

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 October 2019

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

Decision (including any steps ordered)

1. The complainant requested performance reports relating to the delivery and performance management of asylum accommodation.
2. The Home Office ultimately provided some relevant information, but refused to provide the remainder citing sections 40(2) (personal information) and 43(2) (commercial interests) of the FOIA.
3. The Commissioner has considered whether the request was interpreted correctly. She has also considered the Home Office's application of section 43(2) of the FOIA.
4. The Commissioner's decision is that while the request was interpreted correctly, the Home Office applied the exemption provided by section 43(2) incorrectly.
5. The Commissioner requires the Home Office to take the following step to ensure compliance with the legislation:
 - disclose the withheld information, a copy of which was provided to the Commissioner during the course of her investigation (with appropriate redactions for personal data).
6. The Home Office must take this step 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

7. On 10 January 2018, the complainant wrote to the Home Office and requested information in the following terms:

"In respect of each of the 6 regions and 3 contractors in your Compass 'asylum accommodation' contract, with reference to Sch.7 and Sch.14 to this contract and for the period 2017 calendar year, please provide each monthly Performance report (pursuant to 6.2.3 Sch.7), that was sent to each of the Compass' regions Strategic review management board?"

Please let me know if you need me to refine this request. I have focused it on only the key information on the performance report, which I can see is a clear contractual requirement and is information you hold".

8. The Home Office responded on 6 February 2018. It confirmed it held the requested information but refused to provide it. It cited the following exemptions of the FOIA as its basis for doing so:
- section 40(2) (personal information)
 - section 41(2) (information provided in confidence); and
 - section 43(2) (commercial interests).
9. The complainant requested a review on 17 April 2018. He asked the Home Office to review its application of all three of the exemptions.
10. Following an internal review, the Home Office wrote to the complainant on 12 October 2018 maintaining its position with respect to sections 40(2) and 43(2). However it advised that it was no longer relying on section 41(2).

Scope of the case

11. The complainant provided the Commissioner with the relevant documentation on 13 December 2018 to complain about the way his request for information had been handled. With respect to section 40(2), he told the Commissioner:

"I have never sought personal data and recall asking that such be redacted [from] any performance reports disclosed..."

12. With respect to the Home Office's application of section 43(2), he considered that the balance of the public interest favoured disclosure.

13. As is her practice, the Commissioner wrote to the Home Office at the start of her investigation explaining that, where possible, she prefers complaints to be resolved by informal means. She also confirmed the scope of her investigation in this case, namely the Home Office's application of section 43(2) of the FOIA.
14. In correspondence with the Commissioner, the Home Office advised that an informal resolution was being considered. When the Home Office ultimately provided its substantive response, on 15 March 2019, it confirmed that it was the intention to provide the complainant "*with redacted versions of the reports he requested...*".
15. The Commissioner acknowledges that the Home Office wrote to the complainant on 3 April 2019, advising:

"The Home Office has re-considered your request and found that some information can be disclosed to you. However the rest of the information remains exempt from disclosure under section 43(2).

The Home Office is currently undertaking work to redact the reports and the information will be disclosed to you as soon as possible".
16. Further to that correspondence, the Home Office wrote to the complainant on 15 April 2019, stating:

"The entirety information was originally withheld under 43(2) due to the commercially sensitive nature of the information, however, it is considered that some information can be release [sic]".
17. On 26 April 2019, the Home Office wrote to the complainant:

"Please find attached response and redacted reports from quarterly "Strategic Review Management Board" meetings for each provider for the period of 2017 as requested in your Freedom of Information request of 10 January 2018 and subsequent internal review".
18. Following that disclosure, it became evident that there was some disagreement between how the Home Office had interpreted the request for information and how the complainant interpreted the request.
19. The complainant wrote to the Commissioner advising that he remained dissatisfied with the Home Office's handling of this matter:

"... especially the length of time since the original request in Jan.18 plus the lack of information provided in the Home office's 'further response'...."
20. Additionally, he told the Commissioner that the information supplied was not what was asked for in the original request.

21. In light of the above, the Home Office wrote to the complainant, explaining why it responded with respect to the reports for the Strategic Review Management Boards. It also said:

"However, it appears that you may have in fact been looking for the individual performance reports; which are produced for the Contract Management Group. If that is the case then I can confirm that we do hold that information".

22. In further correspondence between the Commissioner and the complainant, the Commissioner explained that, given the approach which she takes in cases where there is a disagreement about the interpretation of a request, any concerns about whether exemptions have been correctly applied by a public authority can only be addressed once the Commissioner has determined how the request should be interpreted.
23. The complainant confirmed that he wished to proceed to a decision notice (DN) that considered both the interpretation of the request and, if applicable, the Home Office's application of section 43(2) of the FOIA to the requested information.
24. The Commissioner subsequently wrote to the Home Office regarding the proposed approach, noting that it had already provided her with its substantive submission about the section 43(2) exemption, as well as with copies of both the redacted and unredacted versions of the withheld information.
25. As the unredacted copy of the withheld information was not marked to show which exemption(s) apply, for the avoidance of doubt the Commissioner asked the Home Office to send her a copy clearly marked to show where it considered the section 43(2) exemption applied.
26. The analysis below considers the interpretation of the request for information and the Home Office's application of section 43(2) of the FOIA.

Reasons for decision

The interpretation of the request

27. In cases such as this where the objective meaning of the request is in dispute and the request was not clarified, the Commissioner will consider both the complainant's and the public authority's interpretations.

28. If the complainant's intended interpretation is an objective reading of the request, then the Commissioner will issue a DN which orders the public authority to issue a fresh response based upon the complainant's interpretation of the request. If the complainant's interpretation is not an objective reading, and the public authority's is, then the Commissioner will issue a DN which finds that the request has been interpreted correctly by the public authority.

The complainant's position

29. In his correspondence with the Home Office, the complainant included a section entitled '*Background to request*' in which he provided context to the request in this case.
30. Prior to receiving the information provided by the Home Office, the complainant told the Commissioner:

"I am requesting the monthly performance reports as jointly agreed by the Home office and its 3 contractors and which are to go to each 'Compass region Strategic review management board'".

31. Having been provided by the Home Office with the redacted copy of the information it considered fell within the scope of the request, the complainant told the Commissioner:

"The information supplied was not what was asked for in the original request. In total 12 provider reports to the quarterly strategic management review group were sent. ... The original request asked for the monthly performance reports that were sent to the quarterly strategic management group for each of the 6 regions not the quarterly reports".

32. In his submission, the complainant explained to the Commissioner why his focus was on the monthly rather than the quarterly reports. In that respect he said:

"... issues and decisions of potential KPI non-conformance, amongst other things, are dealt with in these monthly meetings and with escalation to the strategic management group meeting only where needed".

The Home Office's position

33. During the course of her investigation, the Commissioner asked the Home Office to respond to the complainant's view that the information provided was not what was requested.
34. In its response, the Home Office explained that, having discussed whether there was a need to seek clarification:

"... the decision was made to answer the question we thought [the complainant] had asked which in our view was the quarterly reports of the SRMB".

35. The Home Office explained to the Commissioner:

"If we go back to the wording of the original request, it's the case that essentially [the complainant] has misread the contract, and is confusing the Monthly Contract Management Group Meetings, with the quarterly Strategic Review Management Board (SRMB) meetings".

36. It added:

"If we take the exact question that [the complainant] poses then the answer is simply none – as there are no reports that are sent by the CMG to SRMB. Each meeting has it's own specific reports that are described within the contract. As outlined above, taking a proactive approach, we answered the question we felt [the complainant] wanted, which was the reports for the SRMB".

37. In support of its interpretation of the request, the Home Office provided the Commissioner with relevant extracts from the contracts. Those extracts included the parts of the contract referred to by the complainant in his request for information.

The Commissioner's position

38. The Commissioner considers that public authorities have a duty to interpret requests objectively. Her guidance '*Interpreting and Clarifying Requests*'¹ states:

"If, once the background and context are taken into account;

- the meaning of the current request becomes unclear or ambiguous; OR,

- it is apparent that there is at least one other possible interpretation of the request;

the authority must go back to the requester to ask for further clarification".

¹ <https://ico.org.uk/media/for-organisations/documents/1162/interpreting-and-clarifying-a-request-foia-eir-guidance.pdf>

39. In this case, the Home Office confirmed that it did not seek clarification of the request.
40. The Commissioner notes that, both prior to and following her intervention, the correspondence between the Home Office and the complainant used generic terms, and thus it was not obvious until the information was provided to him that the two parties were referring to different reports.
41. Having considered the wording of the request, and the submissions of both parties, the Commissioner has concluded that the complainant's interpretation of the request is not an objective one. In reaching this conclusion, the Commissioner accepts that, while the request refers to "*each monthly Performance report ... that was sent to each of the Compass' regions Strategic review management board*", it does so with reference to specific clauses in the contract.
42. The Commissioner is satisfied that the Home Office's interpretation of the request is an objective one.
43. In light of the above, the Commissioner has next considered the Home Office's application of the section 43 exemption to the withheld information.

Section 43 commercial interests

44. Section 43(2) 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).'

45. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered her guidance² on the application of section 43. This states that:

"A commercial interest relates to a person's ability to participate competitively in a commercial activity. The underlying aim may be to make a profit however it could also be to cover costs or to simply remain solvent".

46. Her guidance also explains:

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

"In order for such information to be exempt, the public authority must show that because it is commercially sensitive, disclosure would be, or would be likely to be, prejudicial to the commercial activities of a person (an individual, a company, the public authority itself or any other legal entity)".

47. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers that three criteria must be met:
- First, 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.
 - 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.

The applicable interests

48. When identifying the applicable interests, the Commissioner must consider whether the prejudice claimed is to the interest stated, which in the case of section 43(2), is commercial interests.
49. In the Commissioner's view, 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.
50. The Commissioner is satisfied that, in the context of the request in this case, the information relates to a commercial interest. She is also satisfied that the commercial activity involved – the procurement of services relating to asylum accommodation facilities – is conducted in a competitive environment.
51. Therefore, with regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the Home Office relates to the interests which the exemption contained at section 43(2) is designed to protect.

Nature of the prejudice

52. 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(2). 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.
53. Secondly, there must be what the Tribunal in the case of *Christopher Martin Hogan and Oxford City Council v the Information Commissioner* (EA/2005/0026 and 0030) called a 'causal link' between the disclosure and the prejudice claimed. The authority must be able to show how the disclosure of the specific information requested would, or would be likely to, lead to the prejudice.
54. In this case, the Home Office variously told the complainant that disclosure 'would' and 'would be likely to' prejudice the commercial interests of both the Home Office and those companies with whom the Home Office enters into contracts for the management of asylum accommodation facilities.

Nature of the prejudice – the Home Office

55. With respect to prejudice to its own commercial interests, the Home Office told the complainant:

"... non-disclosure in this case enhances the department's ability to secure value for money... It also gives the Home Office sufficient leverage to be in a sufficiently strong position when negotiating contracts for services".
56. In its submission to the Commissioner, the Home Office described the withheld information as "*valuable information to potential future bidders*".
57. It also argued that contracts are derived through competition and that disclosure in this case could discourage companies from dealing with the Home Office.

Nature of the prejudice – third party accommodation providers

58. In its submission to the Commissioner, the Home Office said:

"... it has been a long-standing principle that the release of provider financial information is commercially sensitive, and our providers have indicated as such".
59. In relation to the third parties' commercial interests, the Home Office argued that the providers would stand to lose financially if the

information was disclosed. For example, it argued that disclosure in this case could damage the third parties commercially:

"... if competing accommodation providers could see each other's performance indicators".

60. When claiming that disclosure would, or would be likely to, prejudice the commercial interests of a third party, the Commissioner expects a public authority to consult with the third party for its view. In this case, the Home Office accepted that it had not consulted with the third parties.

61. However, the Home Office confirmed that it had *"discussed it with them in the past"*.

62. It also told the Commissioner that some providers:

"... have stipulated in Schedule 10 that performance information is commercially sensitive ...".

63. The Commissioner accepts that Schedule 10 of the contracts states:

"Both parties agree that the following is deemed to be "Commercially Sensitive Information" for the purposes of the Contract and the obligations set out in Clause 12 (Data Protection and Freedom of Information)".

64. The information that follows within that part of the contract includes, for example, costs information and details, performance, including KPI performance, and meetings related to performance.

Is the exemption engaged?

65. The Commissioner considers that the prejudice test is not a weak test: an evidential burden rests with public authorities to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, real, actual and of substance. In the Commissioner's view, if a public authority is unable to discharge this burden satisfactorily, the exemption is not engaged.

Is the exemption engaged – the Home Office?

66. The Commissioner recognises that there may be circumstances where the release of information held by a public authority could damage its reputation or the confidence that customers, suppliers or investors may have in it.

67. In determining whether or not the effect of disclosure in this case would be likely to be detrimental or damaging in some way to the commercial interests of the Home Office, the Commissioner has considered the nature and likelihood of harm that would be likely to be caused.

68. She considers that the arguments the Home Office put forward in its correspondence with the complainant were high level, generic arguments. She recognises, however, that in its submission to her, the Home Office provided more detailed arguments in support of its position. She accepts that those arguments could be considered to be valid arguments in the context of a case involving the application of section 43(2) of the FOIA.
69. In reaching her decision in this case, the Commissioner is mindful that the Home Office has had more than one opportunity to confirm that the arguments it put forward related to the information that it considered fell within the scope of the request – namely the quarterly reports.
70. In this case, having had the opportunity to consider the Home Office's arguments in relation to the withheld quarterly reports, the Commissioner is not satisfied that the arguments relate to the withheld information.
71. The Commissioner has therefore concluded that section 43(2) is not engaged in respect of the withheld information relating to the commercial interests of the Home Office.

Is the exemption engaged – the third party providers?

72. The Commissioner considers it important that, in claiming the section 43 exemption on the basis of prejudice to the commercial interests of a third party, the public authority must have evidence that this does, in fact, represent or reflect the view of the third party.
73. In this case, the Commissioner accepts that the views of the third parties, in relation to commercially sensitive information, were known to the Home Office.
74. However, from the evidence she has seen, and mindful of the nature of the withheld information, the Commissioner is not satisfied that the Home Office has demonstrated that disclosure would be likely to prejudice the commercial interests of third party companies.
75. The Commissioner has therefore concluded that the Home Office has failed to demonstrate that section 43(2) is engaged in respect of the withheld information relating to the commercial interests of the third party providers.

Other matters

Time for internal review

76. The Commissioner cannot consider the amount of time it takes a public authority to complete an internal review in a DN because such matters are not a formal requirement of the FOIA. Rather, they are matters of good practice which are addressed in the code of practice issued under section 45(1) of the FOIA. However, the Commissioner has issued good practice guidance in which she has stated that, in her view, internal reviews should take no longer than 20 working days to complete, and even in exceptional circumstances the total time taken should not exceed 40 working days.
77. In this case, the internal review that was requested on 17 April 2019 was not completed in accordance with that guidance.
78. The Commissioner expects the Home Office to ensure that the internal reviews it handles in the future adhere to the timescales she has set out in her guidance.

Performance reports

79. The Commissioner acknowledges that, during the course of her investigation, the Home Office wrote to the complainant, confirming that it held:

"... individual performance reports; which are produced for the Contract Management Group".
80. It advised the complainant that, should he wish to request those reports, one or more exemptions might apply.
81. The Commissioner expects that, if the complainant were to make a request for those reports, the Home Office will have due regard to its responsibilities under section 1 and section 10 of the FOIA.

Right of appeal

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

83. 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.

84. 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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