

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 March 2016

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) seeking information regarding the cost of living allowance paid to staff overseas. The MOD disclosed some information but withheld the remainder on the basis of section 43(2) (commercial interests) and section 41(1) (information provided in confidence) of FOIA. The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of section 43(2) of FOIA and that in all the circumstances of the case the public interest favours maintaining the exemption.

Request and response

2. The complainant submitted the following request to the MOD on 18 May 2015:

'I would like to see the calculations, assumptions (basis e.g comparator items for comparison of costs v UK) and basis for previous (2014) and current service Local Overseas Allowance. All items included in comparator calculations and those specifically excluded. To include all changes and justifications for the change. Any changes due to exchange rate fluctuations should be highlighted and on what basis they affect the calculation (for instance for such changes is the change based on an assume % of £/€ expenditure. Although, not MOD I would like to request information on what similar allowances (regardless of name) are paid to diplomatic staff in Germany to reflect the difference

in the cost of living in Germany. As above all changes and calculations/assumptions are requested.'

3. The MOD responded on 16 June 2015. With regard to the first part of the request, the MOD provided the complainant with three documents concerning the Local Overseas Allowance. With regard to the second part of the request, the MOD explained that diplomatic staff are paid a Cost of Living Addition (COLA) and that the calculation of COLA rates is undertaken by an independent organisation, Employment Conditions Abroad (ECA). However, as the detailed calculations in respect of COLA were covered by the MOD's contractual arrangement with ECA, such information could not be disclosed. No exemption within FOIA was cited as a basis to withhold this information.
4. The complainant contacted the MOD on 17 June 2015 and explained that he was dissatisfied that the information concerning COLA had not been disclosed.
5. The MOD responded on 1 July 2015 and provided a brief explanation of the aim of COLA but again explained that information relating to the calculation of COLA could not be disclosed.
6. The complainant contacted the MOD on 16 July 2015 and explained that he intended his email of 17 June 2015 to be taken as a request for an internal review. He confirmed that he wished the MOD to conduct a review of its decision to withhold information about the calculations relating to COLA.
7. The MOD informed him of the outcome of the review on 18 August 2015. The review found that the detailed rates and methodology underpinning the rates of COLA are not in fact held by the MOD; such information was owned by ECA. However, the MOD did hold the final output of assignment costs and the detailed composition of the 'shopping basket' but it considered this information to be exempt from disclosure on the basis of section 43(2) of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 5 November 2015 to complain about the MOD's decision to withhold the final output of assignment costs and the detailed composition of the 'shopping basket' on the basis of section 43(2) of FOIA.
9. During the course of the Commissioner's investigation the MOD explained that it also considered the withheld information to be exempt

from disclosure on the basis of section 41(1) (information provided in confidence) of FOIA.

Reasons for decision

Section 43 – commercial interests

10. Section 43(2) 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).'

11. 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.

12. 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.

The MOD's position

13. The MOD argued that disclosure of the withheld information would be likely to prejudice both ECA's commercial interests and those of the MOD (and more broadly HM Government's).
14. With regard to the effect on ECA, the MOD explained that ECA had been consulted about the request and firmly argued that disclosure of the withheld information would be against its commercial interests. (The Commissioner was provided with a copy of this correspondence).
15. ECA argued that disclosure of 'location data' – such as that withheld in this case, would seriously weaken its market position as it would enable third parties to reproduce its methodology. This would allow competitors to use it to determine what cost factors should be taken into account and what individual weight should be applied to each cost factor to formulate a reliable, realistic and reasonable level of allowance to compensate individuals for the additional costs of living overseas in specific locations. The MOD concurred with this assessment and was satisfied that the exemption was engaged at the lower threshold as disclosure of the withheld information would be likely to reduce ECA's competitive advantage.
16. With regard to the impact on the MOD's and the government's commercial interests, the MOD emphasised that disclosure would be likely to lead to a breach of the MOD's contract with ECA. The Commissioner was provided with a copy of the relevant contract condition which specified that all written information supplied by ECA to the MOD remained ECA's copyright and must be kept confidential. The MOD argued that disclosure of the withheld information, without ECA's consent, could lead to ECA discontinuing its business with government and the MOD being forced to look for another supplier who may not offer the service at a cheaper price. The MOD emphasised that there are currently few companies that can offer a service which meets the government's specific requirements in terms of what data are used to assess the cost of living overseas.

The Commissioner's position

17. With regard to the three limb test referred to at paragraph 11, the Commissioner is satisfied that the first limb is met given that the nature of prejudice envisaged to both the ECA and the MOD/government's interests are clearly ones that fall within the scope of the exemption provided by section 43(2).
18. With regard to the second limb, the Commissioner accepts that there is clearly some causal link between disclosure of the withheld information

and harm occurring to ECA's commercial interests. This is because he accepts that it is logical to argue that disclosure of a company's particular methodology, which underpins how it delivers part of its services, is likely to provide its competitors with an advantage. Furthermore, the Commissioner is satisfied that the resultant prejudice which is alleged in relation to ECA is real and of substance. Similarly, in terms of the MOD/government's commercial interests the Commissioner accepts that it is not – in theory - illogical to suggest that if ECA's commercial interests were harmed then it may consider withdrawing its services to government departments. In such a scenario the Commissioner accepts that there could be a negative impact on the government's commercial interests in terms of re-tendering for an alternative supplier and potentially only securing one that delivers similar services at a higher cost.

19. With regard to the third limb, in terms of ECA's commercial interests the Commissioner is satisfied that the third limb is met. He has reached this conclusion given the clear way in which ECA has explained how a competitor could gain a commercial advantage if the withheld information was disclosed.
20. With regard to the MOD/government's commercial interests, the Commissioner is usually somewhat sceptical about the line of argument that suggests that private sector companies will no longer offer their services to public authorities if information is disclosed under FOIA against their wishes. There is after all an inherent commercial benefit to such companies entering into contracts with the public sector and part of doing business with the public sector involves accepting that such clients are subject to FOIA. However, in the circumstances of this case the Commissioner is persuaded that disclosure would be likely to affect the government's commercial interests for the reasons the MOD put forward. The Commissioner has reached this conclusion given the clear and firm manner in which ECA has explained that it would consider disclosure to constitute a breach of contract, the clear way in which ECA has explained how its own commercial interests would be likely to be directly harmed by such a disclosure, and because ECA has a range of other private sector companies who use its services; in other words it is not necessarily dependent upon the public sector clients.
21. For the reasons set out above the Commissioner is satisfied that the exemption contained at section 43(2) is engaged.

Public interest test

22. Section 43(2) is a qualified exemption. Therefore the Commissioner must consider the public interest test contained at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption in relation to the information that he accepts is exempt from disclosure outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

23. The MOD argued that in the circumstances of this case there was a clear public interest in ensuring that the commercial interests of both ECA and the government were not harmed.

Public interest arguments in favour of disclosing the withheld information

24. The MOD acknowledged that there was a public interest in disclosure of the information which would provide greater transparency into public funds. Release of this information would increase taxpayers' and claimants' understanding of COLA and the underlying assumptions and data that resulted in the level of allowances paid in a particular period.
25. The complainant argued that disclosure of the withheld information was necessary so that it was possible to compare the amount the MOD paid service personnel as a contribution to the additional costs of living in Germany in comparison to what the MOD (and other government department) employees received. The complainant argued that such a comparison would allow an assessment of whether there was parity and fairness between the manner in which such allowances were paid.

Balance of the public interest arguments

26. The Commissioner clearly accepts that not only is there a broad interest in the public understanding how public money is spent, but more specifically, individuals in receipt of such allowances are entitled to know that they are being paid a fair and reasonable allowance. The Commissioner therefore acknowledges that there is a public interest in the disclosure of information in order to facilitate the comparison that the complainant wishes to undertake and such a line of argument should not be dismissed likely.
27. However, the Commissioner believes that there is an inherent public interest in ensuring fairness of competition; in that respect he agrees with the MOD that it is against the public interest for the commercial interests of a third party to be undermined simply because they have entered into a contract with a government department. Furthermore,

the Commissioner accepts that it would be clearly against the public interest if the commercial interests of the MOD/government would be harmed. Consequently, given the cumulative public interest in protecting the interests of both ECA and the MOD/government, the Commissioner has concluded that the public interest narrowly favours maintaining the exemption.

Right of appeal

28. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

29. 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.
30. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Jonathan Slee
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