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FREEDOM OF INFORMATION REQUEST: SERIOUS FRAUD OFFICE INVESTIGATION INTO BRITISH AEROSPACE

Thank you for your request under the Freedom of Information Act 2000 (the 'Act') for:

The first request relates to the investigation into BAE Systems that was launched in July 2004 by the Serious Fraud Office and the Ministry of Defence police.

1. Does the Attorney-General's Office have a file of information compiled since the BAE investigation began? If so, what information does it have that is not already in the public domain? Please could we have copies of any such information, plus a summary of the public domain information that is held?

2. Please give details of any meetings and telephone and e-mail communications about the investigation that have taken place between Attorney-General's Office ministers and officials, and other British government officials, foreign government officials (including Saudi and US officials), or representatives of BAE Systems. We would like to see the dates of these conversations, the names of those participating, and any minutes or other records of the substance of these communications held by the Attorney-General's Office.

3. Does the Attorney-General's Office have any records of its responses to these communications, including written opinions expressed by department members and policy positions subsequently decided by the department? If so, could we please have copies of these responses?

Further to my letters of 3 January and 20 February, and my e-mail of 23 March, I must apologise for the long delay in responding to your request.

I can confirm that this office holds information relevant to your request. The first part of this letter discloses information relevant to your request. However, there is other information which cannot be disclosed for the reasons given in the second part of this letter and the attached annex. In respect of this information we have concluded that there is no obligation to disclose it, and in accordance with section 17 of the Act, this letter represents a refusal notice for the requested information.

1. Information disclosure

What follows aims, subject to the application of the exemptions outlined in part 2, to provide you with the information you have requested. Some of the information provided below is already in the public domain (and therefore exempt under s.21 of the Act). However, we are providing this on a discretionary basis in addition to some information which does not strictly fall within the scope of your request, in order to provide context and background to the Director of the Serious Fraud Office's decision to discontinue the investigation into the affairs of BAe Systems PLC ('BAe') relating to the Al Yamamah defence contract on public interest grounds.

July 2004

The Serious Fraud Office ('SFO') began its investigation into BAe which concerned payments being made in relation to the Al Yamamah programme to recipients in Saudi Arabia¹. The SFO was assisted in the investigation by the Ministry of Defence Police Fraud Squad, who enjoy constabulary independence from the Ministry of Defence².

The SFO is an independent investigating and prosecuting authority for serious and complex fraud. Under s.1(2) of the Criminal Justice Act 1987, the Director of the SFO discharges his function under the "superintendence" of the Attorney General. As part of the Attorney General's role it is normal for the SFO to brief and consult him about particular cases, especially those of particular complexity or sensitivity, of which the BAe case was clearly one. That includes briefing at regular meetings between the SFO and the Law Officers, which happened throughout this period, as well as more specific paper briefing and meetings to discuss and review the progress of the investigation as required. In discharging his superintendence role in relation to individual cases the Attorney General acts as a guardian of the public interest and independently of government³.

During 2005 and 2006

¹ See Solicitor General's answer to a Parliamentary Question from Vince Cable MP on 23/1/2007

² See Solicitor General's answer to a Parliamentary Question from Norman Lamb MP on 4/12/2006

³ See Solicitor General's answer to Parliamentary Question by Norman Baker MP on 30/1/2007

The Attorney General received regular briefing on developments in the investigation and met with Robert Wardle (Director of the SFO), SFO officials, their Counsel and the Head of the Ministry of Defence Fraud Squad. Some of these briefings and meetings are referred to more specifically below and included consideration of the legal and evidential strength of the case⁴. It had been evident from an early stage of the investigation that this case raised particular difficult legal issues. One important question was the extent to which the relevant payments were made with the consent or authorisation of the ultimate Saudi “customer” or principal. It became apparent, as this question was explored during the course of the investigation, that it would have presented a particular challenge to a successful prosecution given the difficulties of establishing, in the context of the Saudi constitutional arrangements, what authorisation had been given and at what level⁵.

November 2005

Representations from BAe were received by the Attorney General’s Office that the investigation should be discontinued for public interest reasons, specifically that it would adversely and seriously affect relations between the UK and Saudi Arabian governments; and would inevitably prevent the UK securing the next tranche of work under the Al Yamamah programme. It was explained by letter to BAe that it was inappropriate to make such representations to the Law Officers on a “private and confidential basis” and that they would be forwarded to the SFO as the proper recipient which they were. ⁶

In a letter to the SFO, BAe’s solicitors also asserted that the “allegations [were] unfounded for the principal reason that the support services provided to Saudi officials were provided for and paid for under the contractual arrangements that underlie the Al Yamamah programme”.

December 2005

The Attorney General invited views on the public interest issues arising from this investigation from Foreign and Commonwealth Office, Ministry of Defence, Department of Trade and Industry, Home Office, HM Treasury and the Prime Minister’s Office⁷. Attention was drawn to Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business

⁴ See Attorney General’s remarks in the House of Lords debate on 1/2/2007 (Hansard, Column 380)

⁵ See transcript of Attorney General’s interview with the Financial Times, 31/1/2007

⁶ See Attorney General’s answer to a Parliamentary Question from Lord Avebury on 7/12/06 and Lord Lester of Herne Hill on 8/1/2007 (Hansard, Column WA9)

⁷ See the Attorney General’s Statement to Parliament on 14/12/06 (Hansard, Column 1712) and the Solicitor General’s answer to a written Parliamentary Question from Susan Kramer MP on 19/1/07.

Transactions (the ‘OECD Convention’) and it was made clear that the final decision would be a matter for the SFO and the Attorney General, acting independently of government. In assessing the public interest, the SFO and the Attorney General needed to acquaint themselves with all the relevant considerations. There is a well established practice by which views can be sought from other government Ministers for this purpose. This is sometimes referred to as a “Shawcross exercise” after the classic statement by Attorney General Sir Hartley Shawcross in 1951:

“The true doctrine is that it is the duty of the Attorney General, in deciding whether or not to authorise the prosecution, to acquaint himself with all the relevant facts, including, for instance the effect which the prosecution would have upon public morale and order, and with any other consideration affecting public policy. In order so to inform himself, he may ... consult with any of his colleagues in the government, and indeed ... he would in some cases be a fool if he did not ... The responsibility for the eventual decision rests with the Attorney General, and he is not to be put, and is not put, under pressure by his colleagues in the matter.”

The Attorney General was provided with views on the public interest, including on the commercial importance of the Al Yamamah programme, from the Prime Minister, Foreign Secretary and Defence Secretary in response to the Shawcross exercise. They explicitly recognised that any decision on these matters was for the Attorney General and the SFO, acting independently of government. The views were copied to the Director of the SFO⁸.

The Attorney General explored the case further in meetings with his own leading Counsel and with the SFO to consider the prospects of the case. He raised concerns with the SFO about whether the case would ultimately be proved because of the evidential questions relating to consent or knowledge on the part of the Kingdom of Saudi Arabia, and the assertion by BAe’s solicitors that the services provided to Saudi officials were provided for and paid for under the relevant contractual arrangements.

January 2006

The Attorney General, having regard to the OECD Convention, rejected the public interest issues raised by other Ministers and concluded that the SFO investigation should continue. He noted that it was not possible at that stage to say whether the evidential test for a prosecution would ultimately be met but he was satisfied, given the current available material, that there were proper and sufficient grounds for the SFO to continue the investigation. The SFO were to keep under review the evidential strength of the case and the public interest factors as the investigation proceeded.

⁸ See Attorney General’s answer to a written Parliamentary Question from Lord Avebury on 22/1/07 and the Solicitor General’s answer to a written Parliamentary Question from Susan Kramer MP on 19/1/07.

April/May 2006

The Attorney General continued to be briefed on the progress of the investigation at routine business meetings with SFO. He again raised the issue of the need to identify evidence to meet the legal difficulties already identified, specifically whether the payments were authorised.

June 2006

The Attorney General met with Robert Wardle, SFO Officials and their Counsel to discuss various issues including prospects of charges being brought and timing. The Attorney General stressed the need to treat corruption seriously, but was concerned that it was very important to identify any potential weaknesses in the case at the earliest possible stage.

September-October 2006

A further response to the original Shawcross exercise following up on the views expressed in December 2005 was provided to the Attorney General⁹. The Attorney General carefully considered the further views but was of the view, if the case was in fact soundly based, that the investigation should continue.

The Attorney General (and the Solicitor General for one meeting) and his officials met with Robert Wardle and SFO Officials on three occasions to discuss the investigation. During this period the Attorney became increasingly concerned that evidential problems were not being resolved. Any prosecution would need to establish the extent to which the financial arrangements in issue were approved or known about by the relevant person(s) in Saudi Arabia. Evidence needed to be obtained to address the question whether the financial arrangements were approved by or on behalf of the principal in order to determine whether the financial arrangements which lay at the centre of the investigation were authorised. SFO were asked to consider how this evidence could be obtained from the Kingdom of Saudi Arabia.

⁹ See Attorney General's answer to a written Parliamentary Question from Lord Avebury on 22/1/07 and the Solicitor General's answer to a written Parliamentary Question from Susan Kramer MP on 19/1/07.

November 2006

The Attorney General met Jack Straw (Leader of the House of Commons) who had requested a meeting to raise this case¹⁰.

The Attorney General met his own Counsel to consider legal and evidential issues arising from the investigation. The Attorney General and his counsel both met Robert Wardle and SFO officials to discuss various evidential issues including the issue of principal's consent arising from the investigation and how evidence on that issue could be obtained.

The Director General of the Attorney General's Office ('AGO') attended a meeting with HM Ambassador to Saudi Arabia¹¹ which was also attended by Robert Wardle, SFO officials, their Counsel, the Head of MDP Fraud Squad and officials from the Foreign Office and Cabinet Office to discuss aspects of the case concerning Saudi Arabia.

December 2006

Various written briefing was provided to the Attorney General by SFO officials concerning evidential issues and a meeting to discuss these issues and the progress of the case took place with the Attorney General, the Director General of AGO, Robert Wardle, SFO officials and their Counsel. At this stage the SFO contemplated inviting BAe and certain BAe executives to plead guilty to certain charges, though no charges had been laid. No contact had been made with any of the persons concerned and it was speculative whether anyone would have been prepared to plead guilty¹². Further consideration of this idea was overtaken by the events detailed below. The Prime Minister provided the Attorney General with further views on the public interest considerations raised by the investigation (endorsed by both the Foreign Secretary and Defence Secretary) and met him¹³. These views were accompanied by detailed notes on the public interest issues from senior officials. The Prime Minister expressed the view that continuation of the investigation would cause serious damage to UK/Saudi Arabia security, intelligence and diplomatic cooperation, which was likely to have seriously negative consequences for the UK public interest in terms of both national security and the UK's highest priority foreign policy objectives in the Middle East¹⁴. The

¹⁰ See Attorney General's answer to a written Parliamentary Question from Lord Avebury on 22/1/07.

¹¹ The Solicitor General in answer to a written Parliamentary Question from Vince Cable MP on 19/1/07 stated that the Director of the SFO had met with HM Ambassador on three occasions (in November and December 2006) and he had attended the final meeting.

¹² See debate in the House of Lords on 1/2/07 (Hansard, 1/2/07 at Column 380)

¹³ See Attorney General's answer to a written Parliamentary Question from Lord Avebury on 22/1/07 and the Solicitor General's answer to a written Parliamentary Question from Susan Kramer MP on 19/1/07.

¹⁴ See Attorney General's Statement to the House of Lords on 14 December 2006 (Hansard, column 1712)

assessment was formed with the benefit of advice from the Government's most senior national security official advisers¹⁵. This information was seen by Robert Wardle of the SFO.

The Attorney General decided that he should himself now review the case in detail, with the benefit of full briefing from SFO investigators and lawyers, sight of the underlying material and advice from independent leading Counsel. His review took place over the period 12-14 December 2006¹⁶.

On 12 December 2006 HM Ambassador to Saudi Arabia met with the Solicitor General, the Director General of AGO, Robert Wardle and SFO officials to discuss obtaining evidence from Saudi Arabia and what that evidence would be, and to gauge his view on public interest issues concerning the continuation of the investigation¹⁷.

Having considered the various views conveyed as to the public interest, including those of the Ambassador, the Director of the SFO independently concluded that it would not be in the public interest to continue with the investigation because of the risk to national and international security¹⁸. He conveyed this view to the Attorney General on 13 December 2006 and, having considered the matter further overnight, confirmed his decision to AGO on 14 December 2006.

In the morning of 14 December 2006 the Attorney General, Solicitor General and the Director General of AGO met heads of the security and intelligence agencies and the Cabinet Office Permanent Secretary for Intelligence, Security and Resilience to hear directly from them the possible consequences for the public interest if the Saudi Arabian Government withdrew cooperation with the UK. None of those consulted disagreed with the overall assessment that the Saudi threats were real. The Chief of the Secret Intelligence Service's ('SIS) view was that the Saudis might withdraw their co-operation if the SFO investigation continued, and that they could decide to do so at any time¹⁹.

Further, the Attorney General in a debate in the House of Lords responding to questions on the position of SIS said they had authorised him to say they were clear about the importance of the Saudi counterterrorist effort to the UK. Its view was that it would not be possible to replicate the level of counterterrorist effort that had been achieved with the Saudis on UK/Saudi aspects of the problem if it were

¹⁵ An explanation of the public interest issues is set out in more detail in letters from the Attorney General to Lord Garden on 10/1/07 and Sir Menzies Campbell MP on 17/1/07 as well as in the House of Lords debate on 1/2/07 (see Hansard, Column 376 and 378-379). Copies of these two letters were placed in the House of Commons and Lords Libraries.

¹⁶ See House of Lords Debate on 1/2/07 (Hansard, column 380).

¹⁷ See footnote 6.

¹⁸ See Solicitor General's answer to a written Parliamentary Question from Susan Kramer MP on 19/1/2007

¹⁹ See House of Lords debate on 18/1/07 (Hansard, Column 780).

necessary to work at one remove (via another country)²⁰. Specifically, SIS made it clear publicly that it shared the concerns of others in government over the possible consequences for the public interest of the SFO investigation²¹.

Meanwhile the Attorney General supported by leading Counsel had completed his own review of the case including a thorough consideration of the evidential issues. He found that there were significant evidential obstacles to a successful prosecution. In particular, in his view the SFO would not be able to obtain evidence to refute the proposition that the payments made by BAe were approved by or on behalf of the Saudi principal(s). In his view there was unlikely ever to be sufficient evidence for a prosecution to go ahead on a charge of corruption.

At 5.21pm the Attorney General made a Statement to Parliament. He agreed with the SFO Director's decision to discontinue the investigation. The Director's decision was based upon the potential damage to the UK's counter-terrorism strategy, and ultimately on the risk to the lives of our citizens and service people if the case had gone ahead. UK co-operation with Saudi Arabia in the counter-terrorism field is of crucial importance. Saudi Arabia is a source of unique streams of intelligence on Al Qa'eda and other terrorist activity which may represent a threat to the UK, our citizens in the UK at home and abroad and to our Armed Forces. If Saudi Arabia were to withdraw that co-operation, the UK would be deprived of a key partner in our global counter-terrorist strategy. In addition, Saudi Arabia plays a key role in the UK Government's efforts to promote peace and stability in the Middle East. This is important in terms not only of the effect on international tension but also the potential impact on reducing a sense of grievance in the Muslim world and on support for international terrorism²². The Attorney General also stated in addition to these reasons that he agreed with the decision because there were "obstacles to a successful prosecution so that it [was] likely that it would not, in the event, go ahead"²³.

The SFO Director's decision to discontinue the case was taken wholly independently by him, applying his own judgment. It was not taken on the direction or instruction of the Attorney General (or anyone else)²⁴.

The Solicitor General made a similar statement to the House of Commons at 6pm²⁵.

²⁰ See House of Lords Debate on 1/2/07 (Hansard, column 379).

²¹ See House of Lords Debate on 1/2/07 (Hansard, column 379).

²² An explanation of the public interest issues is set out in more detail in letters from the Attorney General to Lord Garden on 10/1/07 and Sir Menzies Campbell MP on 17/1/07 as well as in the House of Lords debate on 1/2/07 (see Hansard, Column 376 and 378-379).

²³ See Statement on 14/12/06, Hansard, column 1712.

²⁴ See Attorney General's response to a Parliamentary Question from Lord Lester of Herne Hill on 8/1/2007 (Hansard, Column WA9), in the House of Lords debate on 1/2/2007 (Hansard, Column 376) and Solicitor General's remarks in the House of Commons debate on 7/2/2007 (Hansard, Column 905)

²⁵ See Hansard, 14/12/06, Column 1119

Various other information (including two notes from AGO/SFO to the OECD on the decision regarding this investigation) produced after these events is accessible from our website: www.attorneygeneral.gov.uk

2. Information to which exemptions apply

However, in relation to other information held by this office, we have concluded that there is no obligation to disclose this information. We have assessed that the exemptions available in sections 23(1), 24(1), 27, 31(1), 35(1)(a), 36(2)(b) and (c), 40(2), 41(1) and 42 can and should be relied upon to refuse your request. A full explanation is set out in the Annex to this letter.

If you believe that the decision made in relation to your request to us is incorrect, you may ask for an internal review. You should address a request for an internal review to Jonathan Jones, Director General, at the address above.

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

If you have any further queries about this matter, please contact me.

Yours sincerely

CHRISTOPHER SIMSON
Freedom of Information Officer

ANNEX

The Freedom of Information Act 2000 creates rights of access for any person making a request for information to a public authority. The rights of access are twofold. First, to be informed by the public authority whether it holds information of the description specified in the request, and if that is the case, secondly, to be provided with that information. These rights are subject to important limitations, which are designed to achieve a proper balance between the right to know and considerations of law and policy in the broader public interest.

We have reviewed the requested information which we hold and reached the clear view that, other than the information we have disclosed, it is all information falling within one or more of the exemptions specified below and ought not to be disclosed.

Some of the information requested is subject to an absolute exemption (as defined by s.2(3)), in particular:

- Certain information falls within **section 23 (Information supplied by, or relating to, bodies dealing with security matters)** and we are not obliged to communicate this information to you.
- Some of the information requested constitutes the personal data of another within the meaning of the Data Protection Act 1998, and the disclosure of that information would contravene one of the data protection principles. **Section 40(2) (Personal Information)** ensures that the Data Protection Act principles, particularly those relating to the disclosure of information, are preserved under the Freedom of Information Act. We have concluded that disclosure of the information you seek would breach the first data protection principle (that data must be processed fairly and lawfully), and that such disclosure would result in an actionable breach of the Data Protection Act 1998. We have therefore concluded that disclosure of some of the information you have requested would be prohibited by section 40 of the Act.
- **Section 41 (Information provided in confidence)** exempts information if it was obtained by a public authority from any other person (including another public authority), and the disclosure of the information to the public by the public authority holding it would constitute a breach of confidence actionable by that or any other person. This exemption qualifies the right of access under the Act by reference to the common law action for “breach of confidence”. The courts have recognised that a person holds information subject to a duty of confidence in two situations. First, where there is an express duty of confidence. Secondly, where there is an implied duty of confidence. It is well established that confidentiality attaches to information given to the investigating authorities during the course of a criminal investigation, whether it is given by a suspect under caution or by potential

witnesses. Some of the requested information is therefore also being withheld under s.41.

Further, we consider that other exemptions are applicable to some of the information requested which require a public interest balancing test to be carried out before they can be relied upon (the qualified exemptions).

- **Section 24(1) (National security)**

As is noted above and in the public statements by the Attorney general, the SFO decision was based on information regarding potential damage to the UK's counter terrorism strategy. In our view, section 24(1) would apply to this information (not covered by s.23(1)). With regard to section 24(1), there is a strong public interest in maintaining that exemption, in order to ensure that information, the release of which would be detrimental to national security is not disclosed and in all the circumstances remains confidential.

- **Section 27(1) and (3) (international relations)**

Some of the information within the scope of your request relates to Saudi Arabia's role in the UK Government's efforts to promote peace and stability in the Middle East and related to the Saudi Government's involvement in the Al Yamamah programme. The disclosure of information covering these issues and internal discussions about their effects would be likely to prejudice relations with Saudi Arabia and other states and would accordingly harm UK interests abroad. The withheld information contains candid assessments that were clearly made with the expectation that they would not be disclosed. Release of the information would be likely have a detrimental effect on relationships between the United Kingdom and other states. Such administrations would be reluctant to share sensitive information in the future with the UK. This would affect the government's ability to protect and promote the UK's interests overseas.

- We would highlight that the decision to discontinue the prosecution was made by the Director of the SFO on public interest grounds relating to national and international security. It is inevitable from the nature of this case that background information is held that if it were disclosed would, or would be likely to, prejudice relations with Saudi Arabia.

- **Section 31(1) (Information whose disclosure would, or would be likely to, prejudice (a) the prevention and or detection of crime, (b) the apprehension or prosecution of offenders, or (c) the administration of justice)**

We recognise that there is a public interest in understanding the investigation process including the accountability and transparency of the SFO in the effective commission of their duties, and the use of public funds in performing those duties. However, consideration must equally be given to the flow of information from witnesses, and the possibility of disclosure acting as a deterrent to the public providing information to the SFO. If this relationship were impeded, it would be more difficult for the SFO to gather the information it needs to perform its functions. While the investigation into the Al Yamamah programme has been discontinued, the SFO continues actively to pursue a number of other cases including lines of investigation relating to BAe Systems Ltd. Therefore revealing specific details of this investigation may prejudice the effective investigation of other cases and/or any possible future prosecutions.

There are also issues of the fair treatment of individuals, who have been investigated, but were not charged. There is a presumption of innocence that is afforded to all individuals prior to any finding of guilt. Any disclosure of the information that forms part of an investigation may unfairly damage the reputation of a person, who has been the subject of unsubstantiated allegations.

- **35(1)(b) (Ministerial communications)**

Some of the remainder of the information we hold within the scope of your request also relates to Ministerial communications, namely communications from the Prime Minister to the Attorney General, the Attorney General to the Prime Minister and the Leader of the House of Commons to the Attorney General. We recognise that there is a public interest in the public being able to assess the way in which the Attorney General exercises his public interest functions. However, there are also clear public interest considerations in favour of non-disclosure of the content of these communications. Under the Shawcross doctrine it is for the Attorney General to decide whether and from whom of his Ministerial colleagues he wishes to seek views about the public interest in order to fully acquaint himself with all the facts of a particular case. Disclosure of the content of these communications may inhibit Ministers from being frank and candid about all the relevant facts if there is a risk of subsequent disclosure and this would lead to the quality of these contributions being diminished. There is a clear public interest in allowing Ministers to have a clear space, immune from exposure to public view, in which they can freely give their views to the Attorney General free from the pressures of public political debate.

- **Section 36(2)(b) and (c)**

Information relating to briefing and views to and from the SFO, civil servants and Ministers is covered by sections 36(2)(b) and (c). There is a public

interest in the transparency of the decision-making process, so that the public can assess the way in which Government considers important public interest decisions. However, there are also clear public interest considerations in favour of the non-disclosure of this information. There is a strong public interest in the Attorney General being able to receive free and frank advice to inform his views. He needs to be able to discuss and debate any investigation or prosecution freely with his own staff, investigators, lawyers, civil servants, the SFO and parliamentary colleagues in private before reaching his own decision which will be subject to public and parliamentary scrutiny. Disclosure of such material would undermine the decision-making process in the future. In particular, were such information be disclosed, those giving advice would be reluctant to be so frank and candid in providing their views. Having regard to these considerations, we have concluded that in all the circumstances of the case the public interest in maintaining the exemptions outweighs the public interest in disclosure.

- **Section 42 (Legal Professional Privilege)**

Section 42(1) of the Act provides that information is exempt if it could be the subject of a claim to legal professional privilege. Some of the information we hold relates to confidential legal communications whose dominant purpose is the investigation of crime and the potential prosecution of legal proceedings. There is a strong public interest in protecting the confidentiality of communications between lawyers and their clients. Without confidentiality, clients might fear that anything they say to their lawyers, however sensitive or potentially damaging could be revealed later. They might be deterred from seeking legal advice at all, or from disclosing all relevant material to their lawyers, or the advice given might not be as full and frank as it ought to be. We believe that the public interest under section 42 rests in not disclosing material in our possession.

We have therefore assessed that the public interest in maintaining each of the exemptions outlined above clearly outweighs the public interest in disclosing the information.