

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 14 June 2016

**Public Authority:** Cabinet Office

**Address:** 70 Whitehall  
London  
SW1A 2AS

#### **Decision (including any steps ordered)**

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1. The complainant has requested transaction information that has taken place under the Spend Analysis and Recovery Framework from the Cabinet Office. The Cabinet Office argued that this information was exempt from disclosure under section 43 and upheld this position at internal review.
2. The Commissioner's decision is that the Cabinet Office is not entitled to rely on section 43 as its basis for withholding this information for the reasons set out in this notice.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose all the information it holds within the scope of the complainant's request.
4. 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**

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5. On 10 July 2015, the complainant requested information of the following description:

"I [am] writing to request details of all the transactions with providers that have taken place under the Spend Analysis and Recovery Framework. Please provide the data in a machine readable format (preferably csv). As a minimum, please make sure to include the date, value and recipient of each transaction. Please also provide details on the procurement category of each transaction if you have it.

If you do not have your spend linked to these contracts, please can you provide details of all your spend with BravoSolution for spend analysis instead?

For the avoidance of doubt, I am making this request under the Freedom of Information Act. I look forward to your response within 20 working days."

6. On 27 July 2015, the Cabinet Office responded. It refused to provide the requested information. It cited the following exemption as its basis for doing so:
  - Section 43(2) (prejudice to commercial interests).
7. It also explained that it did not hold the procurement category of each transaction "as that is not reported as part of customer or supplier management information returns. All individual call-off contracts are directly between customer authorities and their chosen supplier".
8. The complainant requested an internal review on 6 August 2015. The Cabinet Office sent her the outcome of its internal review on 21 August 2015. It upheld its original position.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 26 August 2015 to complain about the way her request for information had been handled.
10. The Commissioner has considered whether the Cabinet Office was entitled to rely on section 43(2) as its basis for refusing to provide the requested information.

## Reasons for decision

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11. Information about the Spend Analysis Recovery Framework is available online.<sup>1 2</sup>
12. Section 43(2) of the FOIA states that information is exempt information if its disclosure under the legislation would – or would be likely to – prejudice the commercial interests of any person (including the public authority holding it). A commercial interest relates to a person's ability to participate competitively in a commercial activity, ie the purchase and sale of goods or services.
13. In order for a prejudice based exemption such as section 43(2) 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 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 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.

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<sup>1</sup> <http://ccs-agreements.cabinetoffice.gov.uk/contracts/rm1037>

<sup>2</sup> <http://ccs-agreements.cabinetoffice.gov.uk/sites/default/files/contracts/5%20%20Framework%20Agreement.pdf>

*The Cabinet Office's arguments*

14. The Cabinet Office initially did not provide particularly detailed arguments as to the likelihood of prejudice. It said, when specifically asked, that the party whose commercial interests would be prejudiced by disclosure was Crown Commercial Services ("CCS").
15. It said that the Category Team at the CCS<sup>3</sup> provided a steer which explained that "it may deter customers from using future CCS agreements if they fear their information will be published". It provided limited elaboration of this point. The Commissioner pressed the Cabinet Office to make additional arguments.
16. In its further reply, the Cabinet Office explained that the information it held within the scope of the request (which it had supplied to the Commissioner) was a list of different legal entities and the amount each had paid to one or more of the suppliers for the service that it had accessed via CCS. However, it did not hold information which linked the amount spent to a particular supplier.
17. In its further reply, it also explained the expectation of confidentiality that each of the legal entities would have when supplying any information to the CCS.
18. It also provided an extract from what the Category Team had said. In short, the Category Team had expressed concern about any accounts payable information being put into the public domain. It had explained that the accounts payable system detailed a vast amount of information "some of which will be confidential". It had said it was for the public authority who had engaged the supplier and for the supplier to determine what information was to be put into the public domain and that if any information was put into the public domain without their consent this may deter customers from using CCS agreements.
19. In support of its arguments as to confidentiality it provided the following link:

<https://data.gov.uk/data/contracts-finder-archive/contract/832000/>

It drew the Commissioner's attention to paragraph 23.3 at Attachment 5 which states:

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<sup>3</sup> <https://www.gov.uk/government/organisations/crown-commercial-service>

"The Authority shall be responsible for determining in its absolute discretion and notwithstanding any other provision in this Framework Agreement or any other agreement whether the Commercially Sensitive Information and/or any other Information is exempt from disclosure in accordance with the provisions of the FOIA or the Environmental Information Regulations".

20. The "Authority" in this case, means the Cabinet Office.

21. It also drew the Commissioner's attention to paragraph 15.3 of the same document which states:

"In the event the Authority shares the Management Information any Other Contracting Body receiving such information shall be informed of the sensitive nature of that information and shall be requested not to disclose it to any person who is not a Crown body or Other Contracting Body (unless required to do so by Law)".

22. The Cabinet Office argued that the above two paragraphs indicated that there was a clear expectation of confidentiality and a very high bar which must be overcome before disclosure.

23. It also argued that disclosure would constitute a breach of confidence which would, in turn, undermine CCS' position of trust with its commercial partners. Where trust is broken, this would discourage organisations from using CCS. Its purpose is to broker efficient deals for the benefit of the public purse when it chose suppliers that could provide the same service to a large number of organisations. It was cheaper for those organisations to access a service organised via CCS than to, for example, arrange an individual contract of the same type with a service provider.

24. It was concerned that disclosure would encourage other individual suppliers to target the more lucrative contracts e.g. the organisations shown in the withheld information as having spent the most money, and to negotiate separately with them, thus undermining the work of CCS through a "divide and conquer" strategy. Organisations do not have to use CCS to obtain a particular service although, in the Cabinet Office's view, the work of CCS improves value for public money.

*Does the harm envisaged relate to interests that are applicable to the exemption?*

25. The Cabinet Office, when asked specifically, sought to argue that it was the commercial interests of CCS that it was seeking to protect by relying on the exemption. It did not assert that disclosure would harm the commercial interests of any third party, for example, those who use

suppliers via contracts arranged by CCS or, as another example, the suppliers themselves.

26. A commercial interest relates to a person's ability to participate competitively in a commercial activity, ie the purchase and sale of goods or services. The Commissioner is unclear from the Cabinet Office's arguments as to how disclosure would affect CCS own commercial interests.
27. Its arguments can, in general terms, be seen as concern about the risk of undermining the effectiveness of CCS through disclosure. The Commissioner does not agree that a disclosure which might undermine the effectiveness of CCS would undermine CCS' commercial interests, that is, its ability to participate in a commercial activity. The Cabinet Office's arguments may relate to the financial viability or operational effectiveness of CCS but these do not constitute CCS's own commercial interests.
28. Also, the Cabinet Office appears to argue that the information is commercially confidential and as such would be exempt under section 43. There is no exemption for "commercially confidential" information in general in FOIA, although other exemptions may apply, such as section 41 – the exemption for information provided in confidence.
29. The Commissioner specifically asked the Cabinet Office if it wanted to introduce reliance on any other exemptions and, if so, to make its arguments to him. It did not do so. Had it done so, the Commissioner would have taken them into consideration.
30. Given that the Cabinet Office, despite being asked twice for its section 43 arguments, did not satisfactorily explain how the harm it envisaged related to the commercial interests of CCS, the Commissioner has concluded that section 43 is not engaged.

### **Section 43 - Conclusion**

31. The Commissioner has concluded that the Cabinet Office cannot rely on section 43 as its basis for withholding the requested information. This is because the prejudice it describes does not relate to the commercial interests of CCS. The Commissioner had specifically asked the Cabinet Office to identify the party whose commercial interests would be harmed by disclosure. It identified CCS but did not identify any other party. The Commissioner also specifically asked the Cabinet Office if it wished to rely on any other exemptions and it did not say that it wished to do so. The information should therefore be disclosed because the Cabinet Office has not produced a satisfactory explanation as to why it is exempt under section 43(2).

## Right of appeal

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32. 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 123 4504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

33. 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.
34. 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 .....**

**Gerrard Tracey**  
**Principal Adviser**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**