

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 12 August 2015

**Public Authority:** Department for Business Innovation and Skills  
**Address:** 1 Victoria Street  
London  
SW1H 0ET

#### **Decision (including any steps ordered)**

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1. The complainant has requested a copy of the contract between the Department for Business, Innovation and Skills ('DBIS') and the consortium delivering the Manufacturing Advisory Service ('MAS') programme. DBIS provided a significant amount of information but withheld some of the requested information under sections 43(2) and 40(2).
2. The Commissioner's decision is that DBIS has correctly applied section 43(2). However, DBIS has incorrectly applied section 40(2) of the FOIA in this case.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
  - Disclose the information withheld under section 40(2) insofar as it relates to the details of senior employees of DBIS and its contractors.
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 the Act and may be dealt with as a contempt of court.

## Background

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5. The complainant has had on-going concerns about DBIS for a number of years. He made the Commissioner fully aware of his opinion of both DBIS and MAS:

"Obviously my history with the FOI Act and BIS has shown them to be deceitful, or incompetent, or both, so I have no faith in them.

MAS has been a disaster, with one in three - or over million - manufacturing jobs lost since the MAS scheme was launched in 2002."

6. The complainant had previously requested and received a specification document for the Growth Accelerator Scheme ('GAS') [previously known as 'Business Coaching for Growth'] which he considers to be a "very similar scheme" to the MAS scheme. The complainant is concerned that the MAS Specification and the GAS Specification are different in content and considers that he has not been provided with the equivalent MAS information he seeks because he alleges that the information disclosed on GAS "revealed evidence of a potential £83m fraud by a contractor, in which BIS appears complicit or incompetent."

## Request and response

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7. On 19 May 2014, the complainant wrote to DBIS and requested information in the following terms:

"I would like a copy of the contract between BIS and The Consortium (which comprises of Grant Thornton, Pera and others) who are currently delivering the manufacturing Advisory Service programme."

8. DBIS responded on 17 June 2014. It provided in full the first 39 pages of the 79 page contract and five of the eleven Schedules. Only Schedule 3 was redacted in full. It relied on sections 43(2) and 40(2) to redact and withhold information in the contract and remaining five Schedules.
9. In requesting an internal review the complainant made clear his opinion that the information provided by DBIS was not "the agreed specification as part of the contract with GT UK LLP to deliver the contract, but part of the tender". Following an internal review DBIS wrote to the complainant on 14 July 2014. It upheld the application of the exemptions and confirmed that the correct MAS Specification had been provided to him.

## Scope of the case

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10. The complainant initially contacted the Commissioner on 13 June 2014 to complain about the way his request for information had been handled. He had not received a response to his request. However DBIS responded on 17 June 2014. Following the response and review the complainant explained his complaint as follows:

"BIS are withholding the contract and specification agreed between themselves and Grant Thornton UK LLP in 2012/13 for the delivery of the Manufacturing Advisory Service (MAS) scheme, I believe against the public interest. They have instead provided a largely irrelevant document which was part of the invitation to tender, and not the agreed contract."

11. The Commissioner has considered the application of the exemptions at section 43(2) and 40(2) to the redactions from the total information disclosed to the complainant. In doing so he has also considered the complainant's allegations in respect of the documentation identified by DBIS as all the information within the scope of the request.

## Reasons for decision

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### Section 43

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 to discharge.
14. In relation to the commercial interests of third parties, the Commissioner does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, the Commissioner expects that arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns.
  15. DBIS has withheld under section 43(2) information contained in a number of schedules which form part of the MAS contract. With regard to the three limb test the Commissioner is satisfied that the first limb is met given the nature of prejudice envisaged by DBIS. The applicable interests in this case are clearly identified as commercial. The withheld information relates directly to the business contract between DBIS and Grant Thornton. Consequently the harm which DBIS alleges would occur if the withheld information was disclosed is commercial in nature and clearly falls within the scope of the exemption provided by section 43(2).
  16. In respect of the second criterion, the Commissioner accepts that there is a causal link between disclosure of the withheld information and prejudice to the commercial interests of the contractor to a greater extent than the commercial interests of DBIS.
  17. DBIS explained to the Commissioner that disclosure of the withheld information would be of value to competitors bidding for any retendering of MAS contracts in future, and would consequently affect DBIS's ability to gain the best value for money for the taxpayer in similar situations in future. Furthermore it considers that any release would prejudice DBIS's ability to successfully tender for future contracts of this nature as potential bidders would be reticent about providing such detailed, commercially sensitive information for the fear of its release into the public domain. DBIS confirmed that the current contract will expire in July 2016 and retendering will take place before this date. It stressed that MAS is an important programme which DBIS uses to support

manufacturing companies, and links to the Government's wider Industrial Strategy.

18. DBIS provided the Commissioner with copies of the information it had posted to the complainant, in hard copy, due to the volume of documentation. It went on to state that the withheld information is clearly commercial as it constitutes the contractor's proposals for the operation of the MAS service. DBIS explained that the withheld information sets out in considerable detail how the contractor plans to "run, manage and organise MAS". It also provided information (both explicit and implicit) on how Grant Thornton organises itself as a company bidding for Government contracts. Given the detailed and bespoke nature of the contractual information, its disclosure would reveal information which would assist future bidders for this contract in determining the information required by DBIS. DBIS confirmed to the Commissioner that it considered that prejudice would, rather than would be likely, result from disclosure of the withheld information.
19. In reference to the third criteria, detailed in paragraph 13, the Commissioner's view is that DBIS is likely to be in a sufficiently strong position when negotiating contracts for services such as MAS that it could withstand the impact of disclosure without it having a significant effect upon its commercial interests in obtaining the best value for taxpayers' money. The Commissioner does not consider that disclosure would inhibit third party contractors from attempting to secure government contracts. He considers that it may potentially assist DBIS in securing a more favourable contract. If contractors are fully aware of the nature of the successful contract they would be better placed to attempt to replicate it with improvements or potentially at a discounted cost. Consequently, he is not convinced that DBIS would suffer significant prejudice.
20. DBIS has stated in its opinion that disclosure would provide other third party contractors with an unfair advantage when competing at the next re-tendering resulting in a negative impact on Grant Thornton's position in the marketplace. This is because it would provide strategic information about its business and the operation of MAS which would benefit its competitors. Such details on the structure and finances of a third party contractor, including information on pricing structures and its financial model, would not normally be in the public domain.
21. DBIS explained that it had contacted the incumbent contractor (Grant Thornton) specifically to consult on its position and its reasoning in support of its view.

22. The contractor itself provided the following detail in respect of the withheld information, in particular the specific document headed 'Invitation to tender response' which is listed as Schedule 3 - The Service Provider's Tender in the contract:

*"the tender document contains commercial assumptions made by Grant Thornton and the methodology we have used to provide the Business Coaching for Growth service.*

*If the full contents of the tender document were to be released this could damage Grant Thornton's commercial interests and seriously undermine Grant Thornton's accumulated competitive advantage that has resulted from our provision of similar services over a period of several years. If, other third party advisors operating competitively in the same market were to gain access to this information it would enable them to use and copy Grant Thornton UK LLP's proprietary methodology which includes (but is not limited to):*

- *pricing model and costs*
- *operational delivery plans*
- *mobilization and exit plans*
- *tool and techniques and analytics."*

23. The Commissioner has considered the withheld information in detail, in particular Schedule 3 "The Service Provider's Tender". This document along with Schedule 4 "Charges and payment", Schedule 6 "Continuity of Service Plan" and Schedule 11 "Implementation Plan" are fully redacted from the contract along with parts of Schedule 2 "Service Levels" and Schedule 5 "Contract Management". The remaining documents were provided to the complainant in response to his request. The Commissioner notes that DBIS has engaged with the complainant and accepts that DBIS has sought to release a volume of information within the scope of the request.

24. The Commissioner attempted to clarify with the complainant which document he considered to be "largely irrelevant". In response, the complainant reiterated the information he sought:

*"I am asking for the same information as BIS provided me for the GAS in response to my FOI request in late 2013".*

The Commissioner considers that DBIS provided relevant information within the scope of the request.

25. The complainant has argued that DBIS is withholding information on the MAS contract to prevent him using that information to pursue other matters. He is satisfied with the information he received in respect of

GAS (referenced in paragraph 6) and has focussed his attention on comparing the GAS Specification he holds with the MAS Specification he received (Schedule 1 of the contract) as one of the documents released in respect of this request. The complainant provided the Commissioner with a list of items he considered to be "missing" from the MAS Specification.

26. The Commissioner questioned DBIS regarding the differences and DBIS explained that as part of the contracting process the Specification contains details of the service required with generic descriptions giving the general approach to the work required. The Commissioner notes that the GAS Specification provides greater detail than the MAS Specification. DBIS explained:

"The GAS was a brand new service and therefore the Department needed to provide more information on what it might want to procure – it was starting from scratch. MAS on the other hand was a re-procurement of an existing service and therefore it was not necessary to be so prescriptive. This is essentially what is at the heart of the differences between the two Specifications."

27. The complainant does not accept this argument. He explained to the Commissioner:

"...the GAS specification, it has 41 pages, contains far more information in greater detail than the MAS document, which has been most probably been redacted unreasonably, has a Versions Control Sheet which is missing from the MAS specification, which may be key. I have been provided with all the information I am asking for GAS, which is missing from the MAS specification."

28. The Commissioner accepts that the Specifications are drafted differently, with the MAS Specification comprising 23 pages including non-sequentially marked annexes. However, he also accepts that DBIS has not redacted the MAS Specification document; it has been released in full to the complainant. The Commissioner queried the sequence of the annexes which begins with 'B'. DBIS explained:

"This is simply due to the labelling of the Annexes starting at Annex B, there is no reference to an Annex A in the ITT or the contract specification so it has not been withheld or removed from the contract specification."

29. The Commissioner considers that the complainant has become focussed on this document - which is variously and confusingly referred to as 'ITT', 'Specification' or 'Schedule 1' - to the exclusion of the information

actually withheld by DBIS (as detailed in paragraph 23). For this reason the Commissioner has specifically commented on the document. He agrees with the complainant that it appears strange to commence with Annex B, however, he accepts the explanation provided by DBIS as no reference is made to an Annex A in the body of the document.

30. Having both reviewed the withheld information and considered DBIS's submissions, the Commissioner's view is that it is quite reasonable to suggest that access to the withheld information would provide Grant Thornton's competitors with an inherent advantage in future bidding for MAS contracts. As a result other organisations could tailor their own tenders in the light of the content of the information. He considers that Grant Thornton would be unfairly disadvantaged in competing for future public and private sector contracts. The Commissioner is therefore satisfied that the resultant prejudice which is alleged is real and of substance, and therefore considers the section 43(2) exemption to be engaged.

#### Public interest test

31. The next step is to consider the balance of the public interest. In forming a conclusion here, the Commissioner has taken into account the general public interest in the transparency of DBIS, as well as specific factors that apply in relation to the information in question.

#### *Public interest arguments in favour of maintaining the exemption*

32. The Commissioner recognises that there is a public interest in preserving a situation in which private sector suppliers can contract with public authorities without prejudice to their commercial interests. Whilst the Commissioner is not convinced that prejudice to the commercial interests of DBIS was more probable than not in this case, he does recognise that a number of disclosures that result in prejudice to the commercial interests of private sector contractors could lead to a less favourable environment for public authorities seeking to contract with private sector contractors. Avoiding that outcome is in the public interest.
33. DBIS argued that there is a public interest in ensuring that the commercial interests of external businesses are not damaged or undermined by disclosure of information which is not common knowledge and which could adversely impact on future business. DBIS went on to explain that it considered that by releasing information it deemed to be commercially sensitive:



"...the confidence our suppliers have in us may be damaged, making them reluctant to provide us with commercially sensitive information as part of bidding processes. This will make it harder for BIS to achieve best value for money for the taxpayer when procuring such services, for example, in any re-procurement of MAS."

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

34. The Commissioner notes the considerable sums of public money involved with the MAS contract now and in the future. Disclosure of the withheld information would provide clarity regarding the agreed contract and therefore the method of operation. This may potentially result in better value for money future bids which could save public money.
35. The complainant has explained to the Commissioner his specific personal interest in the operation of MAS. Notwithstanding this involvement the Commissioner acknowledges the complainant's public-spirited intentions to make public any wrongdoing which he considers to be resulting from the delivery of MAS. He has expressed his concern as follows:

"MAS has been a disaster with over 1 million jobs lost in manufacturing since 2002, so again BIS may be anxious to hide any incriminating evidence..... The information supplied by BIS for the GAS scheme revealed evidence of a potential £83M fraud by a contractor, in which BIS appears complicit or incompetent.

BIS are currently withholding the identical financial information for the MAS scheme, which I believe is likely to be to conceal a similar fraud regarding the MAS scheme, and profiteering by the same subcontractors.

Both these issues are clearly in the public interest."

36. However, in respect of that point, the Commissioner notes that the complainant is already pursuing his concerns with the Parliamentary and Health Service Ombudsman and has provided the information disclosed in a subsequent request to DBIS to support his case.

*Balance of the public interest arguments*

37. In the Commissioner's opinion there is an inherent public interest in the disclosure of information which would reveal how public authorities have spent public money. Furthermore the Commissioner accepts that the complainant's argument deserves some weight: there is clearly a public interest in ensuring effective spending of public money.

38. However, in the Commissioner's opinion disclosure of the withheld information clearly would allow competitors for the re-tendering of the MAS contract to benefit from a detailed knowledge of Grant Thornton's approach not only to MAS but also to its organisation in bidding for all Government contracts. The Commissioner believes that there is an inherent public interest in ensuring fairness of competition: consequently he agrees with DBIS that it does not serve the public interest for the commercial interests of third parties to be undermined and prejudiced as a result of tendering for Government contracts.
39. In reaching his determination in the circumstances of this case the Commissioner has taken into account the volume of relevant information already disclosed and the extent to which, in respect of the content of the information withheld, disclosure would serve the public interest. On balance the Commissioner has concluded that the public interest in maintaining the exemption - specifically, the point made in the previous paragraph - outweighs the public interest in disclosing the withheld information.

## **Section 40(2)**

40. Section 40 states:

*"(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.*

*(2) Any information to which a request for information relates is also exempt information if –*

*(a) it constitutes personal data which do not fall within subsection (1), and*

*(b) either the first or second condition below is satisfied.*

*(3) The first condition is-*

*(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-*

*(i) any of the data protection principles"*

41. The relevant data protection principle to consider for this complaint is the first data protection principle. This states that:

*"Personal data shall be processed fairly and lawfully and, in particular,*

*shall not be processed unless—*

*(a) at least one of the conditions in Schedule 2 is met, and*

*(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”*

42. The withheld information in this case comprises the names, personal identifiers, such as telephone numbers and email addresses, and job titles/roles of both DBIS and Grant Thornton employees. The Commissioner is satisfied that the names relate to living individuals who may be identified from that data. In the same way, the email addresses and job titles specifically relate to individuals who may be identified by these details. The requested data therefore constitutes personal data.
43. DBIS explained to the Commissioner that it had withheld the personal data relating to junior DBIS staff in non-public facing positions and comparable employees of Grant Thornton and other parties. DBIS also argued that the names of senior members of staff should also be withheld in the circumstances of this case.
44. When considering whether a disclosure of information would breach the first data protection principle the Commissioner firstly considers whether a disclosure of the information would be fair.
45. In considering whether it would be unfair to provide the withheld names the Commissioner has taken the following factors into account:
  - the consequences of disclosure;
  - the data subjects' reasonable expectations of what would happen to their personal data; and
  - the balance between the rights and freedoms of the data subjects and the legitimate interests of the public.
46. The Commissioner understands that the information withheld under section 40(2) is a small part of the requested information and was not specifically requested. DBIS has explained that the staff members detailed on page 77 of the contract are not senior members of staff. The Commissioner therefore considers that they would have a reasonable expectation that their identities would remain private and not be disclosed to the public under the FOIA.
47. The Commissioner appreciates that the requested information has been requested in the context of the professional lives of the individuals concerned. However as they are not senior employees and are not in public facing roles the Commissioner is satisfied they would not have an

expectation that their identities would be disclosed widely in response to a request.

48. DBIS has not provided the Commissioner with any detailed explanation as to the possible consequences of disclosure. However, the Commissioner considers that disclosure of the requested names would be contrary to expectations, and may expose junior employees to undue scrutiny or contact from third parties when the accountability for the contract lies with those at a more senior level. He therefore considers disclosure of identifying information would be unfair and may cause some distress to the individuals concerned.
49. The Commissioner is satisfied that providing the names of these junior employees of DBIS and its contractors would be unfair and unwarranted by reason of prejudice to the rights, freedoms and legitimate interests of the individuals in question.
50. However, the Commissioner does not agree with DBIS withholding identifying information relating to senior members of staff contained in the contract. The employees whose details have been redacted on pages 40, 44, 45, 52, 53 and 59, and also the first three employees listed in the table on page 60, are in senior roles and in many instances the redacted information is already in the public domain. The Commissioner has determined that their names, job titles and contact details should be disclosed.
51. While the Commissioner notes that employees of private companies may have less of an expectation than public authority employees that information identifying them may be disclosed in response to a request, he considers disclosure would be fair in these instances. The individuals are senior staff with relatively high profiles and a public facing element to their roles, as demonstrated, for example, by the availability of contact details for some of the employees on Grant Thornton's website. These individuals also have a degree of accountability in relation to the performance of the contract and there is no indication that there would be consequences arising from disclosure. Therefore the Commissioner does not consider disclosure would be unfair or unwarranted by reason of prejudice to the rights, freedoms and legitimate interests of the individuals in question.
52. The Commissioner also notes that "Roles" (job titles) have been redacted in the tables on pages 59 and 60 in reliance on section 43. He considers that this information, in isolation, is clearly not commercial in nature and therefore does not engage the section 43(2) exemption. As the Commissioner has found that section 40(2) also does not apply to this information, the information contained in the "roles" columns of those tables should be disclosed.

53. In view of the above, the Commissioner is satisfied that DBIS is correct to withhold the names of junior employees discussed at paragraphs 46 to 49 of this Notice.
54. However, the Commissioner has determined that identifying information relating to senior staff of DBIS and its contractors cannot be withheld under section 40(2) and should be disclosed. For the avoidance of doubt, the identifying information which should be disclosed is that relating to employees listed in the contract at pages 40, 44, 45, 52, 53 and 59, and also the first three employees listed in the table on page 60.

## Right of appeal

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55. 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 123 4504

Fax: 0870 739 5836

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

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

56. 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.
57. 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 .....**

**Alexander Ganotis**  
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