

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 May 2017

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) for certain parts of a contract between it and BAE Systems concerning the Type 26 Global Combat Ships. The MOD provided the complainant with the information he requested but redacted certain parts on the basis of section 43(2) (commercial interests) of FOIA. The Commissioner is satisfied that the majority of the withheld information is exempt from disclosure on the basis of section 43(2). The only exception to this finding is in respect of the small portions of information which although the MOD had sought to withhold had in fact already been disclosed to the complainant in response to an earlier request. The Commissioner has also concluded that the MOD breached section 17(3) of FOIA given the time it took to complete its public interest considerations.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with a further copy of the information he requested ensuring that any information which was provided in response to request Ref FOI2015-09397 is **not** redacted from the information falling within the scope of the complainant's request of 17 December 2015.
3. 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.

Request and response

4. The complainant submitted the following request to the MOD on 17 December 2015:

'Thank you for your response to my enquiry for a contents list of Contract No SHIPACQ036.

*Please provide an electronic copy of pages 1 to 128 inclusive, Schedule 3 pages 330 to 335, Schedule 19 pages 467 to 493 and Schedule 21 pages 495 to 513 of Contract No SHIPACQ036.'*¹

5. The MOD acknowledged receipt of this request on 4 January 2016 and explained that it would need additional time to consider the balance of the public interest test in respect of the information that had been requested.
6. The MOD sent a number of subsequent letters to the complainant further extending the time it needed to complete its public interest test considerations until a substantive response was issued on 8 August 2016. At this point the MOD provided the complainant with a copy of the parts of the contract he had requested but with numerous sections redacted on the basis of the exemptions contained at sections 43(2) and 40(2) of FOIA.
7. The complainant queried the basis of the redactions made by the MOD in an email also sent on 8 August 2016. The MOD responded on 15 August 2016 and provided further reasoning behind its reliance on section 43(2) of FOIA.
8. The complainant subsequently contacted the MOD on 30 August 2016 in order to formally request an internal review of the redactions which had been applied.
9. The MOD informed him of the outcome of the internal review on 11 November 2016. With the exception of a small amount of information, the review upheld the application of the exemptions cited in the refusal notice.

¹ The request concerns a contract between the MOD and BAE Systems for the demonstration phase relating to the building of eight Anti-Submarine Type 26 Global Combat Ships. Further background details are available here <http://www.bbc.co.uk/news/uk-scotland-scotland-business-31554494>

Scope of the case

10. The complainant contacted the Commissioner on 2 December 2016 in order to complain about the MOD's handling of his request of 17 December 2015. The complainant disputes the MOD's reliance on section 43(2) as a basis to redact information from the information falling within the scope of his request. Furthermore, he is also dissatisfied with the length of time it has taken the MOD to process his request.

Reasons for decision

Section 43 – commercial interests

11. 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).'

12. 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.

13. 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

14. The MOD argued that disclosure of the redacted information would prejudice both BAE System's (BAES) commercial interests and those of the MOD.
15. In respect of BAES' commercial interests, the MOD explained that BAES had been consulted about the request and firmly argued that disclosure of the redacted information would be against its commercial interests. The Commissioner was provided with a copy of this correspondence.
16. In its responses to the complainant, the MOD identified the following reasons why disclosure of the withheld information would prejudice its commercial interests or those of BAES:
 - Disclosure of the scope of the transformation activity required would prejudice BAES' commercial interests;
 - The disclosure of the specific contract values would prejudice any future competitive exercise which would unfairly disadvantage BAES' commercial interests;
 - Release would also prejudice BAES' commercial interests within the market place by adversely affecting its ability to effectively compete for other ship design and build projects; and
 - Release of the information which relates to the MOD's unique negotiated position with BAES would weaken both the MOD's and government's position on other contract negotiations, both now and in the future.
17. The MOD emphasised that the withheld information relates to highly sensitive issues that are the subject of current and future commercial negotiations between the interested parties on the Demonstration Phase of the project and subsequent contracts.
18. In its submissions to the Commissioner, the MOD provided a significantly more detailed explanation to support its reliance on section 43(2) of FOIA. However, such submissions make direct and lengthy reference to the content of the withheld information and therefore the Commissioner has not reproduced these submissions here.

The complainant's position

19. The complainant argued that the MOD's assessment of the request for information, and the resulting responses, were extremely shallow and lacked the expected professionalism in discriminating between what may be released and what is exempt or not in the public interest. Indeed he noted that some subject headings had been redacted when, in responding to his previous request for simply a Contents List of the contract, MOD reference FOI2015-09397, such headings had been provided.
20. The complainant suggested that the requested information concerned only the commercial aspects of the transaction reflected in the contract in question. No product, technical or national security information has been requested; only the terms and conditions of the transaction and that such information could be disclosed without any prejudice to the commercial interests of the MOD or BAES.

The Commissioner's position

21. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the MOD clearly relates to the interests which the exemption contained at section 43(2) is designed to protect.
22. With regard to the second criterion, the Commissioner is satisfied that disclosure of the information withheld on the basis of section 43(2) has the potential to harm both BAES' commercial interests and those of the MOD. The Commissioner has reached this conclusion given that the redacted information relates directly to a number of commercial issues that are the subject of current and future negotiations between the parties in question. Moreover, the Commissioner is satisfied that any such prejudice would clearly be of substance.
23. The only exception to this finding is in respect of the contract headings which although redacted on the document disclosed by the MOD in response to this request had in fact been provided to the complainant in response to an earlier request, ie MOD reference FOI2015-09397. In light of this previous disclosure the Commissioner does not believe that disclosure of these contract headings, albeit set into the context of the contract itself, could potentially result in prejudice to either the MOD or BAES.
24. With regard to the third criterion, the Commissioner is satisfied that there is a more than a hypothetical risk of prejudice occurring to both the MOD and BAES if the redacted information was disclosed; rather the risk of such prejudice occurring can be correctly described as one that is real and significant. In respect of BAES the Commissioner has reached this conclusion given that there are a number of different ways in which

disclosure could harm BAES' commercial interests. For example, the internal review response focuses on the harm that could be caused to BAES' interests by revealing the level of transformation activity required but also by undermining BAES' negotiating position in competitive exercises in the future with sub-contractors in respect of this contract or discussions in respect of other contracts in the future. Furthermore, the MOD's submissions to the Commissioner make reference to a number of further ways which, because of the specific content of the withheld information, could lead to BAES' commercial interests being undermined. In respect of the MOD, having reviewed the nature of the withheld information the Commissioner accepts that this is sufficiently detailed such that its disclosure is likely to jeopardise the MOD's ability to negotiate effectively with suppliers in respect of similar contracts in the future.

25. In reaching the conclusion that section 43(2) is engaged in respect of the majority of the withheld information, the Commissioner wishes to emphasise that she has considered the grounds of complaint raised by the complainant. However, based upon the submissions provided to her by the MOD, which includes a copy of the MOD's internal public interest test assessment, it is clear to the Commissioner that the MOD's approach to applying the redactions has been far from cursory. Rather, the submissions demonstrate that the MOD has taken a careful and detailed approach to determining what information it considers was, and was not, potentially prejudicial.

Public interest test

26. 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.
27. The complainant argued that the withheld information was of public interest and should be open to public scrutiny. Furthermore, the complainant argued that the sub-contractors of the main contractor have an interest in the information to assess the flow-down of terms from the main contract to the sub-contractor, to assess the extent to which the main contractor is over-reaching in applying more onerous terms than were provided in the main contract, which will affect the negotiations of those subcontracts. The complainant also argued that MOD contractors, and the MOD itself, need to be clear on the extent to which sensitive commercial outcomes from lengthy negotiations will be exposed to public scrutiny. He suggested that exposing these outcomes will have the effect of levelling the playing field between big companies and small companies in negotiations with the MOD, so that all players have similar risk exposures.

28. The MOD argued that there was a very strong public interest in safeguarding the commercial interests of the UK government as well as its suppliers.
29. The Commissioner agrees that there is a legitimate public interest in the public being able to understand the commercial framework within which the Type 26 Global Combat Ships are being procured. This would allow the public to understand whether the costs associated with the procurement demonstrate that value for money is being obtained for taxpayers. In the Commissioner's opinion this argument attracts particular weight given the value of the contract in question. Furthermore, the Commissioner accepts the points made by the complainant that disclosure of the withheld information could assist any sub-contractors in better understanding the main contract between the MOD and BAE. Moreover, that there is arguably a public interest in ensuring fairness of competition between suppliers to the MOD and this extends to BAES' relationships with its sub-contractors.
30. However, this public interest in ensuring fairness of competition includes BAES itself; ie there is a public interest in ensuring that companies do not have their commercial interests harmed simply because they have entered into contracts with the government. Furthermore, the Commissioner believes that there is an inherent, and very strong, public interest in ensuring that the government's own commercial interests are not undermined. Given the cumulative weight that should be attributed to these two reasons, the Commissioner is satisfied that the public interest favours maintaining section 43(2) of FOIA.

Section 10 and section 17

31. Section 10(1) of FOIA requires public authorities to respond to a request promptly and in any event within 20 working days of receipt.
32. Section 17(1) of FOIA explains that if a public authority intends to refuse to comply with a request it must provide the requestor with a refusal notice stating that fact within the time for compliance required by section 10(1). Section 17(3) allows a public authority to extend its consideration of the public interest for a reasonable period of time if necessary. The Commissioner believes that this should normally be no more than an extra 20 working days, which is 40 working days in total to deal with the request. Any extension beyond this time should be exceptional and the public authority must be able to justify it.
33. In this case the complainant submitted his request on 17 December 2015 but the MOD did not inform him of its public interest test considerations until 8 August 2016, 161 working days later. The Commissioner recognises that the MOD's considerations in respect of this request involved the extensive analysis of a complex contract. The

Commissioner is not unsympathetic to the time and effort expended by the MOD in responding to this request. However, she does not accept that such a lengthy period of time for considering the public interest was reasonable in all the circumstances.

34. Consequently the Commissioner has found that the FCO has breached section 17(3) of FOIA by failing to inform the complainant of the outcome of its public interest deliberations within a reasonable timeframe.

Other matters

35. As noted above the Commissioner has concluded that the MOD breached 17(3) of FOIA by failing to complete its public interest test considerations in a reasonable period. The complainant also raised concerns with the Commissioner about the MOD's delays in completing the internal review. FOIA does not provide for a statutory time limit within which such reviews must be completed. These matters are, however, addressed in the Code of Practice, issued under section 45 of FOIA and in the Commissioner's guidance. In the Commissioner's view most internal reviews should be completed within 20 working days or 40 working days in complex cases.
36. In the circumstances of this case the complainant requested an internal review on 8 August 2016. The MOD informed him of the outcome of the internal review on 11 November 2016. It therefore took the MOD 69 working days to complete its internal review. The Commissioner considers this to be an excessive period of time, particularly taking into account the length of time the MOD took to initially respond to the request. The Commissioner would remind the MOD of its responsibilities in relation to responding to requests promptly and dealing with any internal reviews in a timely manner.

Right of appeal

37. 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

38. 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.
39. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF