

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

### **Decision notice**

**Date:** 22 July 2020

**Public Authority:** Department for International Trade  
**Address:** 3 Whitehall Place  
London  
SW1A 2AW

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

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1. The complainant has requested information on the cost of advertisements during the World Economic Forum at Davos.
2. The Commissioner's decision is that Department for International Trade ("DIT") is not entitled to rely on section 41(1)(a) FOIA (Information provided in confidence) but is entitled to rely on the exemption at section 43(2) FOIA (Commercial interests). In failing to specify all the exemptions on which it was relying at the time of its responses to the complainant, DIT breached section 17(1)(b) of the FOIA.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

#### **Background**

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4. DIT explained:

"The World Economic Forum ('WEF') is a Swiss non-governmental, membership-based organisation founded in 1971. Each January, it hosts an annual meeting at Davos. The meeting is an invitation-only event and discussions cover a broad range of global and regional issues. Attendees from more than 110 countries include heads of state, politicians, CEOs, investors, heads of intergovernmental organisations, NGOs, academics and journalists."

#### **Request and response**

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5. On 15 February 2019 the complainant wrote to DIT and requested information in the following terms:

"I am sending this request under the Freedom of Information Act to ask for the following information:

What is the total cost to the DfIT of placing the 'Free Trade is Great' advertisements on the outside of Belvedere Hotel during the World Economic Forum in Davos?"

6. DIT responded on 5 March 2019. It stated that the information in the scope of the request was withheld in reliance of section 41(1)(a) FOIA (Information provided in confidence).
7. The complainant requested an internal review on 18 March 2019. Following an internal review DIT wrote to the complainant on 25 July 2019 upholding the initial response.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 2 September 2019 to complain about the way his request for information had been handled. He explained his view that the public interest arguments in favour of disclosure had not been adequately considered by DIT.
9. At the time of its submission to the Commissioner DIT reviewed its considerations and maintained its reliance on section 41(1) and in addition sought to rely on section 43(2) – Commercial interests, and Section 27 (1)(d) – International relations.
10. The Commissioner considers the scope of her investigation to be the application of sections 41(1), 43(2) and 27(1) to the withheld information.

### **Reasons for decision**

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#### **Section 41– Information provided in confidence**

11. Section 41 of FOIA states:

"(1) Information is exempt information if –

a) it was obtained by the public authority from any other person (including another public authority), and

b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

12. In order for this exemption to be engaged both parts (a) and (b) must be met. Part (a) requires that the requested information must have been given to the public authority by another person. In this context the term ‘person’ means ‘legal person’, an individual, company, another public authority or any other type of legal entity.
13. The Commissioner’s Guidance<sup>1</sup> is clear that the contents of a contract between a public authority and a third party generally is not information obtained from another person.
14. This is because the terms of a contract will have been mutually agreed by the respective parties, rather than provided by one party to another. The Commissioner notes the Tribunal’s comments in a previous decision<sup>2</sup>:

‘If the Contract signifies one party stating: “these are the terms upon which we are prepared to enter into a Contract with you” by the acceptance of that Contract the other party is simultaneously stating “and these are the terms upon which we are prepared to enter into a Contract with you”. Consequently the Contract terms were mutually agreed and therefore not obtained by either party.’ (Para 34)

15. In its submission to the Commissioner DIT referenced its responses to the complainant, where it stated:

“the contracts entered into regarding the Department’s presence during the World Economic Forum are subject to a number of confidentiality clauses under Section 41(1)(a).”

16. DIT further explained:

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

<sup>2</sup> In Department of Health v ICO (EA/2008/0018, 18 November 2008)

"The Department is unable to release the total costs associated with the Free Trade is Great advertisements at the Belvedere Hotel during the World Economic Forum in Davos due to the aforementioned confidentiality clauses. The confidentiality clauses were imposed on the Department by the organisations concerned, prohibiting the release of the content of the contracts and related information to a third party."

17. The Commissioner considers that the content of the withheld information therefore clearly falls into that of an agreed contract as referenced above (paragraph 13) by the Tribunal. As such the exemption at section 41(1)(a) is not engaged.
18. As the exemption is not engaged at part (a) the Commissioner has not considered part (b) of the exemption.

### **Section 43 – Commercial information**

19. Section 43 of FOIA states:

"(2) 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)."

20. In order for a prejudice based exemption, such as sections 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. The anticipated prejudice must be more likely than not.
21. DIT explained that it considers disclosing the withheld information would be likely to prejudice the commercial interests of the Belvedere Hotel, by making public the rate they are prepared to offer the UK government for advertising and events at Davos, and also would be likely to prejudice

DIT's own commercial interests in being able to secure an acceptable deal in any future advertising campaigns.

22. DIT explained to the Commissioner the particular circumstances surrounding the WEF at Davos as follows:

"There are a number of relevant factual matters that we would draw to the ICO's attention: -

- the narrowness of the supplier field available to provide the services required in a remote mountain location in Switzerland,
- the Hotel/preferred Supplier's insistence on restrictive confidentiality clauses to protect their commercial interests,
- the suppliers' express objections to disclosure of the requested information,
- the uniqueness of the WEF event held in Davos."

23. Following from the above points DIT explained:

"Ultimately the department is concerned with securing the most reasonable rates and demonstrating effective stewardship of public funds. A failure to protect such commercially confidential information would limit the Department's ability to enter into similar commercial arrangements, to promote the UK economy and support UK businesses overseas. The UK has been represented at WEF Davos regularly, even before DIT's inception in July 2016 and every year since."

24. DIT stressed the Belvedere Hotel's objections to the disclosure of the requested information, its view being that disclosure would breach the terms of the confidentiality clause. DIT also considers that disclosure of the price agreed with the UK in 2019 would likely be regarded by the Hotel as commercially sensitive which would be likely to result in prejudice to its commercial interests in future negotiations, in competition for hosting future events with other customers.
25. The Commissioner would point out that third parties entering into agreements or contracts with public authorities which are subject to the FOIA should be aware of the obligations placed on those public authorities by the legislation.
26. DIT considers that its own commercial interests would be likely to be prejudiced by disclosure of the requested information because:

"...it is reasonable to assume that they [the Belvedere Hotel] (and in all likelihood other venues) would be less willing to deal with a party who breached a confidentiality agreement.... If DIT were unable to negotiate

freely in the future due to breaching the confidentiality agreements in this case, either on pricing changes or less favourable terms with the Hotel/preferred Supplier, or across the full field of suppliers, it would remove or hamper our scope of manoeuvre and reduce options available at this crucial time in the UK's trading history. In addition, breach of confidentiality is very likely to give rise to contractual penalties as stipulated in the confidentiality clauses themselves"

27. With regard to the first criterion of the three limb test set out in paragraph 14, the Commissioner accepts that the harm alleged to occur, as described above, relates to the commercial interests which the exemption contained at section 43(2) is designed to protect.
28. The Commissioner has viewed the withheld information and she considers that the second criterion of the test is met with regard to the limited amount of withheld information on the basis that the information provides the amount paid by DIT which she considers provides potential future suppliers, not only involved with the WEF but other international gatherings, with an unfair advantage in negotiations with DIT and therefore the potential to prejudice DIT's commercial interests.
29. With regard to any prejudice to the third party commercial interests, the Commissioner considers that the Belvedere Hotel appears to be in an extremely strong position to protect its own commercial interests. DIT explained the unique position of the hotel with respect to the location of the WEF which places it in a unique bargaining position. The Commissioner therefore considers it unlikely that the hotel would be likely to be disadvantaged by prejudice to its commercial interests.
30. In its submission to the Commissioner DIT did not specifically state the level of prejudice it considers applicable. In such circumstances she will accept the lower level of prejudice based on her own determination following consideration of the information and the circumstances of this case.

### **Public interest test**

31. Section 43 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Public interest in favour of disclosing the information**

32. DIT explained:

"We recognise that there is a public interest in understanding the decision-making process made by public authorities as it demonstrates openness and accountability and can lead to increased trust between the Department and the public. It would build a sense of confidence that decisions are being taken on the basis of sound judgement, which would improve the overall quality of decisions being made."

33. DIT acknowledged that releasing the requested information would increase public knowledge about DIT's expenditure at Davos, however it advised that:

"To this end the Department has met transparency obligations by publishing the Department for International Trade Annual Report and Accounts."<sup>3</sup>

34. The complainant explained his view of the public interest with regard to the exemption at section 41, however the Commissioner considers this reasoning to be applicable to section 43. He advised the following:

"I would argue that the public interest arguments in favour of disclosure of this information have not been considered adequately by DIT. This banner was funded by the UK taxpayer to push the government's agenda with great worldwide publicity at the World Economic Forum. Given the publicity of the banner and the current political context of Brexit negotiations and the presumed cost of Brexit in the short term to all levels of government in the UK – I would argue that it is in the public interest to know how much was spent on this banner and its instalment on the Belvedere Hotel in Davos."

**Public interest in favour of maintaining the exemption**

35. DIT explained its view that the public interest in maintaining the exemption results from the benefits derived by DIT having the ability to negotiate the most favourable terms with suppliers of services. Any restrictions resulting from the disclosure of the information would lead to considerable further cost to the public purse.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/816440/department-for-international-trade-annual-report-and-accounts-2018-to-2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/816440/department-for-international-trade-annual-report-and-accounts-2018-to-2019.pdf)

### **Balance of the public interest**

36. The Commissioner considers the public interest to be finely balanced in this case. She accepts the complainant's view as set out above in paragraph 33. She is aware of the media attention<sup>4</sup> focussed on the "Free trade is great" banner. She considers that as a promotion funded by the public purse, particularly in the circumstances at the time of the request, a significant weight is attached in favour of disclosure.
37. Notwithstanding this she is persuaded that there is a strong public interest in not hindering DIT's ability to promote the UK economy overseas, particularly as the UK leaves the European Union. Her concern lies with the overall prejudice to DIT's commercial interests which would be likely to result from the disclosure of information which demonstrates the price the Government is prepared to pay for advertising or promotion, which in turn can influence other prospective suppliers at other world trade events. This is in addition to DIT's argument that suppliers would be less willing to deal with a party who breached a confidentiality agreement. Finally, the Commissioner is also cognisant of DIT's view that the confidentiality clauses in its contract with the parties in Davos would be breached by the disclosure and the resultant cost to the public purse, as DIT explained:
- " ... is very likely to give rise to contractual penalties as stipulated in the confidentiality clauses themselves, and risk of further litigation against the Department in Switzerland, due to the existence of exclusive jurisdiction clauses in the contracts."
38. Having weighed all of the above considerations the Commissioner has concluded that the public interest favours maintaining the exemption given the negative consequences of disclosure outlined above. In reaching this view the Commissioner nevertheless considers the complainant's view to have merit. Notwithstanding this, her decision is that DIT is entitled to rely on section 43(2) to withhold the requested information.
39. Having found that section 43(2) is engaged the Commissioner has not gone on to consider the application of section 27(1).

### **Section 17 – Refusal of request**

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<sup>4</sup> <https://news.sky.com/story/world-economic-forum-in-davos-is-a-less-starry-affair-this-year-11613979>



40. Section 17(1) of the FOIA states that when a public authority wishes to withhold information or to neither confirm nor deny holding information it must:

within the time for complying with section 1(1), give the applicant a notice which—

- (a) states that fact,
  - (b) specifies the exemption in question, and
  - (c) states (if that would not otherwise be apparent) why the exemption applies.
41. DIT relied on the exemptions at section 43(2) and 27(1) to withhold the requested information at the time of the Commissioner's submission. This reliance did not form part of the initial response or the internal review. In failing to specify the further exemptions on which it was relying, DIT breached section 17(1)(b) of the FOIA.

## **Other matters**

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42. FOIA does not impose a statutory time within which internal reviews must be completed albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe. In the Commissioner's view it is reasonable to expect most reviews to be completed within 20 working days and reviews in exceptional cases to be completed within 40 working days.
43. In this case DIT provided its internal review after 90 working days. The Commissioner considers this to be excessive and not in accordance with the section 45 code.
44. DIT advised the Commissioner that it recognises that the delay in this case has been greater than is satisfactory and is progressing through a plan to remove any internal review backlog and provide stability in the future.

## Right of appeal

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

46. 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.
47. 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 .....**

**Susan Hughes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**