

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 November 2016

Public Authority: The Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a number of requests to the Cabinet Office about contracts it had entered into with Behavioural Insights Team (BIT). The complainant was dissatisfied with the Cabinet Office's refusal to disclose the maximum day rates it would pay BIT staff. The Commissioner has concluded that this information is exempt from disclosure on the basis of section 43(2). The complainant also asked to know the number of BIT staff who were provided with the passes to access the Cabinet Office premises. The Cabinet Office refused to confirm or deny whether it held this information on the basis of sections 31(3) and 38(2) of FOIA. The Commissioner has concluded that neither of these two exemptions are engaged.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - confirm or deny whether information falling within the scope of the request 6 is held, and if held disclose this information or issue a refusal notice as a basis to withhold the information sought by request 6.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. The complainant submitted the following request to the Cabinet Office on 29 October 2014:

'Please let me have the following information in relation to your work with the Behavioural Insights Team (BIT) -

[1] - a list of contracts awarded to the BIT showing the nature of the services provided

[2] - the approximate value of each contract

[3] - payments in each financial year to date under each contract

[4] - total payments to the BIT each year if different to the sum of the amounts above

[5] - information on how each contract was awarded including where it was advertised

Please also let me know -

[6] - how many BIT staff currently have passes giving them access to Cabinet Office offices

[7] - details of any current secondment or staff loan arrangements between BIT and Cabinet Office¹

5. The Cabinet Office responded on 15 April 2015.² With regard to the aspects of the requests which are relevant to this notice, the Cabinet Office explained that it had two contracts with BIT and directed the complainant to website links containing details of these contracts. It explained that the information contained at these links would answer requests 2, 3 and 4. In relation to request 6, the Cabinet Office sought to withhold this information on the basis of the exemptions contained at sections 40(2) (personal data) and 31(1)(a) and 31(2)(g) (law enforcement) of FOIA.
6. The complainant contacted the Cabinet Office on 21 April 2015 and submitted a request for an internal review. The complainant explained

¹ Behavioural Insights Team (BIT) is a social purpose company jointly owned by the UK Government, charity Nesta and its employees. It focuses on the application of behavioural sciences to public services and government policy making.

² The Cabinet Office apologised for its delay in responding to the request and explained that it had changed IT systems while his request was being processed and unfortunately the files relating to the handling of the request were lost in the transition.

that he could not access the website links provided by the Cabinet Office and that he disputed its grounds for refusing the information sought by request 6.

7. The complainant subsequently contacted the Cabinet Office to question why the day rates and names of senior staff in the published contracts had been redacted.
8. The Cabinet Office informed the complainant of the outcome of the internal review on 7 August 2015. The review concluded that the information sought by request 6 was not exempt from disclosure on the basis of section 40(2) of FOIA, albeit that it was exempt on the basis of sections 31(1)(a), 31(1)(g) by virtue of 31(2)(i), and section 38(1)(b) (health and safety). The Cabinet Office also provided the complainant with different links to the contracts in question. Finally, the Cabinet Office explained that the names of two senior members of staff at BIT would be published in the contracts available online. However, it explained that the day rates and monthly minimum spend commitments had been redacted from the contracts on the basis of the exemption contained at section 43(2) (commercial interests) of FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 8 July 2015 in order to complain about the Cabinet Office's handling of his requests. At the point this notice is being issued the outstanding points of complaint concern the Cabinet Office's refusal to provide the information sought by request 6 and the Cabinet Office's decision to withhold the day rates paid to BIT staff on the basis of section 43(2) of FOIA.
10. In respect of request 6, at this point it is important to record that although the Cabinet Office sought to rely on the exemptions contained at the following sections of FOIA; 31(1)(a), 31(1)(g) by virtue of 31(2)(i), and section 38(1)(b) in its correspondence with the complainant, it has subsequently confirmed to the Commissioner that it in fact wishes to refuse to confirm or deny whether it holds any information falling within the scope of this request. In order to do so, it is seeking to rely on the exemptions contained at sections 31(3) and 38(2) of FOIA.
11. Clearly, it is somewhat irregular for a public authority to confirm that it holds information and then subsequently seek to refuse to confirm or deny whether it actually holds the requested information. That said, in the circumstances of this case, the Commissioner notes that the wording of the Cabinet Office's responses to the complainant were such that it did not specifically confirm that it held information falling within the

scope of request 6. Moreover, in similar cases the Commissioner has allowed a public authority to apply a neither confirm nor deny exemption and considered such an exemption in a decision, even when the authority may have already indicated to a complainant that information is held.

12. In relation to this aspect of the complaint it is important to note that the right of access provided by FOIA is set out in section 1(1) and is separated into two parts: Section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held. Both rights are subject to the application of exemptions.
13. Therefore this notice only considers whether the Cabinet Office is entitled, on the basis of sections 31(3) or 38(2), to refuse to confirm or deny whether it holds the requested information. The Commissioner has not considered whether the requested information – if held – should be disclosed.

Reasons for decision

Cabinet Office passes provided to BIT staff

14. In request 6 the complainant asked how many BIT staff currently have passes giving them access to Cabinet Office offices.
15. As noted above, the Cabinet Office wishes to refuse to confirm or deny on the basis of section 31(3) and 38(2) whether it holds any information falling within the scope of this request. In effect, the Cabinet Office is therefore refusing to confirm or deny whether *any* BIT staff have passes to the Cabinet Office.
16. Section 31(3) of FOIA states 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 any of the matters mentioned in subsection (1).'
17. The matters in question in this request concern those listed at section 31(1)(a), namely the prevention or detection of crime, and 38(2)(i) namely the purpose of securing the health, safety and welfare of persons at work.
19. Section 38(2) of FOIA states 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, have either of the effects mentioned in subsection (1).'

20. The effects in question in this case concern those listed at 38(1)(b), namely endangerment to the safety of any individual.

The Cabinet Office's position

21. In respect of section 31(3), the Cabinet Office explained that it does not normally disclose details of organisations, outside the civil service, whose staff have a pass in order for them to gain entry on to the Cabinet Office estate. The Cabinet Office argued that disclosure of such information would be likely to make it more vulnerable to crime. For example, the Cabinet Office argued that if it was public knowledge that the Cabinet Office issues passes to a named external organisation, a person with criminal intent could seek to gain access to a Cabinet Office building by producing a forged building pass for that external organisation as ID for obtaining temporary access to a Cabinet Office building.
22. In respect of section 38(2), the Cabinet Office suggested that although disclosure of the number of BIT staff holding security passes (if indeed such passes were held) may not in itself endanger the individuals directly, the risk to their physical safety could arise as an indirect result of disclosure. This is because it would enable BIT staff to be identified as a comparatively small group of people who potentially hold Cabinet Office security passes and disclosure would lead to individual BIT staff being easier to target by those with criminal intent.
23. The Cabinet Office emphasised that building passes are an ideal way for those with criminal intent to easily access a building and move around it relatively freely. It noted that it had instances of people trying to access the Cabinet Office estate using a bogus pass. The Cabinet Office acknowledged that protections are in place to ensure that fraudulent passes, it was Cabinet Office Protective Security policy to keep the nature of its security arrangements confidential. It argued that it operated what it considered to be proportionate security arrangements based on a risk management approach and in line with wider government security policy and best practice.

The complainant's position

24. The complainant argued that the Cabinet Office's concerns about the security implications of disclosing the withheld information were misplaced. He suggested that the Cabinet Office's position that if it were known that staff from another organisation had access, someone with

criminal intent could forge such a pass, does not stand up to scrutiny. First, he argued that it is known that staff from BIT do have passes to access Cabinet Office buildings, just not how many. This was on the basis that he had heard this from a people who had worked with - but not in - BIT and he therefore assumed there was no secret about it. Consequently, the complainant suggested that as such people are aware that BIT staff had/have such passes, it seems not to be confidential. Moreover, the complainant noted that BIT are keen to stress its close ties to the Cabinet Office. Second, he argued that the Cabinet Office must surely have protection against forged passes whatever organisation a criminal could be purporting to represent.

The Commissioner's position

25. In order for a prejudice based exemption, such as the two cited by the Cabinet Office, to be engaged the Commissioner considers that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed - or in this case confirmation as to whether or not the requested information is held - has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld - or the confirmation as to whether or not the requested information is held - and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met - ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.
26. With regard to the first limb of this test, the Commissioner is satisfied that this is met for both sections 31(3) and 38(2) given the nature of the prejudice envisaged by the Cabinet Office in respect of both protecting its buildings, and to the safety of BIT staff, if it confirmed whether the information falling within the scope of request 6 was held.

27. Furthermore, in respect of the second limb of this test, for both exemptions the Commissioner accepts that there is some causal link between confirmation as to whether or not BIT staff have Cabinet Office passes and the prejudice envisaged. In relation to section 31(3) the Commissioner accepts that the example provided by the Cabinet Office at paragraph 21 is a logical one and moreover the resultant prejudice, namely unauthorised access into the Cabinet Office estate is one that clearly represents a real risk to the prevention or detection of crime. Similarly, the Commissioner accepts that it is logical to argue that if a particularly small group of individuals were identified as having passes to the Cabinet Office building this could potentially increase the risk of them being targeted by those with a criminal intent determined to get hold of such a pass. Again, any endangerment to an individual in such scenario is clearly one that is of substance.
28. However, the Commissioner is not persuaded that the third limb of the test is met for either exemption. This is because in her view the likelihood of prejudice occurring either to the prevention or detection of crime, or to the safety of particular individuals, if the Cabinet Office confirmed whether or not it held the requested information is one that is nothing more than a hypothetical possibility. She has reached this conclusion for a number of reasons.
29. Firstly, the example given by the Cabinet Office at paragraph 21, presupposes that an individual would be given access to Cabinet Office premises simply on the basis of a forged building pass for an internal organisation, in this case BIT. In the Commissioner's view it seems plausible to suggest that the Cabinet Office would insist on being provided with further identification from the individual in question before they would be given access to the premises. Therefore, whilst the Commissioner could see how an individual may attempt to access the Cabinet Office buildings in such a way, she believes that the security mechanisms that are in place would be sufficient to mean that the risk of any prejudice occurring in this way is remote.
30. Secondly, as noted above the Commissioner accepts confirmation that a particular group – in this case BIT staff – may have Cabinet Office passes could lead them to being targeted by those with criminal intent. However, the Commissioner considers the likelihood of this happening to be remote. Central to her reaching this decision is the fact that the names of a significant number of the Cabinet Office's own senior staff are already in the public domain by virtue of transparency data being

published by the Cabinet Office.³ In the Commissioner's view if an individual was intent on obtaining a pass from a particular individual then there are already a significant number of names of existing Cabinet Office staff in the public domain who could be targeted by criminals.

31. Consequently, the Commissioner is not persuaded that sections 31(3) or 38(2) are engaged.

Day rates paid to BIT staff

32. The Cabinet Office redacted the day rates paid to BIT staff from the versions of the contracts made available to the complainant. The Cabinet Office argued that this information was exempt from disclosure on the basis of section 43(2) of FOIA. This exemption states 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).'

33. The Cabinet Office argued that disclosure of day rates paid to BIT staff under the contracts in question would be likely prejudice the commercial interests of both BIT and the Cabinet Office. If the information was disclosed the Cabinet Office argued that it would be likely to jeopardise the confidence that potential suppliers have in government as a commercial counterparty, prompting concern that commercially sensitive aspects of contracts with government will be made public without their consent. The Cabinet Office argued that this may deter companies from competing for future government contracts, which in turn would negatively impact on the quality and quantity of the government's supplier base.
34. In respect of BIT, the Cabinet Office argued that to release the maximum day rates for the contracts would clearly prejudice BIT's future negotiations with other partners, in particular those from the private sector, by revealing what had been negotiated as a maximum rate with the government and hence putting forward an implication that the proposed partner should pay no more than that. This would prejudice both the commercial interests of BIT itself but also the Cabinet Office as it is a shareholder in BIT and thus any reduction in the profitability of BIT would have an impact for the Cabinet Office.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/529110/co_staff_and_salary_senior_data_march2016.csv

35. As section 43(2) is a prejudice based exemption, in order for it to be engaged, the three criteria set out at paragraph 25 have to be met.
36. The Commissioner is satisfied that the first limb is clearly met given that the nature of prejudice envisaged both to BIT's and the Cabinet Office's interests are clearly ones that fall within the scope of the exemption provided by section 43(2).
37. With regard to the second limb, the Commissioner accepts that there is clearly some causal link between disclosure of the withheld information and harm occurring to BIT's commercial interests. The Commissioner agrees that it is logical to argue that if potential customers of BIT were aware of the maximum day rates BIT had previously agreed then this presents a real risk of BIT's negotiating position being undermined when agreeing day rates with these potential new customers. Moreover, given that the Cabinet Office is a shareholder in BIT, the Commissioner accepts that such an outcome has the potential to affect its own commercial interests. Furthermore, the Commissioner accepts that it is logical to suggest that if the Cabinet Office disclosed commercially sensitive information about a supplier's pricing structure, then it is possible to envisage some link between disclosure of such information and *potential* reluctance on the part of other suppliers to offer their services to the government through concerns that their commercial confidential information could be disclosed under FOIA.
38. With regard to the third limb, the Commissioner is satisfied that the likelihood of prejudice occurring to BIT's commercial interests is clearly more than a hypothetical possibility; rather there is a real and significant risk of this happening. The Commissioner has reached this finding given the direct way in which potential customers of BIT could use this information in their negotiations with BIT in order to achieve a lower price. It follows that the Commissioner accepts that disclosure of the withheld information would be likely to prejudice the Cabinet Office's own commercial interests if BIT's own such interests were harmed given the Cabinet Office is shareholder of BIT.
39. However, the Commissioner is not persuaded that there is a real likelihood that disclosure of the withheld information would dissuade private companies from entering into contracts with the government. In reaching this finding the Commissioner would emphasise that in her view there is an inherent commercial benefit to such companies entering into contracts with the public sector and part of doing business with the public sector involves accepting that such clients are subject to FOIA.
40. Nevertheless, for the reasons set out above, the Commissioner is satisfied that the exemption contained at section 43(2) is engaged.

Public interest test

41. Section 43(2) is a qualified exemption. Therefore the Commissioner must consider the public interest test contained at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption in relation to the information that she accepts is exempt from disclosure outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

42. The Cabinet Office argued that it was not in the public interest to harm the negotiating position of a private sector partner.⁴

Public interest arguments in favour of disclosing the withheld information

43. The complainant argued that there was an overwhelming public interest in the disclosure of the withheld information.
44. For its part, the Cabinet Office acknowledged that disclosure of the withheld information would increase the public's understanding of the basis upon which the government contracted out parts of the Civil Service, be it by mutualisation or otherwise.

Balance of the public interest arguments

45. The Commissioner clearly accepts that there is a broad interest in the public understanding how public money is spent and in the circumstances of this case disclosure of the withheld information would provide the public with a clearer insight into the costs of the contracts entered into with BIT.
46. However, the Commissioner believes that there is an inherent public interest in ensuring fairness of competition. In her view it is against the public interest for the commercial interests of a third party to be undermined simply because they have entered into a contract with a government department. Furthermore, in the particular circumstances of this case, as the Cabinet Office is a shareholder in BIT, disclosure also risks prejudicing the government's own commercial interests an

⁴ The Cabinet Office also advanced arguments which focused on why it was in the public interest for the government to remain a credible commercial partner. However, as the Commissioner has rejected the Cabinet Office's line of argument that disclosure would prejudice its relationships with potential suppliers, she has not taken these arguments into account.

outcome which the Commissioner considers to be firmly against the public interest. Consequently, given the cumulative public interest in protecting the interests of both BIT and the Cabinet Office/government, the Commissioner has concluded that the public interest favours maintaining the exemption.

Right of appeal

47. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

48. 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.
49. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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