

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 January 2023

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested copies of agreements between the UK Government's Principal Partners for the 26th UN Climate Change Conference of the Parties (COP26) and the amounts paid to each of the Principal Partners. The Cabinet Office withheld the requested information on the basis of section 43(2) (commercial interests) of FOIA. During the course of the Commissioner's investigation of this complaint the Cabinet Office published the amount paid to each of the Principal Partners, but maintained its position that the agreements were exempt from disclosure on the basis of section 43(2).
2. The Commissioner's decision is that the agreements are not exempt from disclosure on basis of section 43(2) of FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with a copy of the agreements falling within the scope of his request.¹

¹ In doing so, the Cabinet Office can redact any signatures that are contained in the agreements.

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 FOIA and may be dealt with as a contempt of court.

Request and response

5. The complainant submitted a request to the Cabinet Office on 27 May 2021 seeking the following information:

"1. Copies of the contracts or agreements between each of the government's Principal Partners for the 26th UN Climate Change Conference of the Parties (COP26).
2. The amounts paid to the government by each of the companies listed below in order to become Principal Partners. I understand the Principal Partners for the event so far to be: GSK, SSE, Sky, Hitachi, Scottish Power, Sainsbury's, Reckitt, NatWest Group, National Grid."
6. The Cabinet Office contacted the complainant on 25 June 2021 and confirmed that it held the requested information but considered this to be exempt under section 43(2) (commercial interests) of FOIA and that it needed additional time to consider the balance of the public interest test.
7. The Cabinet Office provided the complainant with a substantive response to his request on 14 July 2021. It explained that it had concluded that the public interest favoured maintaining the exemption and it was therefore withholding the information under section 43(2). The Cabinet Office noted that it would release information on the costs of COP26 and the sponsorship agreements after the event.
8. The complainant contacted the Cabinet Office on 20 July 2021 and asked it to conduct an internal review of this decision.
9. The Cabinet Office informed him of the outcome of the internal review on 1 October 2021. This upheld the decision to withhold the requested information on the basis of section 43(2) of FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 8 September 2021 to complain about the Cabinet Office's decision to withhold information falling within the scope of his request. He disputed the Cabinet Office's

position that disclosure of the information requested would be likely to result in the prejudice envisaged and that in any event there was a compelling public interest in the disclosure of the information.

11. During the course of the Commissioner's investigation the Cabinet Office explained that the information sought by part 2 of the request had been published.² This information was included (as would be expected) in the agreements falling within the scope of part 1 of the request. However, the Cabinet Office remained of the view that the agreements themselves were exempt from disclosure on the basis of section 43(2) of FOIA. This decision notice therefore considers whether these agreements (with the exception of the amounts paid by each of the third parties) are exempt from disclosure on the basis of section 43(2).³

Reasons for decision

Section 43 – commercial interests

12. 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).'

²

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1123904/CO_ARA21-22_WEB_Final_121222.pdf See page 199.

³ It is relevant to note that the Commissioner's role is limited to considering the application of any exemptions at the legal time for compliance with the request. In this case, this is the point that the Cabinet Office completed its public interest considerations in July 2021.

The Cabinet Office's position

13. The Cabinet Office explained that the party whose commercial interests would be likely to be harmed if the withheld information was disclosed is HM Government (HMG). The Cabinet Office argued that disclosure would be likely to damage its pre-existing relationships with the Principal Partners, and with other commercial organisations which are also stakeholders, in the UK's involvement in COP27 and beyond. The Cabinet Office explained that it worked with the corporate sponsors of COP26 in order to increase value for taxpayers and to reduce the overall financial cost of COP26.
14. The Cabinet Office explained that although COP26 is over, HMG has also secured the sponsorship of the UK Pavilion for COP27 in Egypt (which was held November 2022) from GSK, National Grid, NatWest, Reckitt and SSE, all of whom were COP26 Principal Partner sponsors. The Cabinet Office argued that disclosure of the withheld information would be likely to damage HMG's position and its reputation with commercial organisations. This is because sponsors regard agreements and contracts signed with HMG to be confidential documentation. As a result disclosure would be likely to adversely affect the Cabinet Office's ability to engender and maintain trust in the government's handling of sensitive information relating to the agreements, including the conditions attached to them. As a consequence, commercial funding of a UK Pavilion at a future COP would be put at risk, with a consequential negative impact on the taxpayer due to the loss of income.
15. Regarding loss of income being prejudicial to commercial interests, the Cabinet Office cited the Court of Appeal judgement in Department for Work and Pensions v Information Commissioner & Zola [2016] EWCA Civ758.⁴ The Cabinet Office noted that the judgement confirmed the meaning of 'commercial interests' in section 43(2) of FOIA is sufficiently wide to cover a public authority's loss of income.
16. The Cabinet Office explained that in its view the risks arising from disclosure were real, actual and substantial and that there is a causal link between disclosure and the prejudice identified at section 43 of FOIA.

⁴ <https://www.bailii.org/ew/cases/EWCA/Civ/2016/758.html>

The Commissioner's position

17. 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.
18. With regard to the first criterion, the Commissioner is satisfied that the potential prejudice described by the Cabinet Office relates to the interests which the exemption contained at section 43(2) is designed to protect.
19. 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 HMG. The Commissioner has reached this decision because in his view it is logical to argue that disclosure of information which commercial third parties consider to be sensitive, could, in theory, undermine HMG's relationship with such third parties. In this context, the Commissioner accepts that this could mean that disclosure of the withheld information could have an impact on future sponsorship opportunities available to HMG for future COP events, which in turn could affect its commercial interests.
20. However, with regard to the third criterion, the Commissioner is not prepared to accept that the risk of this prejudice occurring for all of the withheld information is one that is more than hypothetical. The Commissioner has reached this conclusion for the following reasons: The Cabinet Office has sought to withhold the entirety of each of the agreements it has reached with each of the sponsors. Whilst the

Commissioner accepts that some parts of each of these agreements may include some information which the commercial parties consider to be sensitive, the Commissioner does not accept that this is the case for all parts of the agreements. This is because there are parts of the agreements which, in the Commissioner's view, clearly do not contain sensitive information. For example, standard wording common to agreements of this nature, definitions of certain terms, and background information to COP26 which is already in the public domain. In the Commissioner's view it is not sustainable for the Cabinet Office to argue that disclosure of such parts of the agreements would be likely to affect the relationships between the parties as it is not, in his view, conceivable that such information could be considered sensitive by the third parties in question and/or that it would be treated confidentially.

21. The Commissioner appreciates that public authorities have to take a pragmatic approach to considering requested information, and the application of FOIA exemptions.
22. However, FOIA provides a right of access to information, not to documents. If there is information contained within a specifically requested document that is not exempt from disclosure, then the Commissioner expects this information to be disclosed.
23. In the context of commercial contracts, the Commissioner's guidance on section 43 specifically explains:

'Where the information requested is a contract, rather than applying section 43 in a 'blanket' fashion and viewing the contract as a whole, you need to consider each clause within the contract individually, with a view to identifying whether it may be disclosed.'⁵

24. It appears to the Commissioner that the Cabinet Office has not done so in this case. However, it is not the Commissioner's role to undertake such an exercise on behalf of public authorities, particularly a central government department sufficiently well versed in FOIA as the Cabinet Office. Furthermore, for the reasons set out above, the Commissioner is of the opinion that there are clearly parts of the agreements that could be disclosed without any real risk of prejudice to HMG's commercial interests occurring in the manner suggested by the Cabinet Office. As a result the Commissioner does not accept that it is sustainable for the Cabinet Office to adopt the position that the entirety of the agreements

⁵ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

are exempt from disclosure on the basis of section 43(2) of FOIA. He has therefore concluded that the Cabinet Office cannot rely on this exemption to withhold the agreements.

Right of appeal

25. 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

26. 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.
27. 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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