

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 26 June 2017

**Public Authority:** Cabinet Office

**Address:** 70 Whitehall  
London  
SW1A 2AS

### Decision (including any steps ordered)

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1. The complainant has requested Management Information System Online ("MISO") information from the Cabinet Office. The Cabinet Office refused to provide this citing section 43 (commercial interests exemption) as its basis for doing so. It upheld this at internal review. During the course of the Commissioner's investigation, it revised its position and made a disclosure under FOIA.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 43 as its basis for withholding the information which remains withheld within the scope of the request.
3. No steps are required.

### Request and response

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4. On 22 April 2016 the complainant requested information of the following description:

"I would like to make a request under the Freedom of Information Act to the Crown Commercial Service regarding the Estates Professional Services (RM928) framework and its predecessor the Estates Professional Services (RM397) framework: <http://ccs-agreements.cabinetoffice.gov.uk/contracts/rm928>.

Please could I access all the MISO<sup>1</sup> submissions made under this framework in a machine readable format (preferably.csv). As an example, this information is already publicly available for G-Cloud here: <https://digitalmarketplace.blog.gov.uk/sales-accreditation-information/>.

Thanks to the open data available on expenditure, we already know how much each supplier received from across the public sector. Therefore the amount paid to suppliers is clearly not an issue of commercial confidentiality. We're only seeking to know how much the framework contract was used and by which suppliers.

Please let me know if you require any clarifications."

5. On 23 May 2016, the Cabinet Office explained that it needed further time to consider the balance of public interest in respect of section 43. On 20 June it replied. It refused to provide the requested information. It cited the following exemption as its basis for doing so:
  - section 43(2) (prejudice to commercial interests).
6. The complainant requested an internal review on 1 July 2016.
7. The Cabinet Office sent her the outcome of its internal review on 22 July 2016. It upheld its original position.
8. During the course of the Commissioner's investigation, the Cabinet Office disclosed some of the requested information.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 25 July 2016 to complain about the way their request for information had been handled. As noted above, the Cabinet Office made a partial disclosure of the requested information on 27 March 2017 during the course of the Commissioner's investigation. However, the complainant remained dissatisfied with the extent of this disclosure and explained on 4 May 2017 that they wished to proceed with the complaint.
10. The Commissioner has looked at whether the Cabinet Office is entitled to rely on section 43(2) as its basis for withholding the information within the scope of the request which remains withheld.

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<sup>1</sup> <https://miso.ccs.cabinetoffice.gov.uk/Pub/Login.aspx?ReturnUrl=%2f>

11. It transpires that the Cabinet Office's disclosure of 27 March 2017 included more information than it intended to disclose. The Commissioner drew this to the Cabinet Office's attention. The Cabinet Office replied that it still intended to rely on the position it had previously argued with respect to this information, despite its inadvertent additional disclosure (it had submitted detailed arguments to the Commissioner on 14 March 2017 about what it proposed to continue to withhold).
12. Although a further inadvertent disclosure has been made, beyond what the Cabinet Office intended to disclose, the Commissioner will consider the matter as if the inadvertent disclosure had not been made. The Commissioner considers that this inadvertent disclosure was, strictly speaking, outside FOIA. While a public authority may make a disclosure of requested information outside FOIA either purposely to resolve a matter informally or by mistake, the Commissioner has no remit to consider such disclosures.

## Reasons for decision

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13. The Cabinet Office explained the background to this request as follows:

"In December 2011, Crown Commercial Service introduced a new online system to enable suppliers to provide their management information returns through an online portal, Management Information System Online (MISO). It is the MISO Returns or Framework Agreement RM928 that the applicant seeks. Details of this agreement are published at <http://ccsagreements.cabinetoffice.gov.uk/contracts/rm928>. Essentially this agreement allows public sector organisations to access professional advice, guidance, negotiation and assistance on property and estates issues through favourable terms and without the burden of running a separate tender for each piece of work needed. As there are over 6000 MI returns, to gather and review them would be far in excess in of the cost limits. We have, however, taken the applicant's request to mean not the returns themselves but the information contained within them which is automatically collated as part of the MI process. This understanding is based on the reference by the applicant to the published expenditure via G-Cloud.

The G-Cloud Spend referred to by the applicant is published with information under [certain] fields."
14. The Cabinet Office has now disclosed some information within the scope of the request including, for example, "Sector"; "Customer Name"; and "Supplier name". However, it has relied on section 43(2) as its basis for withholding other information in other fields.

15. The Cabinet Office argued that the remainder within the scope of the request was exempt from disclosure on the basis of section 43(2) of FOIA. This section states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any party. It explained that both its own commercial interests and the commercial interests of third parties – customers using the arrangement and suppliers providing services to them – would, or would be likely to be prejudiced by disclosure.
16. In order for a prejudice based exemption, such as section 43(2) to be engaged the Commissioner believes that three criteria must be met:
  - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
  - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure ‘would be likely’ to result in prejudice or disclosure ‘would’ result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner’s view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
17. The Cabinet Office explained that some of the information could expose information about different organisations’ finance processes. It explained that, using this information, what it termed “malicious actors” could forge or duplicate invoices. It explained with specific reference to the withheld information, how this could be done.
18. The Cabinet Office also explained how other information, (which it described as “rate cards for suppliers”) would prejudice named supplier negotiations with non-public sector bodies. It explained that the Commissioner had accepted the use of section 43(2) in relation to such information in previous decisions.
19. It provided additional arguments with specific reference to the withheld information explaining how outcomes that were prejudicial to the commercial interests of suppliers and customers would be likely to arise.

20. The Cabinet Office acknowledged that certain parts of the withheld information may well be in the public domain as a consequence of disclosure by some of the parties "under their own individual spend publications" in a format separate to this one. However, information was provided to it in confidence and, in its view, it was important to respect that expectation of confidentiality in order for this particular process to function.
21. The Commissioner had asked the Cabinet Office how it had established the concerns of third parties that it had referred to. This follows Information Tribunal decision in the case *Derry Council v Information Commissioner* (EA/2006/0014), where speculative arguments which are advanced by public authorities about how prejudice may occur to third parties are not ascribed particular weight. The Commissioner accepted that it may not be necessary to explicitly consult the relevant third party, arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns.
22. The Cabinet Office acknowledged that it could not provide any participant in the scheme with a guarantee of confidentiality. It referred to paragraph 22.3 of the Estates Professional Services Framework Agreement which says:

"The Authority is required to form an independent judgement upon whether the information is exempt from disclosure under the FoIA or the EIR and whether the public interest favours disclosure or not. The Authority cannot guarantee that any information indicated as being 'confidential' or 'commercially sensitive' by a Potential Provider will be withheld from publication."<sup>2</sup>
23. However, it said that it had liaised with suppliers previously regarding the type of information under consideration here and concerns regarding likely prejudice to commercial interests had been raised.
24. Regarding prejudice to its own commercial interests, namely those of Crown Commercial Services ("CCS"), it referred to the impact disclosure of a specific field would be likely to have. It explained how disclosure would provide insight into its own commercial activity and the prejudicial consequences for that activity which could arise.
25. The complainant had argued that the information in question was not commercially sensitive and that similar information was available in

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<sup>2</sup> <https://data.gov.uk/data/contracts-finderarchive/contract/1071628/>

other published frameworks. The Cabinet Office had argued to the complainant that it was the construct of this particular framework that made a prejudicial outcome for third parties more likely.

26. A commercial interest relates to a person's ability to participate competitively in a commercial activity, ie the purchase and sale of goods or services.
27. Considering the three step test referred to above, the Commissioner is satisfied that the nature of harm envisaged to the third parties in question and to CCS is clearly one that is protected by the exemption contained at section 43(2). The first limb is therefore met.
28. The Commissioner is also satisfied that there is a causal relationship between disclosure and the prejudicial outcome for third parties and for CCS that the Cabinet Office has described. The Commissioner is also satisfied that this is "of substance".
29. Considering the likelihood of commercial prejudice arising, the Commissioner considers that the likelihood of prejudice occurring is one that represents a real and significant risk. She can see how, for example, invoices could be readily fabricated by "malicious actors" using the withheld information. She also accepts that disclosure of information which allows for the ready deduction of "rate cards" would be likely to result in a prejudicial outcome for suppliers. In addition, the Commissioner accepts the likelihood of prejudice to CCS where a specific field is disclosed. That said, she is concerned that the Cabinet Office did not provide more detail to support its position in this regard.
30. In light of the above, the Commissioner is satisfied, therefore, that the section 43(2) is engaged with respect to the information which remains withheld.

### **Public interest test**

31. Section 43 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
32. The complainant is sceptical as to the extent of any prejudicial outcome and is concerned that insufficient information is being put into the public domain about commercial activity in the public sector. They have argued that this is particularly the case with MISO return information as requested here.
33. The Cabinet Office accepts that there is a public interest in openness and transparency in the Government's commercial activities and in accountability in the use of public funds. It also acknowledged that



“private sector bodies engaging in commercial activities with the public sector must expect some information about those activities to be disclosed”.

34. However, it argued that there was a strong public interest in avoiding the prejudicial outcome that would be likely to arise for both suppliers and customers. It was, it argued, important that each could negotiate on a level playing field in both the private and public sector. Where the party concerned was a public sector organisation, this would be likely to lead to a less effective use of public money contrary to the public interest.
35. It also argued that there was a strong public interest in preserving the free flow of information between CCS, customers and suppliers. It was important that CCS be considered a trusted commercial partner. Where this is undermined through disclosure, this would prejudice the effective delivery of commercial services.

*Balance of public interest*

36. The Commissioner is unconvinced by the Cabinet Office's assertion that prejudicing the free flow of information to it about financial transactions, as asserted above, is a factor that can be considered for section 43. The Commissioner accepts that there can be a public interest in avoiding prejudice to the free flow of information in general terms. However, she is not persuaded that this, of itself, is a relevant factor when considering section 43 in the circumstances of this case. The argument here relates more closely to the effective operation of the framework to which the requested information relates.
37. The Commissioner accepts that there is a public interest in as much transparency as possible about how public money is spent. Incomplete information can, of itself, undermine transparency because it could be seen as providing an inaccurate picture. That said, there is nothing in the FOIA to prevent a public authority from providing an explanation about information it discloses under FOIA. The fact disclosure may include incomplete information is not necessarily a reason for withholding information.
38. In the Commissioner's view, however, there is a compelling public interest in avoiding prejudice to the commercial interests of suppliers and customers in this case. The Commissioner sees how it would be relatively simple, for example, to create fake invoices in order to obtain money under false pretences using some of the withheld information. She also acknowledges the harm this may well cause to named suppliers and customers. Similarly, there is a strong public interest in avoiding distortion of the market which could arise where “rate card” information can be readily determined from the withheld information.

39. The Commissioner also agrees that there is a public interest in supporting the ability of public sector organisations to negotiate in a manner that provides best value for the public purse.
40. In light of the above, the Commissioner has concluded that the public interest favours maintaining the exemption at section 43(2) in relation to the withheld information in this case. She has given particular weight to the public interest in avoiding falsification of invoices and in maintaining a level playing field for negotiations.
41. She would encourage the Cabinet Office to revisit regularly its approach in relation to information of the type requested here. It was only after the request in this case (and the Commissioner's subsequent intervention) that it made further disclosure to the complainant of some of the requested information. It may have further scope for proactive disclosure of related information in the future.



## Right of appeal

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42. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

43. 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.
44. 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 .....**

**Gerrard Tracey  
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