

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 October 2022

Public Authority: Ministry of Defence

Address: Whitehall
London
SW1A 2HB

Complainant: Carl Cookson

Address: carl.cookson@gmail.com

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) seeking data used to calculate the costs and number of lost firing hours as a result of vandalism on Ash Ranges. The MOD provided a table containing the description of each incident, the dates each incident was reported, the completion date of work, and where held, the number of firing hours lost. The MOD withheld the cost of each specific incident on the basis of section 43(2) (commercial interests) of FOIA.
2. The Commissioner's decision is that withheld information is exempt from disclosure on the basis of section 43(2) of FOIA and that in all the circumstances of the case the public interest favours maintaining the exemption.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the MOD on 6 May 2021:

'Please provide any and all data and figures used to define costs and loss of range hours due to vandalism [on the Ash Ranges] in a letter to Councillor Manning of Ash Parish Council from Jeremy Quin MP.

I would expect to see line items for each cost and date of each as well as the definition of the lost hours.¹

5. The MOD responded on 1 June 2021 and provided the complainant with a table containing the description of each incident, the date it was reported, the completion date of work, and where held, the number of firing hours lost. However, the MOD explained that the cost of work incurred for each incident had been withheld on the basis of section 43 (commercial interests) of FOIA.
6. The complainant contacted the MOD on the same day and asked it to conduct an internal review of this response. He challenged the application of section 43 and queried the source of the information provided.
7. The MOD contacted him on 18 June 2021 and asked him to clarify the scope of his request as well as clarifying a number of points he had made in the internal review request. The complainant responded to the MOD's queries on 20 June 2021.
8. The MOD informed him of the outcome of the internal review on 30 July 2021. The review concluded that the costs of repair for each incident were exempt from disclosure on the basis of section 43(2) of FOIA. However, the MOD did provide the total costs of repairs arising from vandalism on the Ash Ranges between Jan 2015 – December 2019. The internal review also addressed the complainant's query about the source of the data.

¹ The Commissioner understands that the letter in question is this one: [20210512-Closure-of-the-Ash-Ranges-Firing-Complex-MSU-4.6.2.1-Min-DP-Cllr-Nigel-Manning.pdf](https://www.ashparish.org/20210512-Closure-of-the-Ash-Ranges-Firing-Complex-MSU-4.6.2.1-Min-DP-Cllr-Nigel-Manning.pdf) ([ashparish.org](https://www.ashparish.org)) The letter concerned the MOD's decision to restrict access to an area of Ash Ranges in order to protect the range complex technical areas which had been damaged as a result of vandalism.

(Although dated 12 May 2021, ie after the request, this version of the letter replaced the original sent on 4 May 2021).

Scope of the case

9. The complainant contacted the Commissioner on 30 July 2021 in order to complain about the MOD's decision to withhold the cost for dealing with each incident on the basis of section 43(2) of FOIA.

Reasons for decision

Section 43 – commercial interests

10. Section 43(2) of 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).'

The MOD's position

11. The MOD argued that disclosure of the withheld information would be likely to prejudice both its commercial interests and those of Landmarc, the company which was contracted to carry out the repair work in question.
12. In support of this position, the MOD explained that the information which it had withheld on the basis of section 43(2) contained the standard fees agreed between the MOD and Landmarc for such work.
13. In respect of Landmarc's commercial interests, MOD argued that disclosure of this information would provide potential bidders for such work with an insight into Landmarc's pricing policy and structures. As a result Landmarc's competitors would have a good understanding of the breakdown of the work required to fulfil the services listed and could then use this to their advantage in offering goods and services to the MOD at a lower rate, therefore prejudicing the commercial interests of Landmarc.
14. The MOD explained to the Commissioner that at the time of the request its contract with Landmarc was in the process of being retendered. The original 'Initiation of Crown Commercial Services Framework Procurement' started in November 2019, and so the procurement process was underway when the request was received. The MOD argued that disclosure of the withheld information, at the time of the request, would have had a direct impact on the procurement process.

15. The MOD noted that once the new contract(s) for the Future Defence Infrastructure Services (FDIS) Training Estate are in place there will be a limited requirement for any new contracts to be let in relation to the training estate, and therefore, limited opportunity for any contractor to negotiate repair works with MOD. However, the MOD explained that it was important to note that there may be opportunities during the 7–10 years of FDIS for the prime contractor to sub-contract works to other companies. The MOD argued that potential bidders for these sub-contracts could use the information in scope of this request to their advantage and influence their own prices, impacting the commercial interests of the prime contractor.
16. In respect of its own commercial interests, the MOD explained that the release of the standard fees agreed between it and Landmarc would be likely to prejudice its own negotiating position in relation to the procurement process of this work.
17. Furthermore, the MOD noted that the information in question was taken from a 'Untoward Occurrence' (UTO) register which is owned and managed by Landmarc and that the company provided the MOD with access to the withheld information on the basis that it was to be handled as 'commercial in confidence'. The MOD argued that the disclosure of information under FOIA that had been provided under such a caveat could lead to a breakdown in trust and, therefore, negatively impact the commercial relationship it has with Landmarc. The MOD argued that this could then lead to Landmarc to be less willing to work with the MOD in future or to negotiate the terms on which they were prepared to do so. The MOD also explained that it was concerned that this breakdown in trust could lead to other companies being less willing to work with or provide incentives to the MOD once the current contract expires with Landmarc.

The Commissioner's position

18. In order for a prejudice based exemption, such as section 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.

19. With regard to the first criterion, the Commissioner is satisfied that the potential prejudice described by the MOD relates to the interests which the exemption contained at section 43(2) is designed to protect.
20. With regard to the second criterion, the Commissioner is satisfied that disclosure of the withheld information has the potential to harm the commercial interests of both the MOD and Landmarc. The Commissioner has reached this decision because in his view it is logical to argue that disclosure of the standard fees Landmarc charges the MOD could undermine both Landmarc's and the MOD's position in any re-procurement of this contract for the reasons set out the MOD. Furthermore, the Commissioner notes that the information in question consists of the charges for 220 separate incidents and as result disclosure would provide a clear indication of Landmarc's fees across a range of its work.
21. With regard to the third criterion, the Commissioner is satisfied that there is more than a hypothetical risk of such prejudice occurring. He has reached this decision given that at the time of the request the re-tendering for the work undertaken by Landmarc was underway and in view of this, and given the content of the information, the Commissioner agrees with the MOD that its disclosure would have clearly impacted on this process. Moreover, the Commissioner is satisfied that such information would have directly assisted Landmarc's competitors and could directly undermine MOD's bargaining position. Furthermore, the Commissioner also accepts that the risk of prejudice occurring to the MOD's interests is also increased given the potential reaction by Landmarc to the disclosure of information which it provided to the MOD on the understanding that it was confidential.
22. The Commissioner is therefore satisfied that section 43(2) of FOIA is engaged.

Public interest test

23. 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 disclosing the information

24. The MOD acknowledged that disclosure of the withheld information would enhance the accountability of government and inform public debate in areas relating to matters of public spending and contractual arrangements. The release of information would also demonstrate the MOD's commitment to openness and transparency and show that its commercial activities are conducted appropriately.
25. The complainant argued that there was a lack of transparency regarding the costs incurred in relation to the repairs on the Ash firing range. He argued that it was unclear where this money had been spent and whether the current restriction had a positive impact as suggested by the MOD. In the complainant's view without accurate figures of the cost of vandalism on the now-closed areas, the public will still question the closure and the continued untransparent nature of the MOD.
26. More specifically in his submissions to the Commissioner the complainant argued that the MOD have provided evidence and costs for the closure of Ash ranges which included costs external to the closed area. The complainant argued that it was of upmost public interest to determine which costs were part of the Ash Range Complex and would have been impacted by the closure rather than a wider cost of damages to all of the ranges.

Public interest in withholding the information

27. The MOD argued that there is a public interest in ensuring that MOD operates in a fair and competitive market and is able to secure contracts whilst protecting its commercial interests.
28. In light of this, in its view the disclosure of the total costs arising out of vandalism across the ranges met the public interest in relation to understanding how much money had been expended on damages arising from acts of vandalism.
29. With regard to the complainant's submissions to the Commissioner, the MOD noted that he appeared to be suggesting that the information provided related to the entirety of Ash Ranges site, rather than being restricted to the 'Complex'. However, the MOD noted that the request sought 'all data' that was used to calculate the figures represented in Mr Quin's letter. Therefore, the information in the disclosed spreadsheet includes entries relating to repairs undertaken outside of the technical area because they formed part of the dataset used to define the costs presented in the letter.

Balance of the public interest test

30. The Commissioner understands that the decision to close part of the Ash ranges has been a matter of considerable concern to members of local community. Disclosure of the withheld information would provide a detailed insight into the costs incurred as a result of vandalism by revealing the repair costs in relation to each incident. The Commissioner acknowledges that disclosure of such information would give the complainant, and other interested parties, a better insight into the costs involved and potentially greater understanding of the decisions reached by the MOD in relation to this matter.
31. However, the Commissioner agrees with the MOD that there is clear public interest in ensuring that its commercial interests are not harmed and that it is able to secure best value for public money. Furthermore, in the Commissioner's opinion there is very strong and inherent public interest in ensuring fairness of competition and in her view it would be firmly against the public interest if Landmarc's commercial interests were harmed on the basis that it has entered into a contract with the MOD. Taking into account the cumulative weight that should be attributed to the public interest in protecting both the MOD's and Landmarc's commercial interests, and given the ongoing procurement process at the time of the request, the Commissioner is satisfied that the public interest favours maintaining the exemption. In reaching this conclusion he has also taken in account the fact that the MOD has disclosed the total costs incurred as a result of vandalism.

Right of appeal

32. 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

33. 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.
34. 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

Jonathan Slee
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