



Government Legal Department
102 Petty France
Westminster
London
SW1H 9GL

By email only to: Andrew.Poole@governmentlegal.gov.uk &
India.Burnett@governmentlegal.gov.uk

Dear Madam/Sir

R () v Secretary of State for International Trade

We write further your letter dated 24 July 2020, conveying the much-delayed decision to refuse to suspend, amend or revoke existing licences; and to recommence assessment of pending licence applications.

As set out below, we require a response to this letter within **14 days** of receipt. We emphasise that our client is very concerned that the decision is unlawful and is preparing to issue proceedings if the response to this letter is inadequate.

The decision

Your letter, and the very limited disclosure received thus far, indicate that your client's decision is flawed for a number of reasons:

1. Your letter explains that the decision was reached applying an assumption that it is "possible" that the equipment covered by the licences in issue was and/or could be sold to and used by police forces involved in the ongoing Black Lives Matter protests. It therefore appears that there has been no enquiry into what actual exports have taken place and/or will take place – which is particularly concerning in the context of the open licences. Please confirm whether this understanding is correct.

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Deighton Pierce Glynn
10th Floor, Unit C
Whitefriars, Lewins Mead
Bristol BS1 2NT
DX 7859 Bristol

0117 332 3598 tel
0117 370 1036 fax
bristol@dpglaw.co.uk
www.dpglaw.co.uk

2. The detailed information submitted by the Claimant is referred to in the letter of 24 July, but its substance is not engaged with at all. The suggestion that the incidents could be described as just examples of isolated or mistaken conduct cannot be rational given the range of incidents documented. The description of serious incidents of violence recorded in the US as constituting merely examples of “*heavy-handed*” policing tactics is very concerning. It irrationally trivialises the degree of violence the evidence shows has been used by the police and federal officers in recent weeks, such as shooting unarmed peaceful protesters and journalists in the face¹.
3. It is unclear what your client has considered as constituting “*the wider context of US policing architecture and general reporting on US policing practices.*” The only reference given is to a now wholly outdated UN report from four years ago. It is unclear how this could be relevant to an assessment of the present and ongoing situation in the US in which protests have been quelled with violence by the police and the unprecedented use of the National Guard and Homeland security federal agents. Moreover, there is clear evidence (referred to in the letter before claim dated 9 June 2020) of wider, long-term, systemic problems of police violence against the black community in the US. This was recently highlighted by Congresswoman Pramila Jayapal in a Congressional hearing, when pointing out that civil rights protests had been met with violent repressive tactics backed up by federal security services, whereas white supremacist protesters carrying swastikas and other racist insignia, calling for the governor of Michigan to be lynched, were left to protest without consequence². Your client appears to have had no or scant regard to these facts.
4. The above concerns are exacerbated by the fact that the UN report referred to in the 24 July 2020 letter actually raised serious concerns about the future conduct of the then new President Donald Trump:

“7. The Special Rapporteur] notes with concern, however, that the new administration of President Donald Trump has talked of taking a radically different approach on all fronts: its engagement with the United Nations, its promotion of human rights abroad, and even its attitude towards fundamental rights domestically. The signals coming from the current administration – including hateful and xenophobic rhetoric during the presidential campaign, threats and actions to lock out and expel migrants on the basis of nationality and religion, a dismissive position towards peaceful protesters, the endorsement of torture, intolerance of criticism and threats to withdraw funding from the United Nations – are deeply disturbing. Meanwhile, legislatures in at least 19 states are taking a cue from the

¹ <https://www.businessinsider.com/portland-journalist-recounts-being-shot-in-the-face-by-police-2020-7?r=US&IR=T>

² <https://twitter.com/ajplus/status/1290860077654704128>

administration and pushing new bills – some proposed, some passed – to restrict the right to freedom of peaceful assembly. The Special Rapporteur urges the administration to continue the United States’ tradition of leading and supporting peaceful assembly and association rights and the mandate.

5. It is clear from the evidence that the current US administration has not responded to that urging. Your client’s reliance on these outdated reports about US practices’ and/or claims about the operation of the US’ democratic institutions are disturbingly misplaced. The concerns raised by the Special Rapporteur in 2016 have been realised as the current administration has and continues to adopt a very different approach to the USA’s international and fundamental rights obligations. That is demonstrated by the use of the National Guard and Homeland security federal agents to ‘police’ civilians. It is concerning that the decision letter does not engage with the materially different political and compliance situation in the US at this time.
6. While there is no dispute that limited steps have been taken in some States to hold some officers accountable for their actions, there is clear evidence of a wider accountability gap for violence against black individuals and protestors. This is a long-term systemic problem. The President himself has made clear that the aim is to “quell” the protests³, which in recent weeks, for example in Portland, have been met with disproportionate, repressive violence from local police and federal officers, with widespread reports and evidence of peaceful protesters being shot in the face⁴. Security services are operating with such impunity that the Mayor of Portland himself was tear gassed⁵, and federal agents have now been shown to have deliberately escalated confrontation in an attempt to justify the repressive measures⁶.
7. The decision letter does not, in any event, specify what accountability steps and/or what review processes it is relying upon in respect of policing tactics, including the widespread use of tear gas and rubber bullets. Nor does the letter provide any timescales for such review processes to conclude. The focus of the decision should have been on how such items have been and are being used now: the question posed by the export control regime is whether it is lawful for such items to be exported during this period and on an ongoing basis. There is no indication from US reporting that these items are no longer used by the police or federal officers – nor that any decision to limit, ban or otherwise further control their use is imminent. On the contrary, the protests have been met in many instances by markedly militarised and aggressive policing, using tear gas, rubber bullets, batons, pepper spray and armoured personnel carriers. This has

³ <https://edition.cnn.com/2020/06/01/politics/donald-trump-national-address-race/index.html>

⁴ <https://thehill.com/changing-america/respect/equality/509171-portland-mom-shot-in-the-face-during-black-lives-matter>

⁵ <https://www.pbs.org/newshour/show/portland-police-and-feds-are-responding-to-largely-peaceful-protests-with-violence>

⁶ <https://www.nytimes.com/video/us/100000007243995/portland-protests-federal-government.html>

been underscored by the US President's public comments criticizing the protests and his decisions to mobilize the National Guard and, in recent weeks, unprecedented and legally controversial large-scale deployments of federal officers to protest hotspots. The protests show no sign of abating, and will likely surge again around court hearings in the George Floyd case, the next of which is on 11 September 2020, a day already fraught with the potential for tension due to the President's rhetoric depicting civil rights protesters as "terrorists". Protests are also likely to flare up again when further incidents of fatal police violence against black citizens occur (Time magazine has reported that "[a] *black person is killed by a police officer in America at the rate of more than one every other day...*"⁷ so it really is a matter of when rather than if).

8. Thus, the decision appears to have proceeded on the assumption that "heavy-handed" police tactics will be addressed in the future, despite evidence of (i) ongoing violence, and (ii) a long history of violence against the black community, which is a pervasive, systematic problem that has prevailed for years, now given added impetus by recent developments. This approach is unlawful and irrational.
9. Moreover, and in any event, the claim that the situation "on the ground" is improving is premature, as any cursory inquiries would demonstrate:

- a. On Sunday 26 July 2020, the Washington Post declared that "*Protests explode across the country, police declare riots in Seattle, Portland*" reported that:

"From Los Angeles, to Richmond, to Omaha, police and protestors clashed in another tumultuous night that saw scores arrested after demonstrators took the streets and police in some cities dispersed crowds with tear gas and pepper spray. In Austin, a man was shot and killed in the midst of a downtown rally. In Richmond, a truck was set ablaze outside police headquarters. Outside of Denver, a Jeep sped through a phalanx of people marching down an Interstate, when a shot was fired injuring a protestor, police said..."

Nightly protests since Floyd's killing had dwindled in recent weeks in Seattle. But they were reinvigorated in the wake of federal action in the Portland protests and after Washington Gov. Jay Inslee (D) tweeted that President Trump had sent federal law enforcement agents to the city."
[Emphasis added]

- b. As noted above, deployment of federal agents escalated violence in Portland, then in other cities, and this is likely to continue to spread to other

⁷ <https://time.com/5847967/george-floyd-protests-trump/>

cities, as Trump promised Fox News that he would send 75,000 federal agents “into all of the cities”⁸, having branded protesters as “terrorists”⁹.

In addition, as we noted above, as : (i) the court proceedings in respect of Mr Floyd’s death continue¹⁰; and (ii) the build up to the national election continues, we understand it is likely that the situation will worsen, not improve.

10. Overall, the implication of the decision is that your client’s position is: (a) the US is a democratic country, and so we can rely on its institutions to deal with and remedy any ‘heavy handed’ policing tactics; and (b) the situation is getting better. However, neither conclusion appears to be the product of: (a) a full and proper inquiry into the current and ongoing situation; (b) the application of the correct legal test (see below); and (c) a rational approach to the evidence available in assessing what the future implications of exporting items such as teargas are.

Next steps: Response and Disclosure

Your client is required to comply with the duty of candour. However, at no stage to date has proper disclosure been provided.

First, we have requested relevant disclosure on our client’s behalf on multiple occasions, see para 18 of our client’s pre-action letter and para 6 of our letter of 2 July 2020. In the letter of 24 July 2020, you stated: “*We will respond to your request at paragraph 6(a) of your letter of 2nd July 2020 as soon as possible.*” No such response has been received. Please now provide all relevant disclosure in respect of the decisions to: (a) suspend decisions on pending applications; (b) apply a more in-depth analysis of applications (Full Review, rather than issued on the Smart Front End); and (c) commence the reassessment process. Please also provide full details of OIEL6.

Please also clarify whether as a result of the decision summarised in the 24 July letter, the decision to conduct Full Reviews of new applications has been overturned.

Second, and critically, you failed to provide any disclosure with your letter dated 24 July 2020, so it is difficult to understand at present the apparent conclusions that:

- a. the violence covered in the evidence gathered from credible NGOs and news reports can be dismissed as showing ‘isolated’ instances of violence / merely evidence of ‘heavy handed tactics’; and

⁸ <https://edition.cnn.com/2020/07/23/politics/trump-federal-agents-us-cities/index.html>

⁹ https://edition.cnn.com/2020/07/25/politics/us-protests-trump-terrorists-intl/index.html?utm_source=twCNN&utm_content=2020-07-27T14%3A40%3A06&utm_medium=social&utm_term=link

¹⁰ As noted above, the next court date is on 11 September 2020, a date fraught with other connotations already.

- b. the situation is basically improving without apparent concern about any future escalation in protests, and disproportionate policing in response to them.

These conclusions ignore the seriousness of the widespread incidents reported, and the likelihood of further surges in violence precipitated, *inter alia*, by the further deployments of federal officers and steps being taken in the criminal process against officers charged with Mr Floyd's death.

Moreover, as noted above, your client has proceeded on an assumption that it is "possible" items covered by the licences, including the open licences, may be used by US police forces. But, despite our queries (which is again repeated above), your client has not confirmed whether inquiries have taken place to establish what items are in fact being exported to the US and to which end-users. This is essential in order to know the degree of risk involved. If they are being exported to, for example, the National Guard and federal agencies, recent events suggest there is a real risk they might be used to commit human rights violations. Simply assuming that it is "possible" exports might be used by the police or federal agencies, is insufficient in order to assess the degree of risk involved.

In these circumstances, it would appear that the decision is unlawful. We are mindful, however, that in the course of the last 2 months your client would, if acting rationally and bona fide, have considered significantly more material in reaching her decision than is suggested in your brief, 3-page letter. Our client is therefore willing to give her a final opportunity to demonstrate through compliance with her duty of candour that adequate inquiries were made. Thus, your client is asked to provide the following critical disclosure and information in respect of the decision reported on 24 July 2020:

- (a) the material that was collated and considered during the Ministerial process;
- (b) a description of the process, i.e. who was involved and how it worked (unless this is self-evident from the documentary disclosure);
- (c) any ministerial submissions/briefings that were put to the Defendant as part of the decision-making process;
- (d) records of consultation or communications with any other Government departments, including the Cabinet Office, the Foreign Office and No.10;
- (e) the full decision itself.

We are willing to allow her 14 days to do so, failing which proceedings will be issued and the Court will be invited to make appropriate inferences as to the inquiries made and the material considerations taken into account.

We look forward to your response and thank you for your assistance.

Yours faithfully

A handwritten signature in blue ink that reads "Deighton Pierce Glynn". The signature is written in a cursive style with a horizontal line above it.

DEIGHTON PIERCE GLYNN