

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 April 2018

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested details of a £2.5 million settlement for a contractual claim which was listed in the Home Office's ("HO") 2015-16 annual accounts. The HO refused to provide the requested information citing section 43(2) (commercial interests) of the FOIA as its basis for doing so; it later added reliance on section 41(1) (information provided in confidence). The Commissioner's decision is that neither exemption is engaged.
2. The Commissioner requires the HO to take the following steps to ensure compliance with the legislation:
 - disclose the requested information or issue a fresh response, compliant with section 17 of the FOIA, which does not rely on section 43(2) or 41(1).
3. The HO 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 FOIA and may be dealt with as a contempt of court.

Request and response

4. On 28 November 2016 the complainant wrote to the HO and requested information in the following terms:

"On page 108 of your annual accounts for 2015-16 you disclose that £2.5million was paid to settle a contractual claim."

Please could you state who received this money and details on what the contract was, what if any of it was delivered and why the claim was paid".

5. The HO responded on 23 January 2017 and refused to provide the requested information. It cited section 43(1) (commercial interests) of the FOIA as its basis for doing so.
6. Following an internal review the HO wrote to the complainant on 16 February 2017. It revised its position, stating section 43(2) of the FOIA instead of 43(1), but still maintained that the requested information was exempt from disclosure.
7. During the Commissioner's investigation the HO added reliance on section 41(1) of the FOIA.
8. The HO has requested that *"any indication as to the content of the withheld information should not be disclosed or reproduced in the Decision Notice"*. The Commissioner will oblige so far as it is reasonably practicable.

Scope of the case

9. The complainant contacted the Commissioner on 17 May 2017 to complain about the way his request for information had been handled. In his view, he believed that the public interest favoured disclosure of the withheld information because of the *"not insignificant sum of money"* concerned.
10. The Commissioner commenced her investigation on 12 October 2017. She wrote to the HO raising various queries about its reliance on section 43 of the FOIA. Having unsuccessfully chased a response to her enquiries, the Commissioner issued an Information Notice on 4 January 2018, formally requiring a response.
11. The HO provided its response on 2 February 2018. It provided some withheld information for the Commissioner's consideration but neither the original contract nor details of the settlement agreement which it relied on were included in its correspondence. The Commissioner raised the matter and these were provided on 6 February 2018. (Reference was also made to a consent order - this was provided to the Commissioner later on in her investigation.)
12. The HO added reliance on section 41(1)(b) (information provided in confidence) at this late stage, but did not advise the complainant about its change in position. The Commissioner therefore asked it to do so,

which it did, but it failed to offer any reasons to the complainant in explaining why it was engaged. In view of the already considerable delay in this case, the Commissioner has decided to consider the matter as things stand.

13. Furthermore, it is unclear which exemption is being applied to the withheld information as the responses are intermingled.
14. The Commissioner will consider the citing of sections 43 and 41 below.

Reasons for decision

Section 43 – commercial interests

15. Section 43(2) states:

"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)."

16. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner's guidance on the application of section 43¹ states:

"...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 service".

17. Section 43 of the FOIA is also subject to the public interest test. Therefore, in addition to demonstrating that disclosure would or would be likely to prejudice the commercial interests of itself or a third party, the HO must also consider the public interest arguments for and against disclosure and demonstrate that the public interest rests in favour of maintaining the exemption.

18. In its internal review the HO advised the complainant that it considered:

"... that section 43(2) is engaged because disclosure of the requested information would entail a significant risk of prejudice to the commercial interests of the Home Office. Contractors taking part in a tender process have a right to expect that the details of their bid will remain confidential. If the Home Office were to

¹https://ico.org.uk/media/fororganisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

contravene this principle challenges from suppliers would be likely to follow, lengthening the tender process and increasing costs”.

19. The Commissioner does not afford any weight to this argument as the request does not relate to the tendering process or bids.

20. The HO further argued:

“In addition, disclosure of the information would be likely to lead suppliers, contractors and buyers altering their negotiating strategy resulting in higher prices and lower receipts. This would create an uneven playing field for all procurements and affect value for money in procurements for the Home Office. This would go against the Department’s overall objective of achieving best value for money for the taxpayer and would not be in the public interest”.

21. Again, the requested information does not relate to negotiations and the Commissioner does not consider this argument to be of relevance.

22. The HO advised the complainant that the third party concerned:

“... received £2.5M in settlement of a commercial claim. Release of this information may encourage other suppliers to submit similar commercial claims being aware of the identity of the claimant potentially allows other suppliers to seek more detail and make assumptions potentially allowing them to submit similar commercial claims. This would clearly be prejudicial to the interests of the Home Office. Furthermore, the settlement agreed is subject to a confidentiality clause contained within the final Settlement Agreement signed by the Home Office and the supplier. I consider that release of information in relation to this commercial claim would go against the spirit of the confidentiality clause causing reputational damage to the Home Office and in turn causing suppliers to mistrust the Home Office which could prevent future suppliers from tendering for future Home Office services. This would not assist in achieving best value for money and would not be in the public interest”.

23. It is publicly known that the payment was made to settle a commercial claim. Furthermore, it is apparent that there is a signed settlement agreement in relation to this payment. In its submission to the Commissioner the HO stated:

“The overarching reasons for maintaining the exemption is that the Home Office does not want to disclose:

(a) The names of those who received the financial settlement to which this request for information relates; and

(b) The terms of the settlement which the parties have agreed and are cited in a Court Order as confidential”.

24. The Commissioner has seen two versions of the settlement agreement, one of which seems to be a final version signed by the parties, as well as email correspondence between the parties which originated as a result of this information request and did not take place until after the Commissioner commenced her investigation. Although unclear, the information which seems to be the withheld information in this case is only provided as a summary in a letter from the HO to the Commissioner; no further documentation was provided and no details regarding any further actual information which is held.
25. Having considered the withheld information the Commissioner is satisfied that it relates to a commercial activity, ie the fulfilment of a contract.

Likelihood of prejudice occurring and affected parties

26. In order for the exemption to be engaged it is necessary for it to be demonstrated that disclosure of the information would, or would be likely to, result in some identifiable commercial prejudice which could affect one or more parties.
27. The Commissioner has been guided on the interpretation of the phrase “*would, or would be likely to*” by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged, i.e. either prejudice “*would*” occur or prejudice “*would be likely to*” occur. The HO has advised that it is relying on the lower level of likelihood, ie that the prejudice would be likely to occur.
28. With regard this level of prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner [EA/2005/0005]* confirmed that “*the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk*” (paragraph 15).
29. In this case the HO has stated to the Commissioner that disclosure of the information *would be likely to* prejudice the commercial interests of both itself and the third party. As cited above, it has stated that it does not wish to disclose the names of those who received the financial settlement along with the terms of that settlement, although it has also stated to the Commissioner that it considers the settlement agreement itself to fall outside the scope of the request.

Consultation

30. In accordance with the recommendations of the Code of Practice issued under section 45 of the FOIA (the "Code"), a public authority should contact any third party for its views when considering disclosure of contractual information. The HO advised the Commissioner that, at the time of the original request, it had not contacted the parties concerned because the company *"was no longer trading, so their commercial interests were not thought to be affected"*. However, during the Commissioner's investigation, it had consulted with the parties concerned and sought their views as to the disclosure of the information. The Commissioner has had sight of the relevant correspondence and has considered this in reaching her decision.

Nature of the Prejudice

31. The Commissioner has considered the arguments provided. In summary these are:

"In releasing the information sought, there is a real risk that the Home Office would be disclosing information which would undermine its ability to effectively manage its relations with suppliers across a tightly knit market place;

Releasing the information sought would result in disclosure of the terms of a confidential settlement agreement".

32. The HO provided further commentary in respect of the terms of the settlement agreement, however, as the HO seems to consider that the settlement agreement falls outside the scope of the request, this is confusing. In any event, the Commissioner does not consider these arguments to be relevant to section 43 as they refer to confidentiality matters, so she has not considered them in relation to this exemption. Also, it is noted that the HO has failed to specify which information it considers to actually fall under this exemption; rather, it has been generally cited in respect of any information held.
33. The Commissioner does not consider that any of the arguments provided relate to the third party's 'commercial interests' in any way. This is simply because it was no longer trading at the time of the request so therefore could not be considered to have any commercial interests. As noted in paragraph 30, above, the HO itself acknowledges that because it was not trading it did not consider the third party's commercial interests to be affected (albeit, confusingly, it still maintains reliance on this exemption). Whilst the third party may have subsequently raised objections to disclosure these are in terms of 'confidentiality' rather than commercial interests, as indeed were all the queries which the HO actually put to the third party when undertaking its consultation. She

therefore does not find any of the arguments provided in connection with that party to be relevant to the application of this exemption.

34. In respect of its own commercial interests, the Commissioner has not found many of the arguments to be relevant, as explained above. The HO seems to be chiefly concerned with disclosing any potential weaknesses in the related business area as it believes that in doing so it may encourage other suppliers to submit similar commercial claims. Whilst she understands that there may be some concerns, the Commissioner is not convinced that such matters relate to the HO's own commercial interests, ie it they do not relate to the purchase and sale of goods or services; rather, they concern issues about exposing any potential vulnerabilities which the HO may be subject to if the information was disclosed. Although alluded to, the HO has not provided specific evidence of where a similar issue might occur thereby resulting in the payment of a further settlement agreement with another party. And, even were this a possibility, this would not be a matter of 'commercial interests'; rather, it would be a payment made in respect of a legal settlement. In this respect, the Commissioner does not consider that the arguments presented relate to section 43(2).
35. In cases where an authority has failed to provide adequate arguments in support of the application of an exemption the Commissioner does not consider it to be her responsibility to generate arguments on its behalf. In this case the Commissioner considers that the HO has had ample opportunities to justify its position, including at the time of its initial response, at the internal review stage, in responding to her Information Notice and in providing a further update to the complainant. On the basis of the available evidence, the Commissioner has concluded that the HO has failed to demonstrate that section 43(2) is engaged.

Section 41 – information provided in confidence

36. This exemption provides that information is exempt if it was obtained by the public authority from any other person and the disclosure would constitute an actionable breach of confidence.
37. It was relied on by the HO at a very late stage, being cited in response to the Commissioner issuing an Information Notice.
38. The HO did not advise the complainant about the addition of this exemption so the Commissioner advised it to do so. In then doing so it gave only the briefest of explanations and advised him:

"The exemption applies where a breach of confidence would be 'actionable'. For the purposes of section 41 it is assumed that a breach of confidence will only be 'actionable' if a person could bring a legal action and be successful. We consider that this test is met".

39. There was no further explanation afforded as to why it considered the exemption to apply or what information it was being applied to. In view of the considerable delay, the Commissioner finds this to be an extremely disappointing rationale for citing the exemption. It offers the complainant no reasoning and, therefore, no opportunity to counter the position.
40. As with section 43, above, the HO has failed to identify which parts of the withheld information it considers to fall under this exemption; rather, it has just generally been cited in respect of any information. She has assumed that it is claiming that disclosure of the details which were included in its letter to her of 2 February 2018 would breach both the settlement agreement and consent order, although this is unclear.
41. The Commissioner has viewed two versions of the settlement agreement, one of which seems to be a final document signed by the parties. She was not provided with a copy of the consent order so is unable to take its content into consideration.
42. As requested by the HO, the Commissioner will not disclose any more detail than is absolutely necessary. She therefore draws the HO's attention to the following sections in the two settlement agreements it provided:

Document dated 26 May 2016
 - Paragraphs 3.1, 4.1 and 13.1 to 13.6
Document dated 19 July 2016
 - Paragraphs 6 and 14.1 to 14.5
43. The Commissioner has reached her decision based on the wording of these paragraphs.
44. As with the citing of section 43, above, in cases where a public authority has failed to provide adequate arguments in support of the application of an exemption, the Commissioner does not consider it to be her responsibility to generate arguments on its behalf. In this case the Commissioner considers that the HO has had ample opportunities to justify its position, including at the time of its initial response, at the internal review stage, in responding to her Information Notice and in providing a further update to the complainant. On the basis of the available evidence, the Commissioner has concluded that the HO has failed to demonstrate that section 41(1) is engaged.

Other matters

45. As well as finding above that the HO is in breach of the FOIA, the Commissioner has also made a record of the delay in this case. This may form evidence in future enforcement action against the Home Office should evidence from other cases suggest that there are systemic issues within the HO that are causing delays.

Right of appeal

46. 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

47. 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.

48. 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

**Carolyn Howes
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