

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 July 2019

Public Authority: Department for Transport
Address: Great Minster House
33 Horseferry Road
Westminster
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant has requested information about his company held by the Department for Transport (DfT), including emails between named individuals and any other information referencing him or his company. The DfT provided some information under the subject access provisions but withheld information covered by the FOIA under section 41, 42 and 43. During the Commissioner's investigation, the DfT accepted the information previously withheld under section 41 and a small number of documents withheld under section 43 could be disclosed.
2. The Commissioner's decision is that the DfT has correctly withheld two documents under the provisions of the section 42 exemption. For the information withheld under section 43; the Commissioner finds the exemption is not engaged in relation to category 2) information but the DfT has correctly engaged section 43 in relation to category 3) information and the public interest favours maintaining the exemption.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information previously withheld under section 41
 - Disclose the category 2) information previously withheld under section 43(2) subject to any appropriate redactions for personal data.

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

5. On 2 July 2018 the complainant made a request to the Department for Transport (DfT) in the following terms:

"Please supply the data about myself and my company – Movecom Ltd – that I am entitled to under data protection law relating to:

My personnel file and any file held about my Company Movecom Ltd

Emails between [name redacted], [name redacted], [name redacted], [name redacted] and any other persons (from 1 January 2018 to today's date)

Please include data that references me by my full name, or by shortened or attributed terms such as "Movecom"."

6. The DfT dealt with any parts of the request concerning the complainant's personal data as a subject access request and considered the remaining information under the FOIA. This information was as follows:

any file held about my Company Movecom Ltd and emails between [name redacted], [name redacted], [name redacted], [name redacted] and any other persons (from 1 January 2018 to 13 August)

7. The DfT responded to this on 24 September confirming that information was held but was exempt from disclosure under section 43(2) of the FOIA.
8. The complainant requested an internal review of this decision on 27 September, disputing that all of the information held would be prejudicial to commercial interests if it were disclosed.
9. The DfT conducted an internal review and responded on 8 November 2018. It clarified there were four broad categories of information it held:
 - 1) Information about an incident involving a Drug and Alcohol test submitted by a Movecom employee at a construction site under the purview of Costain Skansa joint venture on 22 February ("the incident"), and correspondence between Costain Skansa, HS2 and DfT officials about the incident.

- 2) Correspondence between DfT officials about how to respond to the incident.
 - 3) Information concerning the nature of Movecom's contract with the DfT and the services it provided, including Movecom's relationship with other commercial entities with whom it sub-contracted.
 - 4) Correspondence around the response to a letter from the complainant's MP.
10. For category 1) information the DfT stated it considered the information had been provided in confidence and was therefore exempt under section 41 of the FOIA. For category 2) and 3) information the DfT confirmed it considered the section 43(2) exemption applied and for category 4) information the DfT withheld the information as it was legally privileged and therefore exempt under section 42 of the FOIA.

Scope of the case

11. The complainant contacted the Commissioner on 14 November 2018 to complain about the way his request for information had been handled.
12. During the course of the Commissioner's investigation the DfT partially revised its position. The DfT, after reconsidering the request, determined that the information previously withheld under section 41 (category 1) information) could now be disclosed. Similarly the DfT identified a small number of category 2) and 3) documents previously withheld under section 43(2) that did not meet the prejudice threshold and could now be disclosed.
13. The Commissioner therefore considers the scope of her investigation to be to determine if the DfT has correctly withheld the remaining information within the scope of the request on the basis of any of the cited exemptions – section 42 or 43.

Reasons for decision

Section 42 – legal professional privilege

14. Section 42(1) of the FOIA says that information that attracts legal professional privilege (LPP) is exempt from disclosure. This exemption is subject to the public interest test.
15. The purpose of LPP is to protect an individual's ability to speak freely and frankly with their legal advisor in order to obtain appropriate legal

advice. It recognises that individuals need to lay all the facts before their adviser so that the weaknesses and strengths of their position can be properly assessed. Therefore legal professional privilege evolved to make sure communications between a lawyer and his or her client remain confidential.

16. The DfT withheld category 4) information on the basis that it was legally privileged. The Commissioner has viewed the information the DfT has identified in this category and notes that it can be described as communications between a professional legal adviser and client as it involves communications between a DfT lawyer and a policy official. The correspondence was for the purpose of commissioning legal advice from the lawyer on the issue which is at the centre of this request.
17. The ICO has referred to *Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry (EA/2005/0023, 4 April 2006)* in which the Information Tribunal described LPP as: *"...a set of rules or principles which are designed to protect...exchanges between the clients and [third] parties if such communications or exchanges come into being for the purposes of preparing form litigation."*
18. The DfT has confirmed the following:
 - The communications were between a professional legal adviser and client;
 - The sole or dominant purpose of the communications was to obtain legal advice;
 - The information was communicated in the legal adviser's professional capacity; and
 - The DfT has not made the information available to the public or a third party without restriction and therefore privilege has not been lost.
19. The Commissioner has reviewed this information and she has found that it is as the DfT has described.
20. The Commissioner has considered all the circumstances and is satisfied that, at the time of the request, all the information that the DfT has identified in category 4) attracted legal advice privilege; that the privilege had not been waived at that point, and consequently that this information engaged the section 42(1) exemption.

Public interest arguments in favour of disclosing the information

21. The DfT has not identified any public interest arguments in favour of disclosing this information.
22. The complainant accepts that the matters being discussed are of direct impact to him but he also considers there is a wider public interest as there are direct cost effects to the taxpayer and disclosure would allow for increased scrutiny of the efficiency of the DfT's operations, particularly around the issue of contract management and the efficient use of public resources.

Public interest arguments in favour of maintaining the exemption

23. The DfT has referred to the general public interest underpinning the principle of legal privilege, which is that communications pertaining to legal advice are protected.
24. The DfT points to the inherent public interest in safeguarding openness in communications with legal advisers to obtain full and frank legal advice. The Commissioner notes that this exemption has only been applied to information in two documents which involve the provision of legal advice in relation to an MP's letter and how to respond. The DfT argues that disclosing this would set a precedent that counteracts the principle of legal professional privilege and as there is minimal public interest in the matter at hand this would not be in the public interest.

Balance of the public interest

25. The Commissioner accepts and adds significant weight to the inherent public interest in the exemption. It is clear that the DfT will often be in situations in which they will need to revert to lawyers to obtain advice on how to proceed or respond to issues that arise, to undermine the concept of legal professional privilege there would need to be compelling competing public interest arguments for disclosure. Whilst there are some broader public interest arguments that can be made in relation to the information allowing for greater scrutiny of the DfT's operations, the Commissioner considers that, having viewed the information herself, these arguments are substantially weaker than the very strong public interest in lawyers and clients being able to talk frankly and openly with each other, particularly as the information reveals nothing about the DfT's operations and is solely about how to respond to a letter. For these reasons the Commissioner is satisfied that the balance of the public interest falls in favour of maintaining the section 42(1) exemption in this case.

Section 43 – prejudice to commercial interests

26. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial

interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.

27. The term 'commercial interests' is not defined in the FOIA; 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."*¹

28. The information withheld under this exemption is the category 2) and 3) information which is as follows:

- Category 2) Correspondence between DfT officials about how to respond to the incident
- Category 3) Information concerning the nature of MoveCom's contract with the DfT and the services it provided, including MoveCom's relationship with other commercial entities with whom it sub-contracted.

29. The DfT has identified some category 2) information which does not meet the prejudice threshold and will be released but for the remaining category 2) and 3) information the DfT maintains this information would be likely to prejudice the DfT's commercial interests and those of the DfT's suppliers if it were disclosed.

30. Category 2) information shows decision making of a commercial nature that the DfT considers, if made public, would be likely to have a prejudicial effect on the Department's ability to secure value in future procurement exercises. Category 3) information is about commercial relationships and services supplied, the DfT considers this would be likely to prejudice the commercial interests of the DfT and its suppliers if it were disclosed.

31. For the category 2) information the Commissioner has reviewed the information that has been withheld and notes that this is correspondence relating to how to handle the incident that was at the centre of the request and several of the emails refer to contracts that

¹ See here:

http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

have been in place. The DfT has not argued that disclosing this information would be likely to prejudice any other parties' commercial interests but has stated it would impact on its ability to secure value in future procurement exercises.

32. For this exemption to apply, the information must relate to a person's (the DfT's) ability to participate competitively in a commercial activity – in this case the ability to compete in future procurement exercises. The category 2) information for the most part relates to discussions on the situation with an, at the time, current contractor and how to handle this situation. There are references to the contracts in place with this contractor and third party suppliers.
33. That being said, for the exemption to be engaged the DfT must be able to demonstrate that disclosing this information would be likely to have a prejudicial effect on its commercial interests. The DfT has not expanded on this point beyond stating that disclosure would be likely to affect future procurement exercises however the Commissioner would generally accept the view that details of commercial arrangements if disclosed may impact on a public authority's reputation as a contracting party and therefore affect its ability in future procurement exercises.
34. However, there must be more than a speculative risk of prejudice to engage the exemption. Having viewed the category 2) information the Commissioner has found that much of the information is mundane and refers to how to handle a situation involving contractors rather than details of the contracts themselves. It is not clear how this information could be used by other contractors to their advantage and the DfT's detriment or how disclosure of the information would be likely to damage the commercial interests of the DfT.
35. The DfT has not explained how disclosure of this information would be likely to damage its own commercial interests. It has argued that disclosure would be likely to hinder its ability to conduct future procurement exercises. However, the Commissioner would point out that the authority is subject to the FOIA and all third parties should be aware of this and the need and importance of public transparency and accountability. The exemption is there to protect truly sensitive commercial information so future customers should not be deterred from entering into commercial arrangements with the public authority. In this case, the Commissioner does not consider the DfT has demonstrated sufficiently that the withheld information is commercially sensitive for the reasons previously given. She therefore does not consider this argument to be compelling enough to warrant the application of this exemption.

36. For the above reasons, the Commissioner has no alternative but to reject the DfT's application of section 43 of the FOIA in relation to the category 2) information in this case and order disclosure of this information.
37. For the category 3) information – which is a smaller number of items of correspondence – the information primarily relates to the nature of Movecom's contract with the DfT and the services it provided, including Movecom's relationship with other commercial entities with whom it sub-contracted. The DfT has argued that this information would be likely to prejudice the DfT's commercial interests and those of its suppliers if it were disclosed.
38. The Commissioner has viewed this information and notes that it includes quotes from suppliers with breakdowns of costs, proposed supplier costs for services and copies of contracts with detailed breakdowns of services and costs. This information is commercial information as it relates to commercial activities.
39. In terms of the prejudice argued by the DfT; the Commissioner is not minded to accept the arguments regarding the impact on third parties as there has been no evidence provided to suggest the DfT has consulted with any of those parties to gain their views on this. The Commissioner does not accept speculative arguments made on a third party's behalf.
40. That being said, the DfT has argued that its own commercial interests would be likely to be prejudiced by the disclosure of this information as it would reveal details of the specifics of contract and prices as well as breakdown of services. This information could be of use to those looking to engage in procurement exercises with the DfT in the future as it would reveal information on what has been offered in the past.
41. Whilst this argument could be seen to be speculative the Commissioner has considered the circumstances at the time of the request. The DfT had made decisions regarding contracts in place via a third party, it was likely that a new contractor would need to be found and reasonable to therefore assume that revealing details of previous contracts and services provided may be of some use to those looking to bid for future contracts. For this reason the Commissioner would accept there was a real risk of prejudice to the DfT's commercial interests through the disclosure of the category 3) information and the exemption has been correctly engaged in relation to this information. She has therefore gone on to consider the public interest arguments in relation to this.

Public interest arguments in favour of disclosure

42. The complainant argues that the information withheld would likely relate to poor decision making and a failure to follow proper processes. The suppliers involved will themselves be at least partly aware of what took place as they were parties to at least some of the exchanges. However, the general public would not be aware and should be able to scrutinise the DfT to ensure they are operating effectively.
43. The DfT recognises there is a public interest in the work of government being closely examined to encourage the discharging of public functions in the most efficient and effective way.

Public interest arguments in favour of maintaining the exemption

44. The DfT argues it is important to maintain the confidence of its suppliers in order to achieve the best value for the taxpayer. Disclosure would likely affect the negotiating position of the DfT and its suppliers in future procurement exercises. The risk of prejudice is real and significant; if the commercial relationships and decision making of a commercial nature that is contained within the information were made public, the DfT's ability to secure best value for the taxpayer would likely be compromised.

Balance of the public interest arguments

45. The Commissioner accepts there is a public interest in disclosing information which increases transparency in public contracts and allows for better scrutiny as to how a public authority operates. That being said, the category 3) information is not likely to meet this interest as it mainly relates to pricing and services. The category 3) information does not reveal any detailed information showing how the DfT is operating and is much more commercially focused than the category 2) information which does reveal more about the DfT's decision making processes.
46. The Commissioner acknowledges that if there is a likelihood of prejudice to the DfT's commercial interests then there will also be weight to the argument that disclosure would affect its ability to secure best value for money in future procurement exercises and she does not consider there are sufficient public interest arguments in favour of disclosure that outweigh that in this case.
47. The Commissioner therefore finds the balance of the public interest favours withholding the category 3) information.

Right of appeal

48. 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

49. 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.
50. 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

Jill Hulley
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