

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 May 2024

Public Authority: Ministry of Defence
Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) seeking a) the percentage increase mandated to AWE Plc for the remuneration of staff for the 2023 June pay round and b) the date when this percentage offered. The MOD withheld this information on the basis of sections 36(2)(c) (effective conduct of public affairs) and 43(2) (commercial interests) of FOIA.
2. The Commissioner's decision is that:
 - Section 43(2) does not provide a basis to withhold either piece of requested information.
 - Both pieces of information are exempt from disclosure on the basis of section 36(2)(c).
 - For the percentage increase which was mandated to AWE, the public interest in favour of withholding this information outweighs the public interest in disclosure.
 - However, for the date this percentage was offered to AWE, the public interest in favour of disclosure of this information outweighs the public interest in withholding it.
3. The Commissioner requires the MOD to take the following steps to ensure compliance with the legislation.

- Provide the complainant with the date the percentage increase was mandated to AWE.
4. The public authority must take these steps within 30 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. The complainant submitted the following request to the MOD on 10 August 2023:

“Under the Freedom of Information Act I would like to request the following information:

What percentage increase was mandated to AWE Plc for the remuneration of staff for the 2023 (June) pay round and when was this percentage offered.

I am happy to receive this information electronically.”

6. The MOD responded on 23 August 2023 and confirmed that it held the requested information but considered this to be exempt from disclosure on the basis of section 43(2) (commercial interests) of FOIA.
7. The complainant contacted the MOD on 29 August 2023 and asked it to conduct an internal review.
8. The MOD informed him of the outcome of the review on 9 January 2024 which upheld the decision to withhold the information on the basis of section 43(2) of FOIA.

Scope of the case

9. The complainant initially contacted the Commissioner on 8 November 2023 about the MOD’s failure to complete the internal review and its decision to withhold the information falling within the scope of his request.
10. The MOD subsequently informed the complainant on 12 April 2024 that in addition to section 43(2) of FOIA, it also considered the withheld information to be exempt from disclosure on the basis of section 36(2)(c) of FOIA.

11. The complainant confirmed to the Commissioner, following both the internal review and the MOD's communication of 12 April 2024, that he wished to continue with his complaint.

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).'

13. 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.

The MOD's position

14. The MOD argued that AWE's pay negotiations with its recognised trade unions constitute a commercial activity with a third party. This is on the basis that AWE seeks to negotiate a deal that it considers fair and sustainable for its employees while also being affordable for the company within the funding the company receives from the MOD. The MOD argued that this is comparable to AWE's procurement activities in

which it negotiates commercial contracts with third parties within its supply chain.

15. The MOD argued that releasing the agreed pay mandate for AWE staff, and the date this was offered, would undermine AWE's position in current and future pay negotiations with its recognised trade unions. This is because it would place AWE in a disadvantageous position as the trade unions are not subject to the same FOI disclosure requirements; with AWE being forced to disclose their negotiating limit but the trade unions would not be.
16. Furthermore, the MOD argued that disclosure of this information would set a precedent, which could negatively affect all pay mandate agreements and negotiations across government and significantly weaken the government's negotiating position in any pay discussions in the future.
17. Taking the above into account the MOD set the level of prejudice at the higher level of 'would' prejudice.

The complainant's position

18. The complainant argued that AWE's position in collective bargaining with trade unions is not a commercial matter. He noted that AWE is engaged in the development and production of the UK's nuclear deterrent; this is not a commercial market. There is no competition for the product nor the contract, it having now been brought into the public sector as an arms length body (ALB). The complainant argued that the only commercial activity that AWE participates in is with its service providers in the supply chain, to which the requested information does not relate.
19. The complainant noted that AWE is not an organisation "seeking to generate an income or to make a profit", which was the test for such commercial organisations set out in the Commissioner's guidance on this exemption. The complainant suggested that whilst the MOD and AWE may be seeking to protect financial interests of not spending money set aside for pay, on pay, such financial interests are not afforded protection by section 43 of FOIA.

The Commissioner's position

20. With regard to the first limb of the test set out above, the Commissioner's guidance on this exemption states that:

"A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually

be to make a profit. However, it could also be to cover costs or to simply remain solvent.”¹

21. Despite the MOD’s submissions, the Commissioner does not accept that the interest being protected is a commercial one, as opposed to simply a financial one. More specifically, the Commissioner is not persuaded that the AWE’s negotiations of its pay award to staff are comparable to its contract negotiations with third party suppliers.
22. On this basis, the Commissioner does not consider the first limb of the above test to be met and therefore the withheld information is not exempt from disclosure on the basis of section 43(2) of FOIA.

Section 36 – effective conduct of public affairs

23. Section 36(2)(c) of FOIA states that:

‘(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act...

...(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.’

24. In determining whether this exemption is engaged the Commissioner must determine whether the qualified person’s opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:
 - Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
 - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
 - The qualified person’s knowledge of, or involvement in, the issue.
25. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

26. With regard to the process of seeking this opinion, the MOD sought the opinion of the Minister for Defence Procurement on 8 March 2024 with regard to whether section 36(2)(c) of FOIA was engaged. Qualified persons are described in section 36(5) of FOIA with section 36(5)(a) stating that 'qualified person' means 'in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown'. The Commissioner is therefore satisfied that the Minister was an appropriate qualified person.
27. The qualified person was provided with a rationale as to why the exemption could apply and a copy of the withheld information. The qualified person provided their opinion that section 36(2)(c) was engaged on 3 April 2024. Whilst the rationale as to why the exemptions apply is contained in the recommendation to the qualified person, to which the latter's opinion simply agreed, the Commissioner is satisfied that this is an appropriate process to follow (and is in line with the approach taken by other central government departments).
28. Turning to the substance of the opinion, the qualified person argued that section 36(2)(c) applied because disclosure may place AWE at a disadvantage in its annual pay negotiations (in essence for the reasons set out in the context of section 43 above), resulting in pay settlements for the public sector being higher than they may otherwise be. In support of it was noted that at the time of the request, pay negotiations for 2023/24 were still live. The qualified person argued that releasing the information after the conclusion of the negotiations would still be prejudicial as it would reveal the approach AWE adopted for 2023/24 and would put the company at a potential disadvantage in the next and any future negotiations.
29. Furthermore, the qualified person also argued that releasing the information could set a precedent for future negotiations, which would negatively affect all pay mandates and agreements across government.
30. The qualified person also argued that releasing the date on which the pay mandate was confirmed to AWE could reveal the time it takes AWE,

MOD and HM Treasury (HMT) to formally respond to AWE's initial pay mandate requests; this length of time may indicate difficulties (or otherwise) in agreement between the parties which could further expose AWE in future negotiations.

31. The qualified person set the level of prejudice at the higher level of 'would' occur.
32. With regard to the level of the percentage mandated, the Commissioner accepts that the qualified person's opinion was a reasonable one to come to. He accepts that it is rational to argue that disclosure of the pay mandate agreed for AWE staff, during the course of ongoing negotiations, could place AWE at a disadvantage in such negotiations. This is on the basis that such information would provide trade unions with an insight into AWE's ultimate position but, as noted above in the context of section 43, the trade unions would not have to disclose their corresponding position. The Commissioner therefore accepts that disclosure risks impacting AWE's negotiating position and in turn its financial interests, which he is satisfied constitutes an "other" form of prejudice for the purposes of section 36(2)(c) of FOIA.
33. With regard to the argument that disclosure of the date at which this percentage was agreed would have a similar prejudicial effect, the Commissioner is less persuaded that this is the case. Nevertheless, the Commissioner accepts that this is not such an irrational or absurd position that it should be considered unreasonable.
34. Therefore, the Commissioner accepts that section 36(2)(c) is engaged in respect of both pieces of information sought by the request.

Public interest test

35. Section 36 is a qualified exemption and in line with the requirements of section 2 of FOIA the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption cited outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

36. The MOD acknowledged that release of the withheld information would promote openness and transparency of the 2023/24 pay negotiating mandate that HMT granted to AWE. Further it may also support providing accountability for the spending of public money.

37. The complainant argued that the requested information is released for every other civil service department and ALB under the remit process.² On this basis he argued that AWE staff are treated to the detriment of the rest of the public sector, and that failing to release the information suggests that HMT has offered more than AWE offered to staff, or that those funds meant for collective pay bargaining have been used for other (undisclosed) purposes.
38. The complainant argued that the failure to disclose the requested information, needed to conduct negotiations under the current recognition agreement, led directly to the ballot for industrial action.

Public interest arguments in favour of maintaining the exemption

39. The MOD argued that given the ways in which disclosure of the withheld information would prejudice AWE's position, the public interest favoured withholding the information in order to ensure that its position in current (at the time of the request), and future, negotiations was not undermined. More broadly, it argued that there was clear public interest in ensuring that the government's position in pay negotiations across the public sector was not undermined.

Balance of the public interest

40. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.
41. The Commissioner agrees that there is a clear public interest in public bodies, including ALBs, being open and transparent about their pay mandates. This aids public understanding of, and contributes to, accountability in relation to the use of public funds. Such openness could also arguably contribute to better relations between the organisation in question and its employees.
42. In the context of this case, such benefits could have been achieved by disclosure of the information at the time of the request. With regard to

² <https://www.gov.uk/government/publications/civil-service-pay-remit-guidance-2023-to-2024/civil-service-pay-remit-guidance-2023-to-2024#pay-remit-process-and-approval>

the comparison drawn by the complainant to the approach toward other public bodies based on the remit process cited above, the Commissioner notes this article which raises questions over the extent to which ALBs, and indeed which ones, are currently subject to the remit.³ Given the apparent lack of public clarity regarding the pay arrangements of ALBs, the Commissioner considers that this factor adds weight to the case for disclosure of the requested information in this case.

43. Turning to the public interest arguments in favour of maintaining the exemption, the Commissioner accepts that disclosure of the percentage mandated at the time of the request would have had a significant and direct impact on AWE's negotiating position. The Commissioner also accepts that it is clearly in the public interest for AWE to achieve good/best value for public money when agreeing pay arrangements with its employees. Therefore, considerable weight should be attributed to this argument and thus the public interest in withholding this particular information.
44. The Commissioner is far less persuaded that disclosure of the date on which AWE received this mandate from HMT would have a particularly prejudicial effect in the terms of the severity, extent or frequency of any such prejudice. Rather, the Commissioner considers the MOD's arguments in this regard, ie that it could reveal the length of time it took to decide on AWE's initial request and that this may indicate difficulties (or otherwise) to be rather speculative in terms of prejudice occurring as a result of this information being disclosed. As a consequence, in terms of the balance of public interest, the Commissioner considers that far less weight should be attributed to the public interest in withholding this particular information.
45. Furthermore, the Commissioner is also not particularly persuaded by the likelihood of disclosure of the requested information having a severe impact on the government's ability to negotiate public sector pay more widely. In part this is due to the existence of the pay remit process cited by the complainant. Furthermore, the Commissioner is not convinced that in respect of bodies to which this remit process may not apply, simply because a body such as AWE has released such information all other public bodies in a similar position would be compelled to do so.
46. In conclusion, and by a narrow margin, the Commissioner has concluded that the public interest favours maintaining section 36(2)(c) in relation to the percentage increase mandated to AWE by HMT. In reaching this

³ <https://www.civilserviceworld.com/professions/article/remove-trading-funds-from-pay-remit-process-union-urges>

decision the Commissioner appreciates the public interest benefits in disclosing such information but finds that these are marginally outweighed by the public interest in ensuring that AWE's negotiating position during the ongoing process was not undermined.

47. In contrast, the Commissioner has concluded that the public interest favours disclosing the date this amount was mandated to AWE. The Commissioner has reached this finding based on his view that the severity and extent of any prejudice following disclosure of such information would be limited, set against the considerable weight he considers the public interest arguments in favour of disclosure attract.

Other matters

48. 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.⁴ The Commissioner expects that most internal reviews should be completed within 20 working days, and even for more complicated requests, reviews should be completed within a total of 40 working days.⁵ In this case, as noted above, the MOD failed to meet these timescales.

⁴ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

⁵ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal>

Right of appeal

49. 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

50. 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.
51. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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