

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 8 March 2011

Public Authority: The Ministry of Defence
Address: Main Building
Whitehall
London SW1A 2HB

Summary

The complainant requested information from the Ministry of Defence (MoD) about a recent contract awarded for repatriation services. The MoD refused to disclose the information citing the exemption in sections 21 (information accessible by other means), 41 (information provided in confidence) and 43 of the Act (commercial interests). The complainant narrowed the scope of his request when he brought his complaint to the Commissioner. With respect to the narrower scope, the Commissioner has not found the exemption in section 43 to be engaged, and therefore requires that part of the requested information to be disclosed.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. In 2009 the MoD invited the submission of tenders in respect of a contract for the provision of a worldwide repatriation service. The contract was awarded to Kenyon Repatriation Ltd. The Commissioner understands the estimated value of the two-year contract is £2 million.

The Request

3. The Commissioner notes that under the Act, the Services Personnel and Veterans Agency (SPVA) is not a public authority itself, but is actually an executive agency of the Ministry of Defence (MoD) which is responsible for the SPVA. Therefore, the public authority in this case is actually the MoD not the SPVA. However, for the sake of clarity, where appropriate this decision notice refers to the SPVA as if it were the public authority.
4. The complainant wrote to the Services Personnel and Veterans Agency (SPVA) on 18 February 2010. In addition to other information, which is not the subject of this Decision Notice, he requested:

"The numerical and narrative assessments made by the SPVA panel for each of the serials (1-24) of the Tender Response Evaluation Sheets submitted by Kenyon Repatriation Ltd."
5. The SPVA responded on 18 March 2010, refusing to disclose the requested information and citing the exemption in sections 21 (information accessible by other means) and 43 of the Act (commercial interests). The Commissioner notes that the information to which the SPVA applied section 21 is outside the scope of this Decision Notice. The SPVA advised the complainant that if he was unhappy with its response, he should contact the SPVA in the first instance and, if informal resolution was not possible, he could apply for an internal review by contacting the Ministry of Defence (MoD).
6. Having failed to achieve a satisfactory response to his complaint from the SPVA, the complainant wrote to the MoD on 25 June 2010 to request an internal review.
7. The MoD upheld the SPVA's decision, clarifying that it was relying on section 43(2) of the Act to withhold the requested information. It also cited section 41 (information provided in confidence) with respect to information within the scope of those parts of the request which are not the subject of this Decision Notice.

The Investigation

Scope of the case

8. The complainant contacted the Commissioner on 24 August 2010 to complain about the way his request for information had been handled. He provided the Commissioner with details of his original multi-part request for information, but told the Commissioner:

"to simplify my FOI request and to concentrate on the core issue, I would ask that you consider only the assessment made by the SPVA of the capability of Kenyon Repatriation Ltd."

9. The Commissioner understands this to be the element of the request at paragraph 4 of this Decision Notice, and has conducted his investigation on this basis.

Chronology

10. The Commissioner wrote to the MoD on 21 December 2010 explaining that the complaint was only with respect to one part of the complaint's original request for information. The Commissioner invited the MoD to disclose the information or provide him with any further submissions it wished to make in respect of its decision to withhold this element of the requested information.
11. The MoD responded on 26 January 2011, maintaining its view that the requested information was exempt from disclosure.

Analysis

Exemptions

Section 43 Commercial interests

12. Section 43(2) of the Act provides:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)".

13. In order to apply the exemption it is necessary to consider whether the release of such information would prejudice someone's commercial interests. Then, if appropriate, it will be necessary to apply the public interest test.

Applicable interests

14. The withheld information in dispute in this case is the numerical and narrative assessments made by the SPVA panel for each of the serials of the tender evaluation sheets submitted by Kenyon Repatriation Ltd, a company involved in the procurement process. According to the MoD, they represent *"the MoD's own comments on the successful tender"*.
15. In correspondence with the complainant, albeit with regard to the wider scope of the original request, the MoD argued that disclosure:

"would adversely affect the Department's bargaining position during future contractual negotiations thus hindering its ability to achieve value for money".

16. In other words, effectively what the MoD is claiming in this case is that disclosure would prejudice its own commercial interests.
17. The Commissioner notes that, having been advised of the scope of the Commissioner's investigation, the MoD requested the opportunity to submit further arguments on the application of section 43(2) to the successful bidder's own commercial interests.
18. It argued that, whilst it had consulted with that third party in relation to the original scope of the request, the third party was not consulted at the time about the information in respect of its own tender to which this complaint relates. During the course of his investigation, the MoD provided the Commissioner with copies of correspondence between the MoD and the third party.
19. The Commissioner notes that the subset of information to which this complaint relates was clearly in the scope of the original request. He also notes that the complainant, both when he contacted the SPVA, and later the MoD, to express dissatisfaction with its response, clearly stated why he did not accept that section 43 applied to the information he was requesting. This included specific arguments in relation to the evaluation details of the successful company.
20. The Commissioner would remind public authorities that, as a matter of good practice, they should establish their arguments and obtain their supporting evidence by the time of the internal review. The Commissioner is therefore disappointed to note that, despite having been given further opportunities to add to its submissions, the MoD still expected to be given more time to consider the matter.
21. In light of the above, and as he is satisfied that the MoD has consulted with the third party, the Commissioner continued with his investigation.

Does the information relate to, or could it impact on, a commercial activity?

22. The term 'commercial interests' is not defined in the Act. However the Commissioner has considered his Awareness Guidance on the application of section 43. This comments that:

"... a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services".

23. The Commissioner accepts that public authorities such as the MoD are major purchasers of goods and services and, as a result, will hold a wide range of information relating to the procurement process. He is therefore satisfied that the withheld information relates to applicable commercial interests and therefore arguments about prejudice to such interests can potentially fall within the scope of the exemption contained in section 43(2).

Nature of the prejudice

24. The Information Tribunal in *Hogan and Oxford City Council v The Information Commissioner Hogan* (EA/2005/2006 and EA/2005/0030) commented:

"An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thoroton has stated 'real, actual or of substance' (Hansard HL (VOL. 162, April 20, 2000, col. 827))".

25. The Commissioner's view is that the use of the term "prejudice" is important to consider in the context of the exemption at section 43. It implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way.
26. The MoD has put forward very little to support its application of the exemption available at section 43(2). It referred the Commissioner to its internal review correspondence stating that this upheld the initial decision on the basis of prejudice to its own commercial interests.
27. The Commissioner has considered the initial decision and notes that, with respect to the exemption claimed, the SPVA merely states that:

"The details you have requested about the tender submitted by Kenyon Repatriation Ltd are judged to be commercially sensitive and, therefore, considered to be exempt from publication under section 43, Commercial Interests, of the FOIA 00 [the Act]".

Likelihood of prejudice

28. The MoD told the complainant that disclosure would prejudice the MoD's commercial interests. It subsequently confirmed to the Commissioner that, in its view, release of the information "*would have*" a prejudicial effect. The Commissioner considers that this means that, whilst it would not be possible to prove that prejudice would occur beyond any doubt whatsoever, prejudice would at least be more probable than not.

Evidence of prejudice

29. The Commissioner has considered the arguments put forward by the MoD as to why it considers its own commercial interests would be prejudiced.
30. The MoD told the complainant that release of the requested information "*could well deter prospective bidders from submitting tenders for MoD business in the future*". However, it also acknowledged that greater understanding of the MoD's procurement processes, via disclosure in this case, "*may enable contractors to respond better to opportunities offered by the MoD in the future*".
31. The Commissioner has considered the withheld information in relation to the representations provided by the MoD. In the Commissioner's view, arguments related to deterring prospective bidders from submitting tenders have not been explained convincingly in terms of establishing a plausible link between disclosure and commercial prejudice to the MoD.
32. As the MoD has not provided the required level of detail, or provided evidence to support its statement that disclosure would cause prejudice, the Commissioner is unable to conclude that the exemption is engaged. Further, the Commissioner considers that the MoD's suggestion that there is a potential risk that competition for the award of the contract in the future could be "*skewed in favour of the applicant*" is somewhat mitigated by the fact that a disclosure under the Act would in essence be to the public at large. Therefore all tenderers would have access to the information.

Procedural Requirements

Section 1 General right of access

33. Section 1(1) states:

"Any person making a request for information to a public authority is entitled –

a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

b) if that is the case, to have that information communicated to him."

34. During the course of his investigation, the Commissioner has concluded that some of the information withheld by the MoD has been incorrectly withheld. As he considers that this information should have been

disclosed, he finds the MoD in breach of section 1(1)(b) of the Act in that it failed to provide this information to the complainant.

Section 10 Time for compliance

35. Section 10(1) of the Act provides that:

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt".

36. In failing to provide the complainant with the information which it incorrectly withheld within the statutory timescale, the Commissioner finds the MoD in breach of section 10(1) of the Act.

Section 17 Refusal of request

37. Section 17(1)(b) places an obligation upon the public authority that its refusal notice *"specifies the exemption in question"*. The Commissioner's view is that the public authority is thereby required to refer to the specific part(s) of the relevant exemption(s). In this case, as a result of the SPVA having failed to do so, the Commissioner notes that the complainant was left in some doubt as to the reason why his request was refused. The MoD therefore breached section 17(1)(b) in this regard.

The Decision

38. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act:

- it breached section 1(1)(b) by not providing the complainant with the requested information by the time of the completion of the internal review;
- it breached section 10(1) by not providing the complainant with the requested information within 20 working days of the request; and
- it breached section 17(1)(b) by failing to specify the subsections of the exemption claimed.

Steps Required

39. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- disclose the numerical and narrative assessments made by the SPVA panel for each of the serials (1-24) of the Tender Response Evaluation Sheets submitted by Kenyon Repatriation Ltd. to the complaint.
40. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

41. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

42. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

43. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
44. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 8th day of March 2011

Signed

**Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Commercial interests

Section 43(1) provides that –

"Information is exempt information if it constitutes a trade secret."

Section 43(2) provides that –

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

Section 43(3) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2)."