

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 October 2021

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested a copy of a specified prison-related audit report. The Ministry of Justice (the 'MOJ') refused to provide it in its entirety, citing section 43(2) (commercial interests) of FOIA.
2. The Commissioner's decision is that the MOJ was not entitled to rely on section 43(2) to withhold the requested report for the reasons set out in this notice. The complainant confirmed he was not interested in the disclosure of the names within the report.
3. The Commissioner, therefore, requires the MOJ to take the following step to ensure compliance with the legislation:
 - Disclose the requested report in its entirety minus the names of individuals.
4. The MOJ 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.

Background

5. The MOJ has explained that Probation Through the Gate ('TTG') resettlement services provide support for all offenders both before and after release from prison in England and Wales. This includes offering targeted support when offenders leave prison to help them reintegrate into society, including working with local partners to help them find

accommodation, find employment and signposting offenders to other services they may need.

6. From April 2015 to June 2021 the service was provided by Community Rehabilitation Companies ('CRCs') contracted to the MOJ under the 'Transforming Rehabilitation' reforms. London CRC is owned by MTC Novo ('MTC') who, at the time of the request, subcontracted delivery of TTG services in HMP Pentonville and HMP Wandsworth to the third sector organisation, Penrose Criminal Justice Services.
7. The MOJ has explained that, from 26 June 2021, the probation service has been reformed.¹ Whilst this change post-dates the request, the MOJ has said that MTC and Penrose, whilst no longer being current providers of probation services, remain on its list of potential future providers of MOJ services.
8. The requested report, dated 9 April 2020, was prepared by Her Majesty's Prison and Probation Service's ('HMPPS') Operational and System Assurance Group ('OSAG'). It sets out the findings of an audit of the London CRC Contract Management Team ie MTC through its former sub-contractor Penrose.
9. The Commissioner is aware that the main findings from the report and the CRC's plans for improvement were sent by the London CRC to the Independent Monitoring Boards ('IMBs') at Wandsworth and Pentonville in July 2020.
10. As set out in the request below, the request under consideration here was initially submitted by the Chairs of the IMBs for Wandsworth and Pentonville. However, the actual complaint to the Commissioner was submitted by another individual from the IMB at HMP Wandsworth.
11. The request was handled by HMPPS as an executive agency of the MOJ with responsibility for prisons.

Request and response

12. On 7 May 2020, the complainant wrote to the MOJ and requested information in the following terms:

"We are the Chairs of the Independent Monitoring Boards at HMP Pentonville and HMP Wandsworth.

¹ Strengthening probation, building confidence - GOV.UK (www.gov.uk)

We have been informed that a report into the CRC companies at Pentonville and Wandsworth (namely Penrose and St Mungo's) was carried out by OSAG in March this year. Our monitoring function includes observing the performance of the CRC Companies, and we would be grateful if you could let us have a copy of the report so that we may fulfil our role...".

13. The MOJ responded, late, on 21 August 2020. It refused to provide the report citing section 43(2) of FOIA, the exemption for commercial interests.
14. The complainant requested an internal review on 21 September 2020, arguing that the balance of the public interest favoured disclosure.
15. Following its internal review, and having considered the complainant's additional public interest arguments in favour of disclosure, the MOJ wrote to the complainant on 19 October 2020. It maintained that section 43(2) applied. It also provided advice which it said was outside the scope of FOIA and on a "discretionary basis" encouraging the IMB to liaise outside of FOIA through the normal channels, and offered the complainant the chance to speak with the relevant manager.

Scope of the case

16. The complainant contacted the Commissioner on 6 January 2021 to complain about the way his request for information had been handled. He argued:

"We believe that the said report contains information which we require to fulfil our statutory obligations, and which would be valuable to Wandsworth prison in its relations with the CRCs...

In this case the commercial interests of bodies which provide a public service relating to the rehabilitation of offenders should not prevail over the public's interest in the performance of those bodies...".

17. The Commissioner understands that the complainant has not taken up the MOJ's offer to discuss the matter further and outside FOIA.
18. The Commissioner contacted the complainant on 25 October 2021 by telephone. He confirmed he was not concerned with disclosure of names within the report, so the Commissioner has not considered this aspect any further.
19. The Commissioner has considered whether the MOJ was entitled to rely on section 43(2) of FOIA to refuse to provide the requested report.

Reasons for decision

Section 43 – commercial interests

20. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.

Is section 43(2) engaged?

21. For section 43(2) to be engaged the Commissioner considers that each of the following three criteria must be met:

- The actual harm that the public authority alleges would, or would be likely to, occur if the withheld information was disclosed must relate to commercial interests.
- 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. Any prejudice that results must also be real, actual or of substance.
- The level of likelihood of prejudice being relied upon by the public authority must be met (ie it must be shown that disclosure would, or would be likely to, result in prejudice occurring).

22. In relation to the lower threshold of 'would be likely', 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 of 'would', in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

Applicable interests

23. The first point for the Commissioner to consider is whether the arguments provided by the MOJ relate to the relevant applicable interests.

24. The term 'commercial interests' is not defined in FOIA. However, the Commissioner's guidance on the application of section 43² of FOIA explains that a commercial interest relates to a person's ability to

² Section 43 - Commercial interests | ICO

participate competitively in a commercial activity, such as the purchase and sale of goods or services. Their underlying aim may be to make a profit, however, it could also be to cover costs or to simply remain solvent.

25. Information may be commercially sensitive, but it does not necessarily follow that it is exempt from disclosure under section 43(2). The Commissioner considers that in order for the exemption to be engaged it must be shown that the disclosure of specific information will result in specific prejudice to one of the parties (an individual, a company, the public authority itself or any other legal entity). In demonstrating prejudice, an explicit link needs to be made between specific elements of the withheld information and the specific prejudice which disclosure of these elements would cause.
26. The MOJ has explained that the requested report was intended for internal management purposes only, to allow its contract managers to work with MTC in rectifying areas of concern and improving service provision. As with all internal audit reports of this nature the MOJ said that the final document is marked 'Official – Sensitive'.
27. Notwithstanding that the probation service has altered since the request was made, the Commissioner must consider the circumstances at the time of the request and subsequent response.
28. The OSAG audit report was commissioned by MOJ contract managers for the specific reason of assessing the contractor's level of performance based on evidence and information received as part of its contract management function. The MOJ has argued that because the withheld report presents an unvarnished assessment of a contractor's performance, this makes the content and final outcomes directly relevant to the commercial interest of the contractor. The MOJ said it needs a healthy market, particularly among framework providers, to ensure delivery of quality services under the framework and to ensure value for money for the taxpayer.
29. Taking the content of the report into account, the MOJ has expressed concern that disclosure of the internal audit report into the public domain would create potentially unwarranted reputational damage for MTC and the former subcontractor Penrose, not just in provision of prison resettlement services but in a wider range of offender management-related areas. The MOJ argued that this could potentially lead to a loss of trade where they became unable to compete for future services. Such a 'narrowing of the field' would affect the MOJ's commercial processes, and create a less efficient use of taxpayer's money in service provision.

30. The MOJ explained that although MTC is currently not providing TTG services, it remains on their broader "dynamic framework" for service provision. It said that both MTC and Penrose have the potential to be future MOJ supply chain partners in both the probation and offender accommodation services sectors. Additionally, the MOJ argued that disclosure of the OSAG report means the public may lose confidence, "*albeit unwarranted*", if it were to commission other services from them.
31. The Commissioner is satisfied that the MOJ has evidenced that the withheld information relates to the appropriate applicable interest. The first criterion in paragraph 21 is therefore satisfied.

Does the requested information relate to the applicable interest?

32. Turning to the second criterion, for the exemption at section 43(2) of FOIA to be engaged, it is necessary to demonstrate that disclosing the information would result in some identifiable commercial prejudice which would, or would be likely to, affect one or more parties. In demonstrating prejudice, an explicit link needs to be made between specific elements of the withheld information and the specific prejudice that disclosure of these elements would cause.
33. In addition to the above points the MOJ argued that disclosure of the full audit report on a much wider scale, would create a compromise of trust between the MOJ and the organisations it contracts with to provide crucial offender management services. It said that these organisations may decide to reassess their decision to compete for services if there was a potential for the MOJ's internal management performance assessments of them, provided in a free and frank forum, to be disclosed to the public. The MOJ said this, in turn, would narrow the field of organisations prepared to do business with it even further, affecting its ability to provide the best value for taxpayers' money.
34. The report concerns the performance of Penrose through MTC in relation to the provision of TTG services. There are no monetary references, no contractual details or any references to specific commercial activity within the report.
35. The Commissioner asked the MOJ at the outset of her investigation to consider, if it maintained that section 43(2) applied, whether any parts of the report could be released. In reply, the MOJ said:

"Our handling approach since the first request was sent to us last year gave consideration to whether the report could be disclosed in redacted form. Having discussed this between officials in the MoJ contract management, commercial and internal audit functions we concluded that, given the extensive detail contained in the report about the weaknesses in the contractor's performance, even at summary level, any redaction exercise

would have left the remaining text immaterial to the reader, in line with ICO guidance. It is clear that the whole purpose of the audit was to provide the right information and evidence for contract managers to confirm the unsatisfactory level of performance in the TTG services at the two prisons, and there was no evident public interest in disclosing other material irrelevant to that purpose."

36. The Commissioner notes that the above points relate to performance as opposed to commercial interests. She considers that section 43(2) has been applied by the MOJ in a "blanket fashion" without due consideration of the content and whether or not *any* parts could be provided such as the introduction or methodology.
37. The MOJ has also argued that it is vital to have the ability to compile reports such as these away from the public gaze and that it would be detrimental to the decision-making process if such reports were to become in some way 'sanitised' to protect damaging information from being released to the public due to the possibility of future disclosure. The MOJ pointed out that this could in turn lead to poor decision making by senior managers, due to the more limited information before them. In cases such as this one, failings may not have come to light resulting in poor value for money for the taxpayer. Whilst such arguments do support non-disclosure, the Commissioner does not consider that they relate to 'commercial interests' so they have been disregarded. Furthermore, providers of services to undertake these highly lucrative contracts should be aware of the MOJ being subject to FOIA legislation and the real possibility that this type of information may be requested and, potentially, disclosed.
38. In addition, the MOJ has explicitly said it had not sought the views of the relevant parties, MTC and Penrose, advising:

"During the handling of this case we have not sought the specific views of the contractor, MTC, or the subcontractor Penrose on the potential commercial impact to them of disclosing this information.

This is predominantly because the conclusions we have outlined, since our first response, to this case in August 2020, include our views on the impact on all our delivery partners in HMPPS and MOJ services, rather than just MTC and Penrose. The MOJ has longstanding experience of the nature of the commercial and competitive environment, in which it, and its partners operate, which allows us to exercise sound judgment, on what information would cause reputational damage, if made public, and which actions we undertake would erode their trust."

39. Whilst noting the MOJ's stance, the Commissioner considers that rather than adopting a 'broad brush' approach in relation to what it deems MTC's and Penrose's views to be, the MOJ should have sought their actual views in relation to the requested information. Her section 43 guidance reflects this position and states:

"...if you propose to withhold information because the disclosure would, or would be likely to, prejudice a third party's commercial interests, you must have evidence that this accurately reflects the third party's concerns. It is not sufficient for you to simply speculate about the prejudice which might be caused to the third party's commercial interests. You need to consult them for their exact views in all but the most exceptional circumstances".

40. Given that both organisations remain on their list of potential future suppliers, the Commissioner considers that this should have been straightforward for the MOJ to do. This is not an 'exceptional circumstances' case.
41. The onus is on a public authority to demonstrate why a particular exemption applies. It is not for the Commissioner to provide arguments on a public authority's behalf. The submissions received do not demonstrate how disclosure would be likely to have the effects described and the MOJ has failed to persuade the Commissioner of any causal link between those effects and the specific withheld information in this case.
42. Having considered the arguments submitted by the MOJ, together with the withheld information, the Commissioner is not satisfied that the MOJ has adequately demonstrated that a causal relationship exists between disclosure of the information and prejudice to MTC's and Penrose's commercial interests. Therefore, the Commissioner finds that the second criterion has not been met.

Conclusion

43. For this reason, the Commissioner finds that the second criterion necessary to engage section 43(2) is not met. This being the case, the Commissioner is not required to consider the remaining criterion. She concludes that the MOJ has not demonstrated that section 43(2) is engaged and now requires it to disclose the withheld report in its entirety as per the step in paragraph 3 of this notice.
44. As the Commissioner has found that section 43(2) is not engaged in relation to the requested information in this case, there is no need for her to consider the associated public interest test.

Other matters

45. In this case, the MOJ failed to respond to the request within the statutory 20 working days' timeframe. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft "Openness by Design strategy"³ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"⁴.

³ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁴ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

46. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

47. 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.
48. 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

Carolyn Howes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF