

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 February 2019

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested information about service credits relating to contracts for the provision of asylum accommodation. The Home Office withheld the information, citing section 43(2) (Commercial interests) of the FOIA.
2. The Commissioner's decision is that the Home Office has failed to demonstrate that disclosing the requested information would be likely to prejudice its, or any of its service providers', commercial interests. The Commissioner therefore considers that section 43(2) of the FOIA is not engaged. The Commissioner also considers that the Home Office has breached sections 10(1) (Time for compliance) and 17(1) (Refusal of a request) of the FOIA.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation.
 - To disclose the withheld information to the complainant.
4. The Home Office 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.

Background

5. The Home Office (HO) has a contract with service providers to provide asylum accommodation.
6. The performance of the service providers is measured against individual key performance indicators (KPIs). Depending on the level of non-conformance, this can lead to the application of KPI scores. The total score of all KPIs is used to determine the value of a service credit (which is a rebate), which should be deducted from the amount payable by, in this case the HO, to its service providers.

Request and response

7. On 15 March 2018 the complainant wrote to the HO and requested information in the following terms:

“How much was levied in respect of service credits in each key performance indicator designated met in respect of each ‘Compass asylum accommodation’ region in 2016/17 and 2017/18 to date?”

8. The HO responded on 17 April 2018. It withheld the requested information, citing the section 43(2) exemption.
9. Following an internal review the HO wrote to the complainant on 21 June 2018, upholding its original decision.

Scope of the case

10. The complainant contacted the Commissioner on 22 July 2018 to complain about the way his request for information had been handled. He explained that service credits relating to the present contracts had been disclosed previously in 2016. He also argued that disclosure would promote transparency, including promoting competition through transparency and accountability regarding public funds.
11. The HO explained that in March 2017 a Home Affairs Select Committee (HASC) began an inquiry into asylum accommodation following concerns about standards. The HASC invited various parties to give evidence on asylum accommodation; in the main body of its report the HASC referred to values of service credits accrued by providers in the years 2014 to 2016. The HASC obtained this information from evidence given

by the Scottish Refugee Council, who had obtained it from a written parliamentary answer in March 2016.¹

12. As part of her initial investigation, the Commissioner asked the HO for a copy of the withheld information. The HO explained to the Commissioner that it was not possible to provide her with a copy of it, as its business department had the information, but that it would be provided as soon as possible. Subsequently, the Commissioner asked for the withheld information again. The HO did not respond to her.
13. Given that the withheld information is figures, the Commissioner does not consider that it is essential to have sight of it. However, she does expect the HO to respond to any requests from her for information which she requires in order to conduct an appropriate investigation.
14. The Commissioner will consider the HO's application of section 43(2) and the time taken to deal with the request.

Reasons for decision

Section 43 – Commercial interests

15. Section 43(2) of the FOIA 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).”

16. Section 43 is a prejudice-based exemption. In order to be engaged, the following criteria must be met:
 - 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;
 - 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

¹ <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-02-24/28212/>

is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and

- 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.

17. In her guidance on section 43² the Commissioner explains that "would...prejudice" means that prejudice is more probable than not, ie that there is a more than 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so. "Would be likely to prejudice" is a lower threshold. It means that there must be more than a hypothetical or remote possibility of prejudice occurring; there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%.
18. As section 43(2) is a qualified exemption, it is subject to public interest considerations.
19. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner has considered what this means in her guidance:

"...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."
20. The relevant applicable interest cited in this exemption is the prejudice to commercial interests. The Commissioner accepts that the arguments made by the HO set out below address the prejudice at section 43(2).
21. When considering the second point, the Commissioner must be satisfied that the nature of the prejudice is "real, actual or of substance" and not trivial or insignificant. She must also be satisfied that some causal relationship exists between the potential disclosure and the stated prejudice.
22. The HO explained that non-disclosure in this case enhances its ability to secure value for money. It explained that the information would provide an indication of the level of service the department could expect from the company before potentially invoking 'breach of contract' on the provider for the standard of service delivered. The HO also argued that

² <https://ico.org.uk/media/1178/commercial-interests-section-43-foia-guidance.pdf>

non-disclosure gives it sufficient leverage to be in a sufficiently strong position when negotiating contracts for services.

23. In addition, the HO explained that each service provider has its own commercial sensitivity around prices and performance measures and these are noted as 'commercially confidential' by providers within their relevant schedule in the contracts. The HO also explained that contracts are derived through competition and companies could be discouraged from dealing with it, fearing disclosure via an information request could damage them commercially, if competing accommodation providers could see each other's performance indicators.
24. With regard to the third point, the HO explained that disclosure of the requested information would be likely to prejudice its commercial interests and those of the companies dealing with it.
25. In relation to its own commercial interests, the HO explained that, as contracts for asylum seekers are decided following competitive tendering, companies would be likely to be discouraged from dealing with it if disclosure of such commercially sensitive information occurred. It argued that this would create a risk that companies would be reluctant to enter into future contracts with it. It also argued that disclosure would be likely to undermine the existing service provider's confidence in its ability to protect its commercially sensitive information and those of other companies it engages with.
26. The HO also pointed to two First-tier Tribunal (FTT) decisions – *Le Vay* (EA/2014/0091)³ and *Miller* (EA/2015/0143)⁴ in support of its position in the present case. It explained that both of these cases involved the provision of asylum accommodation, although it acknowledged that the information in question was not exactly the same as the present case. The HO explained that the *Le Vay* case was about the total cost, average occupancy of those held and details of costs in each of the Immigration Removal Centres (IRCs); and the *Miller* case was about monthly staffing and self-audit reports showing the total number of hours worked by detainee custody officers and managers at two IRCs. It pointed out that in each case, the FTT agreed that disclosure of such information would prejudice the commercial interest of both the HO and suppliers.

³<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1420/Le%20Vay,%20Julian%20EA-2014-0091.pdf>

⁴[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1704/Home%20Office,%20EA-2015-0143%20\(14-1-16\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1704/Home%20Office,%20EA-2015-0143%20(14-1-16).pdf)

27. In relation to disclosure being likely to prejudice any service provider's commercial interests, as noted above, the HO has not provided the Commissioner with any arguments from any service providers in support of this.

28. In her guidance, the Commissioner addresses this issue:

"A public authority can withhold information that has been provided to it by a third party on the basis of prejudice to the commercial interests of that party. However, to do so it must follow the same steps and arguments that it would for its own information.

When a public authority wants to withhold information on the basis that to disclose the information would or would be likely to prejudice the commercial interests of a third party, it must have evidence that this does in fact represent the concerns of that third party. It is not sufficient for the public authority to speculate on the prejudice which may be caused to the third party by the disclosure."

29. The Commissioner accepts the HO's argument that the requested information is commercial in nature as it relates to the performance of contracts – in this instance for the provision of asylum accommodation. The Commissioner also accepts the HO's argument that disclosure could impact on its commercial interests as it is information regarding the performance of the contract, ie the amount of monies levied in service credits if a service provider has not met its KPIs. The Commissioner notes that the contracts are ongoing.

30. As explained above, the complainant pointed out to the Commissioner that service costs had been disclosed in 2016. He explained that he was not aware of any adverse consequences suffered by any of the service providers in question. The complainant accepted that he might not be aware of such adverse consequences, if there were any, but he knew that each contract had been extended in December 2016 to run until September 2019, when the successor contract to 'Compass' was due to commence.

31. The Commissioner notes the complainant's point about the service credits being disclosed in 2016. She also notes that the HO has not provided any arguments from the service provider in support of disclosure causing prejudice to its commercial interests

32. The Commissioner also notes that the HO has not provided her with any information regarding any prejudice to the commercial interests of either itself or any service provider suffered as result of the disclosure of service credits in 2016.

33. In addition, the Commissioner notes that that HO has argued that disclosure would create a risk that companies would be reluctant to enter into future contracts with it. She does not accept this argument. She considers that private companies are well aware that public authorities are subject to the FOIA access regime.
34. The Commissioner has also considered the HO's point regarding the previous IT decisions about the provision of accommodation, where it was found that disclosure would prejudice both the HO's, and service providers', commercial interests. She notes that the information requested in those two cases was far more detailed than the requested information in the present case. She also considers that the requested information in the present case does not reveal at what level the HO would consider that a service provider would be in breach of contract; it is asking how much has been levied in service credits.
35. Taking all of the above into account, the Commissioner considers that the HO has failed to demonstrate that disclosure of the requested information would be likely to prejudice its own commercial interests or those of any service providers.
36. The Commissioner therefore considers that the section 43(2) exemption is not engaged. She will not go on to consider the public interest considerations.
37. Given that the Commissioner does not consider that the section 43(2) exemption is engaged, she considers the HO should disclose the withheld information to the complainant.

Procedural issues

38. The complainant submitted his request on 15 March 2018. The HO provided its response on 17 April 2018.

Section 10 – Time for compliance

39. Section 10(1) of the FOIA provides that a public authority must respond to a request promptly and in any event no later than 20 working days after the date of receipt.
40. The Commissioner considers that the HO has breached section 10(1) as it took longer than 20 working days to provide the requester with its response.

Section 17 – Refusal of a request

41. Section 17(1) of the FOIA provides that if a public authority wishes to refuse a request it must issue a refusal notice within the 20 working day time for compliance, citing the relevant exemption(s).
42. The Commissioner considers that the HO has breached regulation 17(1) as it took longer than 20 working days to inform the complainant that it was relying on an exemption.

Other matters

43. The complainant requested an internal review on 25 April 2018. The HO responded on 21 June 2018.
44. Part VI of the section 45 Code of Practice (the code) makes it good practice for a public authority to have a procedure in place for dealing with complaints about its handling of requests for information.
45. While no explicit timescale is laid down in the code, the Commissioner has decided that a reasonable time for completing an internal review should normally be within 20 working days of receipt of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
46. The Commissioner is concerned that it took the HO longer than 20 working days to complete the internal review.

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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