

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 7 September 2009

Public Authority: The University of Nottingham
Address: University Park
Nottingham
NG7 2RD

Summary

The complainant requested details of grants made to the public authority by organisations associated with the military sector. The public authority initially refused to confirm or deny whether it had contracted with any of the private companies named in the request. Following the intervention of the Commissioner, the stance of the public authority altered and it now confirmed that it did contract with some of the private companies specified in the request, but that these companies had objected to the disclosure of the information held by the public authority that related to them. The public authority cited the exemption provided by section 43(2). The Commissioner finds that this exemption was applied correctly, but also finds that the public authority failed to comply with the procedural requirements of sections 1(1)(a), 10(1) and 17(1)(a), (b) and (c) when responding to the request.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 13 June 2006, the complainant made the following information request:

"Any grants, income or support, of any kind, provided by any of the military organisations listed below since 1 January 2001. I would like to request the following information on the named companies:

- *The amount and date of the grants made by each of the military organisations to the University of Nottingham;*

- *The University departments to which the grants were made; and*
- *The titles of the projects which the grants were used to fund.*

The military organisations I am interested in are:

Alvis

BAE Systems and their subsidiary Virtual University

Boeing

Cobham Plc

Defence Aviation Safety Centre (DASC)

Defence Communications Systems Agency (DCSA)

Defence Logistics Organisations (DLO)

Defence Procurement Agency (DPA)

Defence Science Technology Laboratory

Defence Science Advisory Committee (DSAC)

Defence Training Review (DTR)

Directorate of Safety and Claims (DSC)

European Aeronautic Defence and Space Company (EADS)

Finmeccanica

GKN Plc

Ministry of Defence

Ministry of Defence Police & Guarding Agency (MDPGA)

QinetiQ

Rolls Royce and their subsidiary University Technology Centres

Smiths Group Plc

Thales Group

VT Group Plc”.

3. The public authority responded to this on 13 June 2006. The public authority stated that it had received no funding from the public sector organisations listed in the request. In connection with the private companies named, the public authority stated that *“Any information relating to private companies is commercially confidential and therefore exempt under section 43...”*.
4. The complainant contacted the public authority again on 16 June 2006 and requested that the public authority conduct an internal review of its handling of her request. The complainant also listed the following organisations as those she assumed were the “private companies” specified in the request:

Alvis

BAE Systems and their subsidiary Virtual University

Boeing

Cobham Plc

European Aeronautic Defence and Space Company (EADS)

Finmeccanica

GKN Plc

QinetiQ

Rolls Royce and their subsidiary University Technology Centres

Smiths Group Plc

Thales Group

VT Group Plc

5. The complainant asked the public authority to confirm if any of the other organisations specified in the request were also considered private companies.

6. The public authority responded to this on 30 June 2006. The public authority clarified that it had received no funding from the following public sector organisations:

Defence Aviation Safety Centre (DASC)
Defence Communications Systems Agency (DCSA)
Defence Logistics Organisations (DLO)
Defence Procurement Agency (DPA)
Defence Science Technology Laboratory
Defence Science Advisory Committee (DSAC)
Defence Training Review (DTR)
Directorate of Safety and Claims (DSC)

7. The public authority confirmed that the organisations listed by the complainant in her letter of 16 June 2006 were all those specified in the request that the public authority classed as private companies. The public authority clarified that its stance was that it neither confirmed nor denied whether it held information relating to these companies. In doing so the public authority in effect cited subsection 43(3), although this was not specified.

The Investigation

Scope of the case

8. The complainant contacted the Commissioner initially on 5 July 2006. The request quoted above was part of a larger request made by the complainant for information in the area of funding of the public authority by organisations associated with the military sector. The majority of the request was refused under section 12 as the public authority believed that to comply with the other parts of the request would exceed the cost limit.

9. At this stage the complainant specified that her complaint related only to those parts of the request that had been refused under section 43, these being the request quoted above and the second part of the wider request, which was for partnerships and collaborative schemes with military organisations entered into by the public authority. As the complainant made clear that she wished the Commissioner to address only those parts of the request refused under section 43, the remaining parts of the request are not covered in this notice.

10. During the case handling process, the information withheld from the response to the second part of the request was disclosed. This part of the request is not covered further in this notice.

11. The public authority contacted the Commissioner in connection with this case initially on 26 October 2007. In this response the public authority amended its stance and stated that it no longer wished to neither confirm nor deny whether information falling within the scope of the second part of the request was held and now confirmed that information was held that related to the following private companies specified in the request:

BAE Systems
QinetiQ Ltd
Boeing
Rolls Royce

12. The public authority also amended its stance in relation to information relating to the public sector bodies listed in the request and now stated that it held information relating to Defence Science and Technology Laboratory (“DSTL”).
13. The public authority contacted the five organisations in relation to which it held information to ascertain the views of these organisations about disclosure. BAE Systems and DSTL confirmed that they had no objection to disclosure. This information was disclosed to the complainant. QinetiQ did not respond to the public authority and information relating to it was also disclosed.
14. Boeing and Rolls Royce confirmed that they did object to disclosure and the public authority stated that this information would continue to be withheld, with the exemptions provided by sections 29 (the economy), 41 (information provided in confidence) and 43 (commercial interests) cited. The chronology and analysis sections of this notice relate solely to the information falling within the scope of the request quoted above that relates to Boeing and Rolls Royce.
15. Paragraph 21 below refers to the public authority having provided to the Commissioner the information withheld from the complainant. The Commissioner accepts that the information in the form provided to him by the public authority satisfies the scope of the complainant’s request and the analysis sections of this notice relate to the information in the form in which it was provided to the Commissioner’s office by the public authority.

Chronology

16. The Commissioner contacted the public authority initially on 3 August 2007 and asked that it provide a detailed explanation for the exemptions cited. The public authority responded to this on 26 October 2007. In connection with the information held relating to Boeing and Rolls Royce, the public authority stated that it no longer wished to neither confirm nor deny whether it held information relating to these companies. The public authority went on to confirm that it did hold information relating to these companies but that this information was considered subject to the exemptions provided by sections 41 (information provided in confidence), 43 (commercial interests) and 29 (prejudice to the economy).
17. In connection with section 41, the public authority stated that the contracts

between it and Boeing and Rolls Royce had included confidentiality clauses. In connection with section 43, the public authority stated that it believed the interests of Boeing and Rolls Royce would be prejudiced through providing the competitors of these companies with background information about their work. The public authority also believed that its own commercial interests would be prejudiced through disclosure as private companies might be reluctant to enter into business with it where they were concerned that details of this may be disclosed by virtue of the Act.

18. The public authority also addressed why it believed that the public interest favoured the maintenance of the exemption.
 - The public authority recognised a public interest in favour of disclosure where this would add to debate about research used for military purposes.
 - However, the public authority also stated that it believed that it is in the public interest for such research to be carried out and that in order to do this effectively it is necessary for confidentiality to be maintained.
 - The public authority also believed that any public interest in information about military research would be satisfied through the information it voluntarily makes available about the research it conducts.
 - In terms of any public interest in issues of funding, the public authority believed that this would be reduced in relation to funding by private sector organisations when compared to funding provided by another public authority. The public authority further suggested that the public interest in it overall would be reduced as it receives only part of its funding through public money.
 - The public authority believed that any public interest in disclosure on the basis of ethical issues surrounding military research would be reduced as it has procedures in place to ensure its research is ethical.
 - The information in question would not provide any background about decisions made in connection with this research and so the public authority did not believe that a strong argument could be made that disclosure would be in the public interest on this basis.
19. In connection with section 29 the public authority believed that disclosure would cause prejudice to the UK economy through discouraging investment in research in UK universities. The public authority stressed the importance of scientific research to the UK economy.
20. The Commissioner contacted the public authority again on 27 June 2008 and asked that the public authority provide to the Commissioner's office the exact wording of the confidentiality clauses in the contracts between it and Boeing and Rolls Royce and a copy of the responses provided from these companies to the public authority after they were consulted on the issue of the potential disclosure of this information. The public authority complied with this request on 7 August 2008.
21. The Commissioner contacted the public authority again on 10 November 2008 and asked the public authority to provide to the Commissioner's office a copy of the information relating to Boeing and Rolls Royce that had been withheld from

the complainant. The public authority provided the information in question on 26 November 2008.

22. The public authority also provided further arguments as to why it believed that the public interest favoured the maintenance of section 43, stating that much of its work with private companies perceived to be within the military sector may in fact be for purposes unrelated to the military sector, such as civil engineering. The public authority also reiterated that some information about its work with Rolls Royce is made publicly available and so any public interest in its work with this company would be served without disclosure of the specific information in question here being necessary.

Analysis

Procedural matters

Section 1

23. Prior to the involvement of the Commissioner, the public authority refused to confirm or deny whether it held information falling within the scope of the request. In failing to confirm or deny whether it held the information requested at either the refusal notice or internal review stage, but later amending its stance in this regard, the public authority did not comply with the requirement of section 1(1)(a), the wording of which is set in full in the attached legal annex, as are all other sections of the Act referred to in this notice.

Section 10

24. In failing to provide confirmation or denial within 20 working days of receipt of the request, the public authority did not comply with the requirement of section 10(1).

Section 17

25. In not specifying the correct subsection of section 43 (section 43(2)) at either the refusal notice or internal review stage, the public authority failed to comply with the requirement of section 17(1)(b).
26. In failing to cite sections 29(1) and 41(1) prior to the involvement of the Commissioner, the public authority failed to comply with the requirements of section 17(1)(a), (b) and (c).

Exemption

Section 43

27. Consideration of whether information should be withheld under this exemption is a two stage process. Firstly it is necessary for the exemption to be engaged. The

exemption provided by section 43(2) will be engaged where disclosure *would*, or *would be likely*, to result in prejudice to the commercial interests of any person, including the public authority holding the information. Secondly, this exemption is subject to the public interest test.

Prejudice to commercial interests?

28. The Commissioner has focussed on whether disclosure would, or would be likely to result in prejudice to the commercial interests of the public authority. In its correspondence with the Commissioner the public authority has stated that its own commercial interests would be prejudiced through disclosure of the information in question. The test that the Commissioner applies to establish whether prejudice would result through disclosure is that the prejudice must be at least more probable than not. This is in line with the direction provided by the Information Tribunal in the case of *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026, EA/2005/0030), that there is a much stronger evidential burden on the public authority where its stance is that prejudice *would* result than in a case where its stance is that prejudice *would be likely* to result. In order for the Commissioner to conclude that prejudice would be likely to result, the possibility of this must be real and significant and more than hypothetical or remote. This is in line with the view expressed by the Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005, paragraph 15). Whilst some extrapolation as to the prejudice that the public authority believes would occur is necessary and appropriate, arguments will carry more weight when supported by evidence.
29. The argument of the public authority here is that its commercial interests would be prejudiced both in terms of its commercial relationship with Boeing and Rolls Royce and in terms of its wider ability to secure research contracts in future. It is firstly necessary to consider whether the University has any commercial interests that could be prejudiced by disclosure.
30. As the public authority indicated in its public interest arguments, only part of its funding is provided through public money. On the basis of this evidence the Commissioner accepts that research contracts with commercial organisations are of commercial significance to the public authority and that disruption to its ability to secure these would impact upon its commercial interests. The Commissioner notes that any commercial research activity conducted by a University where the results are to remain private to the commissioning organisation will be conducted through a separate company. Universities are registered charities, which exist to provide education and research and are exempt from paying corporation tax on these activities. To protect this status they are not allowed to carry out what HMRC regard as trading unless exercised in the carrying out of education or research for public benefit. Income that is outside the charitable status remit will be routed through separate companies that are normally wholly owned by the University. The company then coverts funds back to the University. The Commissioner accepts that companies the University uses will have commercial interests and the University has a commercial interest in these companies.
31. Turning to whether disclosure would be likely to result in the prejudice identified

by the public authority, the likelihood of prejudice to commercial interests is affected by the level of competition within the environment in which the commercial activity in question is conducted. In its response to the Commissioner of 26 October 2007, the public authority stated the following on the issue of the competitiveness of the market for securing research contracts:

“In order to obtain research funding from private companies the University is competing in an open market with other private companies and universities.”

The Commissioner accepts that the securing of research contracts takes place within a competitive market.

32. The likelihood of prejudice to commercial interests is also affected by the level to which the information in question can be accurately characterised as commercially sensitive. The information in this case is not detailed on the specifics of the research being undertaken by the public authority. The Commissioner considers it unlikely that a competitor of the university could gain a commercial advantage over the public authority through any knowledge of the research undertaken by the public authority that could be gained from the information in question here.
33. However, this information does include the amounts awarded to the public authority by Boeing and Rolls Royce and, although as referred to above the information is not detailed on the specifics of the research, a *brief* description of the research is included. It is conceivable that a competitor of the public authority could gain a commercial advantage over the public authority through suggesting that it would be capable of carrying out research within a similar area for a lower amount. The Commissioner accepts that the information in question can be accurately characterised as having some commercial sensitivity on this basis.
34. In this case the issue of whether prejudice would be likely to result through disclosure also needs to focus on whether the information in question could be objectively considered as commercially sensitive rather than just on what commercial sensitivity Boeing and Rolls Royce consider this information to hold. In response to the information request, the public authority consulted Boeing and Rolls Royce for their views on disclosure. Included within the response from Rolls Royce is the following statement:

“If the Rolls Royce information is disclosed on this occasion, it is likely that in future due to the possible risks of disclosure of sensitive and confidential information Rolls Royce may reconsider its research options...”

The Boeing response included the following statement:

“If [confidentiality of information] cannot be guaranteed, it will be necessary to consider our position with regard to the placing of research contracts and take any necessary steps to protect our commercially sensitive information and avert any potential detriment that disclosure might cause to Boeing and its operations.”

35. The Commissioner has considered whether the responses from Boeing and Rolls Royce are objectively reasonable and should be given weight. It is important that such statements are not automatically accepted as this could lead to commercial companies involved with public authorities effectively vetoing FOI disclosures. Having considered the information in question and the context he accepts these responses are reasonable. He considers that they may have this reaction as the information could reveal their strategic approach on research investment to competitors. However, this is balanced against the fact that other companies have consented to disclose similar information, however the Commissioner accepts that the situation for each company in the marketplace may be different. He has also considered that the two companies would need to consider the fact that all UK Universities are subject to the Freedom of Information Act and a decision to commission research will also be based on other factors such as the expertise available. In the case of Universities such expertise is often limited to small numbers of institutions. Taking all these considerations into account the Commissioner has concluded that it *would be likely* that the two companies would review their options and not place future research with the University. He does not find this *would* occur.
36. Having considered all of the above the conclusion of the Commissioner is that disclosure of the information in question here would be likely prejudice the commercial interests of the public authority as Boeing and Rolls Royce would be less likely to enter into research contracts with it. In making this decision the Commissioner has noted that the commercial viability of the public authority relies in part on securing research contracts and that there is a competitive market for research contracts. The Commissioner has also given some weight to the representations from Boeing and Rolls Royce that they would reconsider awarding research contracts to the public authority were the information in question to be disclosed.

The public interest

37. Consideration of where the public interest lies is a separate test to whether the exemption is engaged. The effect of the public interest favouring disclosure would be that the information should be disclosed despite the exemption being engaged, rather than overturning the decision that the exemption is engaged. The Commissioner has accepted that prejudice to the commercial interests of the public authority would be likely to occur through disclosure; this does not, however, imply any particular view as to the severity of this prejudice and the level of severity can be taken into account when weighing the public interest.
38. Only those factors that are relevant to the exemption in question can be taken into account. In this case that means that only those factors relevant to the commercial interests of the public authority can be taken into account. If, for example, there was concern that disrupting the research of the public authority would be likely to prejudice the development of military technology, this would not be a relevant issue when considering where the balance of the public interest lies.
39. Covering firstly factors that favour disclosure, it is in the public interest for the

information to be disclosed in order to demonstrate that the public authority is securing a fair market rate when entering into contracts to carry out research. As the public authority receives public funds, it is providing a service funded by the tax payer. The 'value for money' received by the tax payer from this public authority and the burden it places on the public purse is impacted upon by the funds it is able to generate in addition to those received from the public purse. There is, therefore, a valid public interest in information about the revenue generated by the public authority through research and the Commissioner considers this to be a valid argument in favour of disclosure.

40. The public authority has argued that the fact that it is only part funded through public monies means that any public interest in transparency about its finances is reduced in comparison to the public interest in transparency about the finances of a public authority that is entirely publicly funded. The Act, however, makes no distinction between public authorities on the basis of what proportion of their funding comes from the public purse and so this factor has no bearing on the balance of the public interest.
41. The Commissioner recognises that there is a significant level of controversy surrounding the issue of perceived military funding of civil research programmes. Boeing and Rolls Royce were amongst the companies specified in the complainant's request as these companies were perceived to be related to the military sector. Given this level of controversy, there is a public interest in transparency and accountability about the involvement of the public authority with private companies perceived to be involved in the military sector, particularly as the public authority receives funding as a result of this involvement.
42. The Commissioner recognises this as a valid public interest factor in favour of disclosure, but finds that the weight of this factor is reduced for the following reasons. Firstly, the public authority has stressed that not all of the information in question here relates to research that could be fairly characterised as relating to the military sector and has stated in particular that the research contracts with Rolls Royce primarily relate to civil engineering. Secondly, the public authority makes available information that discloses that it contracts for research with organisations that the complainant perceives to be related to the military sector. Any argument that disclosure would be in the public interest solely on the basis that this would disclose the involvement of the public authority with organisations perceived to be related to the military sector would not, therefore, be valid. Thirdly, the Commissioner has located no evidence of any specific controversy about the relationship the public authority has with Boeing and Rolls Royce.
43. Moving secondly to those factors that favour maintenance of the exemption, there is a public interest in enabling the public authority to generate additional commercial revenue in addition to the public funding it receives. This additional commercial revenue enhances the educational service the University is able to provide. The Commissioner has considered two factors when considering how much weight should be given to this public interest. Firstly, as the Commissioner has recognised when concluding that this exemption is engaged, Boeing and Rolls Royce would be less likely to contract were the information in question to be disclosed. Secondly, the wider ability of the public authority to compete fairly

within the market for research services could be prejudiced were potential clients aside from Boeing and Rolls Royce discouraged as a result of disclosure from contracting with the public authority. Whilst the likelihood that the public authority will suffer a wider prejudice to its ability to compete in the research market is less than the likelihood of prejudice through the loss of Boeing and Rolls Royce as clients, the Commissioner also gives some credence to this possibility having taken the reaction of Boeing and Rolls Royce as indicative of the reaction many potential research clients may have to the possibility of disclosure.

44. The public authority has argued that any public interest in disclosure would be reduced by the fact that the information in question includes no detail about the decision making process of the public authority when entering into contracts with Boeing and Rolls Royce. However, the Commissioner would note as a general principle that where the level of detail within information is not great, the severity of prejudice resulting through disclosure of that information is also likely to be reduced. He considers in this case that these two factors balance each other out.
45. When considering commercial interests, the timing of the request is often an important factor in determining the severity of prejudice. Where, for example, section 43(2) has been cited in connection with information relating to a tender process that was finalised by the time of the request, the severity of prejudice to commercial interests resulting from the disclosure of this information would be reduced when compared to the severity of prejudice that would result if the tender process were ongoing.
46. In this case the commercial process to which the arguments of the public authority relate was ongoing at the time of the request, both in the sense that it was undertaking research for Rolls Royce at that time and in the wider sense that it was seeking contracts for research with other organisations. That this process was ongoing at the time of the request suggests that the severity of prejudice to commercial interests would be considerable. If the public authority was to suffer severe prejudice to its commercial interests, this would be counter to the public interest. That the commercial process in question was ongoing at the time of the request is, therefore, a valid factor in favour of maintenance of the exemption.

Conclusion

47. The Commissioner concludes that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Commissioner has recognised public interest factors in favour of disclosure; that disclosure would improve the transparency of the finances of the public authority and particularly would help to demonstrate that the public authority secures a fair rate when contracting for research; and that disclosure would improve transparency and accountability of the public authority in contracting with organisations perceived to be related to the military sector. However, the Commissioner has given particular weight to the public interest in protecting the ability of the public authority to generate commercial revenue and, having weighed all the factors recognised as valid, finds that the balance of the public interest is in favour of maintenance of the exemption.

Sections 29 and 41

48. As the decision above relates to the information withheld in its entirety, it has not been necessary for the Commissioner to go on to consider the other exemptions cited by the public authority.

The Decision

49. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in that it applied the exemption provided by section 43(2) correctly. However, the Commissioner also finds that the public authority failed to comply with the procedural requirements of sections 1(1)(a), 10(1) and 17(1)(a), (b) and (c) at the time of the initial refusal and internal review as covered above at paragraphs 23 to 26.

Steps Required

50. The Commissioner requires no steps to be taken.

Right of Appeal

51. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 7th day of September 2009

Signed

**Steve Wood
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 10

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 12

Section 12(1) provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

Section 17

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information 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.”

Section 29

Section 29(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(a) the economic interests of the United Kingdom or of any part of the United Kingdom,

or

(b) the financial interests of any administration in the United Kingdom, as defined by section 28(2).”

Section 41

Section 41(1) provides that –

“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.”

Section 43

Section 43(2) provides 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).”

Section 43(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”