

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 11 June 2012

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

#### Decision (including any steps ordered)

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1. The complainant requested information from the Cabinet Office relating to Ministry of Defence contracts reviewed as part of the Efficiency and Reform Group's efficiency review. The Cabinet Office disclosed some information within the scope of the request, withholding the remainder under the prejudice to effective conduct of public affairs, information provided in confidence and commercial interests exemptions of FOIA (sections 36, 41 and 43). The Commissioner has investigated and found that the exemption provided by section 43 is engaged. He requires no steps to be taken.

#### Request and response

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2. In May 2010, the Chancellor announced measures to achieve £6.2 billion of savings in 2010/2011 which included discussions on government contracts with a number of key suppliers. Each supplier provided the Cabinet Office's Efficiency and Reform Group (ERG) with information to facilitate assessment of the contract and identify savings.
3. The complainant wrote to the Cabinet Office on 4 October 2010 and requested information in the following terms:

*"Could you please provide me with full information of all Ministry of Defence procurement, IT, support, services and other contracts reviewed as part of the Cabinet Office's efficiency review? Could you please send me full details of all renegotiated contracts as well as details of the original contracts, thus providing, for example, a way of establishing the savings realised and changes made?"*

4. The Cabinet Office responded on 19 January 2011. It confirmed that, at the time of the request, ERG held information within the scope of the request relating to four suppliers. With respect to three of the suppliers, it disclosed some information to the complainant, but withheld the remaining information citing sections 36 (prejudice to effective conduct of public affairs), 41 (information provided in confidence) and 43 (commercial interests) of FOIA.
5. The Cabinet Office explained that it had not disclosed any information relating to contracts with the fourth supplier and suggested to the complainant that he might wish to consider making a request to the Ministry of Defence (MOD) for that information.
6. Following an internal review the Cabinet Office wrote to the complainant on 4 August 2011. As a result of the internal review, the Cabinet Office upheld its original response – which excluded the information relating to the fourth supplier. With respect to that information, the Cabinet Office confirmed that it held information within the scope of the request. It disclosed some of that information, withholding the remainder citing the exemptions in sections 36, 41, 43, 24 (national security) and 26 (defence) of the FOIA.

## Scope of the case

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7. The information within the scope of the request relates to four suppliers who, at the time of the request, had contracts with the MOD and had signed Memorandums of Understanding (MOUs). The Cabinet Office described the information as comprising:
  - MOD's departmental data return (extracted from consolidated information, the remainder of which falls outside the scope of this request);
  - data returns made by a number of suppliers with contracts with the MOD as part of the Cabinet Office review (extracted from consolidated information, the remainder of which falls outside the scope of this request); and
  - schedules to the signed MOUs with those suppliers.
8. With respect to the information extracted from MOD departmental data returns and supplier data returns (the data returns information), the information in scope of the request relates to contracts that were reviewed as part of an efficiency review. The Cabinet Office disclosed some information within the scope of the request, for example the contract name, contracting body, start and end dates and total current

contract value. However, figures for revenue April 2010 – March 2011, revenue paid to subcontractors April 2010 – March 2011 and net retained value, where held, have been withheld.

9. With respect to the schedules to the signed MOUs (the MOU information), the withheld information includes information about the savings agreed with suppliers.
10. During the course of the Commissioner's investigation, the Cabinet Office confirmed that sections 24 and 26 of FOIA were no longer being engaged. Accordingly, it disclosed the information which it had previously withheld by virtue of those exemptions.
11. The Cabinet Office is citing section 43(2) in relation to all of the withheld information. Initially, it also cited sections 36(2) and 41 in relation to the MOU information. Belatedly, at what the Commissioner considers to be a late stage of his investigation, the Cabinet Office advised him that it also wished to apply those sections to the withheld data returns information.
12. The Commissioner considers the scope of his investigation to be whether the Cabinet Office correctly applied sections 36, 41 and 43 to the withheld information.

### Reasons for decision

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13. The Commissioner has first considered the Cabinet Office's citing of section 43(2).
14. Section 43 of FOIA sets out an exemption from the right to know if release of the information is likely to prejudice the commercial interests of any person, including those of the public authority holding the information.

#### *Applicable interests*

15. When identifying the applicable interests in this case, the Commissioner must consider whether the prejudice claimed is to the interest stated. In this case, as the Cabinet Office is citing section 43(2), the prejudice it is claiming is to "*the commercial interests of any person (including the public authority holding it)*".
16. The Cabinet Office has confirmed that the section 43 exemption was applied to protect both the commercial interests of the Government and the four suppliers.

17. In the Commissioner's view, a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services.

18. According to the Cabinet Office website:

*"The Efficiency and Reform Group brings into one place the expertise and capabilities from across Government to tackle two key priorities:*

- o *Making Government more efficient: reducing operational overheads to give taxpayers better value and allow resources to be focused on key priorities; and*
- o *Radically reforming the way public services are provided to ensure they meet rising public expectations: using transparency to improve accountability; shifting power to people and creating the Big Society."*

19. On the basis of that remit and the arguments put forward by the Cabinet Office, the Commissioner considers the applicable interests in scope are those of the Government and the four suppliers concerned.

#### *Nature of the prejudice*

20. In the Commissioner's view, the term "prejudice" implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way.

21. The Cabinet Office argued that disclosure would be to the detriment of the commercial interests of the suppliers involved. For example, it argued that information on a supplier's costing mechanisms would be likely to give advantage to a competitor. It also argued that the disclosure of that information could cause investors to buy or sell shares, causing volatile share price movement.

22. In support of its view that the commercial interests of the Government itself were also involved it argued that disclosure may jeopardise the ERG Commercial Portfolio Team's delivery of the other MOUs as suppliers may be less willing to engage with the team. It argued that the impact of this would be to reduce the Government's potential for achieving maximum savings.

23. The Commissioner is satisfied that the Cabinet Office has demonstrated that disclosure of the information could affect the applicable interests in this case, putting both the ERG and suppliers at a disadvantage.

*Likelihood of prejudice*

24. The Cabinet Office argued that disclosure of the information at issue in this case would be likely to prejudice the suppliers involved.
25. For example, with regard to the withheld information relating to revenue, the Cabinet Office told the complainant:

*“This information reveals a company’s forecast of how well it will do in a year..... It may also give information about contract profile arrangements which can give the market information about a supplier’s likely revenue in subsequent years of the contract lifespan”.*

26. In support of this argument, it explained that disclosure of information on a supplier’s costing mechanisms would be likely to give advantage to a competitor. It also argued that release of the information would be likely to affect the supplier’s share prices, potentially to its detriment, if the market drew negative conclusions about the likely impact of the savings on the supplier’s revenue stream.
27. In respect of prejudice to the Government’s commercial interests, the Cabinet Office argued that disclosure of the information at issue in this case would prejudice the Government’s ability to put into practice the savings agreed with suppliers and seriously reduce the potential for the Government achieving the maximum possible savings for the overall process.

*Is the exemption engaged – the suppliers?*

28. The Commissioner considers it important that, in claiming the exemption on the basis of prejudice to the commercial interests of a third party, the public authority must have evidence that this does in fact represent or reflect the view of the third party.
29. In this case, the Cabinet Office wrote to the four suppliers advising them of this request for information.
30. The Commissioner notes that the suppliers who responded were principally concerned to articulate the commercial sensitivity of the information that they provided. In other words, their comments primarily related to the information they provided as part of the Cabinet Office review and within the MOUs as opposed to information provided by the MOD in its departmental data return.
31. The Commissioner has viewed the responses of the three suppliers which replied and is satisfied that the arguments put forward by the Cabinet Office reflect the concerns of those suppliers.

32. With respect to those three suppliers, the Commissioner finds the exemption engaged with respect to the withheld information relating to their supplier data return and MOUs. However, in the absence of any evidence from the supplier that did not respond, he does not find the exemption engaged in respect of their supplier information or MOU.

*Is the exemption engaged – the Government?*

33. The Cabinet Office is also citing section 43(2) in relation to the same information on the basis of prejudice to the commercial interests of the Government. The Commissioner has therefore considered its reliance on that exemption with respect to the information that he has not already found engages the exemption.

34. In determining whether or not the disclosure would be likely to cause prejudice to the commercial interests of the Government itself, the Commissioner has considered the nature and likelihood of harm that would be caused.

35. The Cabinet Office has argued that disclosure:

*“may jeopardise the ERG Commercial Portfolio Team’s delivery of the other MOUs as suppliers may be less willing to engage. The negative impact on the renegotiations process would reduce Government’s potential for achieving the maximum possible savings for the commercial portfolio programme overall.”*

36. The Commissioner understands that the reference to “the other MOUs” is in relation to negotiations with other suppliers with whom the ERG was engaged.

37. In correspondence with the complainant, the Cabinet Office told him:

*“Government has no formal power to force suppliers to take part in this process and has depended so far on willingness of suppliers to engage”.*

38. In correspondence with the Commissioner, the Cabinet Office argued that if the goodwill and flow of information between suppliers and its negotiating teams was negatively impacted, this would, in turn, be likely to impact on the potential for savings.

39. The Commissioner can see some potential for the disclosure of the information to impact on the supplier negotiation process and thus prejudice the commercial interests of the Government. He therefore finds the exemption engaged in respect of the remaining withheld information.

*The public interest test*

40. Having established that the section 43 exemption is engaged, the Commissioner must go on to consider the public interest test as set out in section 2(2)(b) of the Act.
41. In the Commissioner's view, the public interest arguments the Cabinet Office provided to the complainant, both at the initial refusal and internal review stage, were, for the most part, confused with arguments about the prejudicial effect of disclosure.

*Public interest arguments in favour of disclosing the requested information*

42. When requesting an internal review of the Cabinet Office's decision, the complainant expressed his dissatisfaction in general terms, both with the content of the response and the fact that the requested information was withheld. However, the Commissioner has not seen any evidence that he put forward reasons why he considered that it was in the public interest for the information to be disclosed.
43. Taking into account the scope of the request in this case, the Cabinet Office acknowledged the widespread interest in defence and that it is appropriate for the public to understand, for example, what defence projects are underway.
44. Specifically with respect to the withheld information in this case the Cabinet Office recognised the general public interest in transparency. It told the complainant:

*"There is a public interest in transparency so as to allow public scrutiny of the manner in which Government is undertaking the renegotiation process".*

45. It also recognised the public interest in accountability:

*"so as to allow the public to determine whether the changes to contracts are of public benefit, i.e. developed in such a way that the revised contract will offer value for money".*

46. It also recognised that suppliers may be better placed in the future to meet the Government's needs if, as a result of disclosure in this case, they were aware of the changes agreed.

*Public interest arguments in favour of maintaining the exemption*

47. Arguing against disclosure, the Cabinet Office told the complainant that it was in the public interest:

*"to ensure public money is not wasted and the largest savings possible are achieved".*

48. In this respect, it argued that the success of the review process *"depends upon an open relationship with suppliers"*. It argued that releasing the information:

*"would not only jeopardise the flow of information from them [suppliers], but also impair their willingness to work with Government to identify and deliver savings".*

49. It argued that the Government's ability to complete the review process would be impaired if information were to be released mid-way through the process. In the Cabinet Office's view, that would not be in the public interest as it would leave the Government with unnecessarily expensive and inefficient contracts.
50. The Cabinet Office re-iterated its view - as a public interest argument in favour of maintaining the exemption - that disclosure would be detrimental to the commercial interests of the suppliers as they could suffer volatile share price movements.

#### *Balance of the public interest arguments*

51. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption.
52. With respect to the Cabinet Office's submission that disclosure in this case could cause investors to buy or sell shares causing volatile share price movement, the Commissioner acknowledges that argument. However, while not able to provide an expert opinion on this matter, in his view, this argument has limited weight in relation to the public interest issues in this case.
53. In the Commissioner's view, those contracting with public authorities must expect a more robust approach to the issue of commercial sensitivity than would apply in the private commercial environment. His view is that, following the implementation of FOIA, companies contracting with public authorities can reasonably expect that their commercial dealings will be subject to a high level of public scrutiny.
54. In this case, the Commissioner understands the public interest in transparency of government and decision making and also in the expenditure of public money, and accepts that significant weight is attributed to those arguments. He also recognises that, at the time of the request, there was an increased public interest in all significant



areas of government spending as a result of the comprehensive spending review.

55. In reaching a decision in this case, however, he has taken into account the Cabinet Office's argument that the suppliers concerned have engaged in the process on a voluntary basis. Accordingly, he gives weight to the argument that loss of faith in Government's willingness to protect the information would impair the relationships built with those suppliers and inhibit its ability not only to put into practice the savings agreed in the signed MOUs but also, potentially, to identify and deliver the maximum possible savings in the future, including in negotiations with other suppliers.
56. In conclusion, in the Commissioner's view, the public interest in the Government's ability to deliver significant savings and sustain efficiency improvements, and in protecting the integrity of this process, outweighs the public interest in disclosure. For this reason, the Commissioner has decided that the public authority is entitled to rely on the exemption at section 43(2) as a basis for withholding all the requested information.

### **Other exemptions**

57. As the Commissioner has found that all the requested information is exempt under section 43, he has not gone on to consider the application of the other exemptions cited by the Cabinet Office.

## Right of appeal

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58. 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: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

59. 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.
60. 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** .....

**Jon Manners**  
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