there are no declarations – and therefore no data – for intra-European Union (EU) movements, for electronic transfers of software and technology and for “trade” (i.e. trafficking and brokering). The simplest and most reliable method of acquiring this data is therefore to require exporters to report periodically on transactions under the licences they hold.

It is not intended that this should apply to exports under SIELs because the quantity licensed sets an upper limit on what can be exported. We believe that the differences between licensed and actual quantities exported – due, for example, to unfulfilled contracts – are likely to be relatively small. In any event it is our understanding that the real public interest lies in the quantities that the Government has authorised to be exported, and the fact that actual quantities exported may be less than this is considered less important.

The key requirements of the reporting on usage of open licences are therefore that it must:

- provide meaningful and timely data for publication;
- impose the minimum burden on exporters; and
- be operationally efficient for ECO (i.e. not require significant manual data handling)

Questions

- Q1. What information do users consider should be collected and published? Is ‘item description’ (or rating), quantity and destination sufficient? Do you think it would also be desirable to publish generic information about end-users (e.g. to identify the end-user as ‘government’, ‘commercial entity’ etc)? Would exporters be content to provide and to have this information published?
- Q2. How often should the data be provided and/or published? Would it be easier for exporters if data could be supplied in “real time” (or at least, “when convenient”) rather than at specified times?
- Q3. What would be the burden (in number of hours) on exporters of providing data on item description (or rating), quantity and destination? If this could not be achieved

³ ie Open General Export Licence (OGEL) or Open General Trade Control Licence (OGTCL)

- within current resources please provide an indication of what extra resources would be required, including an estimate of the cost of providing them?
- Q4. How do we ensure consistency of the information provided by different exporters?
- Q5. Is there a “technical solution” to data collection, rather than simply asking exporters to manually key data into a form on SPIRE? What would such a solution look like – for example, could there be an interface to businesses’ internal software (e.g. Enterprise Resource Planning (ERP) software) – and what are the obstacles to achieving this?
- Q6. Is there a trade-off or synergy between the provision of this data and the compliance process which might provide a compensatory reduction in burdens for business?

Making more routine licensing information public

In making information about licensing decisions public the Government has always been careful to avoid:

- naming licence applicants or licence holders
- providing information that would enable licensees to be identified in other ways, for example by releasing information about proprietary products
- providing information in such a way that would identify the contents of individual licences (for example by aggregating information by goods rating)
- and releasing information about the commercial transaction that led to the licence application

This is done to preserve the confidentiality and commercial sensitivity of information contained in licence applications or the licences themselves.

Under the Freedom of Information Act (FoIA) 2000⁴ there are specific exemptions for information provided in confidence (s41) and information relating to commercial interests (s43). Section 43 is a “qualified exemption” meaning that we have to assess whether the public interest in withholding the data outweighs the public interest in releasing it. Although s41 is an absolute exemption it must be applied in line with the common law duty of confidence i.e. it is not sufficient that information be provided “in confidence”, the information must be truly confidential and release of the data must cause harm so that an actionable breach of confidence arises. The common law duty of confidence itself also includes a public interest element (i.e. a breach of confidence may be justified in the public interest).

The Information Commissioner and Information Tribunal have upheld the use of these exemptions on a number of occasions. However in the Bloomberg case⁵ (information

⁴ See: <http://www.legislation.gov.uk/ukpga/2000/36/contents> and http://www.ico.gov.uk/for_organisations/freedom_of_information.aspx

⁵ See the appeal to the Information Tribunal, case EA/2011/0044: <http://www.informationtribunal.gov.uk/DBFiles/Decision/i575/20111130%20Decision%20&%20Ruling%20EA20110044.pdf>

relating to licences granted for export to Iran) the Information Commissioner ruled that it is not sufficient to be able to refer in general terms to the type of harm that could be caused by the release of certain types of information; rather, it is necessary to demonstrate specific harm that could result from the release of the specific information in question.

It has also become clear that not all information contained in licence applications is truly sensitive or confidential and in many cases exporters would not object to its release – for example in the Bloomberg case around a third of relevant exporters told us they had no objection to their names being released. However care must be taken in assessment of potential release of such information because whilst a third of exporters expressed no objection, two-thirds did and ultimately we were able to demonstrate to the Tribunal's satisfaction how the release of the requested information would or would be likely to cause detriment to the companies concerned.

In other cases we have been able to release information about particular licences that goes beyond what we normally publish in Annual/Quarterly Reports e.g. giving further details about the nature of goods, or generic information about the type of end-user (such as “government” or “commercial end-user”). This is particularly true of information we have provided to Parliament as a result of the “Arab Awakening”.

On the other hand the way data is currently presented has led to misunderstanding or even misrepresentation and this has led to even more questions being raised with consequent burdens on staff. This workstream will therefore also examine how to fulfil the commitment in the Foreign Secretary's October statement for enhanced transparency on routine export licensing decisions⁶.

The key requirements are that the information published must:

- improve public understanding of routine licensing decisions;
- not prejudice the legitimate interests of the entities concerned.

Questions

- Q7. What additional information should be made public?
- Q8. What should be routinely published in the Quarterly/Annual Reports and what should be available “on request”, e.g. in response to a request under the Freedom of Information Act?
- Q9. What information is truly sensitive and should continue to be withheld? Why? Is there a time-factor after which data is no longer sensitive?
- Q10. What are your views on a system whereby applicants are required to “tick the box” on a licence application and provide a justification for any information they wish to be withheld (see, for example, the confidentiality statement on p9 of this document)?
- Q11. How could the presentation of the existing data be improved?

⁶ See: <http://www.fco.gov.uk/en/news/latest-news/?view=PressS&id=669255682>

The role of the ‘Independent Reviewer’

A further consequence of the “Arab Awakening” has been the public perception that the export licensing process had not worked as it was meant to – the fact that so many licences were revoked meant that mistakes must have been made or that processes had not been followed properly in issuing the original licences. We have robustly rejected any such criticisms but doubts remain. We consider that some element of independent oversight would therefore help to increase public confidence in the Government’s decision-making processes on strategic export licences.

The “independent reviewer” would review the operation of the ECO by examining specific cases and certifying that the processes and procedures had been properly followed (or not, as the case may be). The role will be part-time, will not have statutory powers, and will report to the Secretary of State. The reports would be published, either as part of the existing Annual Report on Strategic Export Controls, or laid before Parliament through a Written Ministerial Statement.

It must be emphasised that the person would review processes, including the decision-making process, but could not comment on the actual decisions or outcomes. The Secretary of State will retain statutory responsibility for licensing decision-making and will remain accountable to Parliament for those decisions. This is consistent with the remit of the Parliamentary Ombudsman⁷, and with Judicial Reviews which can decide whether or not a decision was properly made (and can order a decision to be taken again) but do not seek to impose a different decision in its place.

It is pertinent to ask whether the Independent Reviewer should be able to investigate individual complaints. While this may seem attractive at first sight it is also problematic - it is not plausible that every exporter refused a licence or whose application took more than 20 days to process, or every member of the public “concerned” about a licence granted for a particular destination, should be able to have a complaint investigated. If it was considered desirable to allow investigation of individual complaints then it would be necessary to specify precisely the basis on which a complaint could be accepted, and the numbers that could be investigated in any year.

The Independent Reviewer will:

- Be part-time;
- Look at process, not outcomes;
- Have no statutory powers;
- Report to the Secretary of State, who will publish the reports.

⁷ See: <http://www.ombudsman.org.uk/>

Questions

- Q12. Do you have any comments on the role of the Independent Reviewer, such as on the terms of reference or on the content and means of publication of the reports?
- Q13. Should the Independent Reviewer be able to investigate complaints from individual companies or members of the public? If so, what should be the criteria for agreeing to investigate?

What happens next?

Following the closing date for responses on 20 April 2012 we will use the results to help us determine precisely what additional information we will make public, how we will acquire that information from exporters, and in what form we will publish it.

An announcement setting out our plans in detail will be made before Parliament's summer recess (17 July 2012). At that time we will publish a formal Impact Assessment.

Detailed technical work to implement these plans – including any necessary changes to SPIRE and the Strategic Export Controls: Reports and Statistics website – will be completed by the end of March 2013.

Confidentiality and Data Protection

We intend to publish a summary of the responses we receive. However, we are aware that for commercial reasons you may want the information you provide to be treated as confidential.

Information provided in response to this document, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

Annex 1: Transparency in Export Licensing – Response Form

The closing date for responses is 20 April 2012

Please return completed forms to:

Margaret Philipson
Export Control Organisation
1 Victoria Street
London
SW1H 0ET

Telephone: 0207 215 3857
Fax: 0207 215 0531
email: Margaret.philipson@bis.gsi.gov.uk

General – About you and your organisation

| Please provide information about yourself and your organisation (optional). | | | |
|---|--------------------|------------|--|
| Title: | Forename: | Surname: | |
| Organisation: | | | |
| Address 1: | | | |
| Address 2: | | | |
| Address 3: | | | |
| Town / City: | | | |
| County: | | Post code: | |
| Tel. number: | | | |
| E-mail address: | | | |
| Sector: Please select from dropdown list | Details of 'Other' | | |

Responding to this consultation:

- Are you responding as:
An individual or on behalf of an organisation
- If you are responding on behalf of an organisation did you consult others within your organisation? Yes No
- If you represent a business, what size is it? Please select from dropdown list
- If you represent a business, which industry do you operate within?
Please select from dropdown list Details of 'Other'
- Does your business operate across multiple sites? Yes No
- Approximately how many exports or transfers has your business made using open or general licences in the last 12 months

Confidentiality:

We intend to publish a summary of the responses we receive. Please indicate which option you would prefer:

Responses can be published with respondent's details

Responses can be published, but without respondent's details

If, however, you would prefer your response not to be published, please explain why you regard the information you have provided as confidential (see statement on page 9):

Reporting on Open Licences

Question 1: What information do users consider should be collected and published? Is 'item description' (or rating), quantity and destination sufficient? Do you think it would also be desirable to publish generic information about end-users (e.g. to identify the end-user as 'government', 'commercial entity' etc)? Would exporters be content to provide and to have this information published?

Question 2: How often should the data be provided and/or published? Would it be easier for exporters if data could be supplied in "real time" (or at least, "when convenient") rather than at specified times?

Question 3: What would be the burden (in number of hours) on exporters of providing data on item description (or rating), quantity and destination? If this could not be achieved within current resources please provide an indication of what extra resources would be required, including an estimate of the cost of providing them?

Question 4: How do we ensure consistency of the information provided by different exporters?

Question 5: Is there a “technical solution” to data collection, rather than simply asking exporters to manually key data into a form on SPIRE? What would such a solution look like – for example, could there be an interface to businesses’ internal software (e.g. Enterprise Resource Planning (ERP) software) – and what are the obstacles to achieving this?

Question 6: Is there a trade-off or synergy between the provision of this data and the compliance process which might provide a compensatory reduction in burdens for business?

Making more routine licensing information public

Question 7: What additional information should be made public?

Question 8: What should be routinely published in the Quarterly/Annual Reports and what should be available “on request”, e.g. in response to a request under the Freedom of Information Act?

Question 9: What information is truly sensitive and should continue to be withheld? Why? Is there a time-factor after which data is no longer sensitive?

Question 10: What are your views on a system whereby applicants are required to “tick the box” on a licence application and provide a justification for any information they wish to be withheld (see, for example, the confidentiality statement on page 9 of this document)?

Question 11: How could the presentation of the existing data be improved?

The role of the ‘Independent Reviewer’

Question 12: Do you have any comments on the role of the Independent Reviewer, such as on the terms of reference or on the content and means of publication of the reports?

Question 13: Should the Independent Reviewer be able to investigate complaints from individual companies or members of the public? If so, what should be the criteria for agreeing to investigate?

Further Comments

Question 14: Do you have any other comments that might be relevant to the development of this policy as a whole?

Please use this space for any general comments that you may have; comments on the content or layout of this document would also be welcomed.

© Crown copyright 2012

You may re-use this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence. Visit www.nationalarchives.gov.uk/doc/open-government-licence, write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

This publication is also available on our website at www.bis.gov.uk

Any enquiries regarding this publication should be sent to:

Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000

If you require this publication in an alternative format, email enquiries@bis.gsi.gov.uk, or call 020 7215 5000.

URN 12/682