

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 April 2019

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

#### Decision (including any steps ordered)

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1. The complainant requested information about the procurement process for asylum accommodation and support services in specified regions. The Home Office refused to provide the requested information, citing section 43(2) of FOIA, the exemption for commercial interests. This notice relates to part one of the request only.
2. The Commissioner's decision is that section 43(2) is not engaged.
3. The Commissioner therefore requires the Home Office to take the following steps to ensure compliance with the legislation:
  - disclose the information in part one of the request.
4. The Home Office 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

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5. On 23 August 2018, the complainant wrote to the Home Office and requested information in the following terms:

*"The attached letter from the minister of state for immigration describes the procurement process for asylum accommodation and support services in the North East, Yorkshire and the Humber and Northern Ireland. It notes that initially, when these*

*contracts went out to tender, the department received no compliant bids.*

*Following this, it says, "officials undertook engagement with potential bidders and the wider market to identify why there were no compliant bids for these regions". In relation to this engagement, please provide the following information:*

- 1. Were any of the organisations contacted as part of this engagement registered providers of social housing?*
- 2. Please provide the names of all the organisations contacted as part of this engagement.*
- 3. Please provide copies of emails or letters that were sent and any minutes of meetings that were held as part of this engagement.*

*If it is not possible to provide the information requested due to the information exceeding the cost of compliance limits identified in Section 12, please provide advice and assistance, under your Section 16 obligations, as to how I can refine my request to be included in the scope of the Act.*

*In any case, if you can identify ways that my request could be refined please provide further advice and assistance to indicate this."*

6. The Home Office responded on 11 September 2018. It refused to provide the requested information citing section 43(2) of FOIA, the exemption for commercial interests.
7. On 11 September 2018, the complainant requested an internal review in relation to part one only of his request, arguing that section 43(2) could not be applied to this part.
8. Following its internal review the Home Office wrote to the complainant, late, on 30 November 2018, and stated:

*"I note that in your request for an internal review you acknowledge that section 43(2) was correctly applied to withhold the names of the organisations. However the response did not provide an answer to question 1 of your request. I apologise for this omission and can now provide an answer.*

*It is the view of the Home Office that revealing whether any of the organisations that were involved in the engagement process were registered providers of social housing could be used to identify them and that this would be likely to prejudice their*

*commercial interests. This information is therefore exempt from disclosure under section 43(2) of the FOIA.*

*My conclusion is that the original response was correct in citing the exemption to withhold the information for questions 2 and 3 of your request. However it failed to answer question 1 of your request and this has now been answered in the internal review report."*

## Scope of the case

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9. The complainant contacted the Commissioner on 2 January 2019 to complain about the way part one of his request for information had been handled.
10. Despite a number of reminders, the Home Office failed to provide a substantive response to the Commissioner's investigation. In light of this, the Commissioner advised the Home Office that in the absence of any further submissions regarding its reliance on section 43 of FOIA, together with its failure to explain how answering part one of the request would possibly identify any of those organisations involved, she would proceed to a decision notice.
11. The Commissioner has considered whether the Home Office was entitled to rely on section 43(2) of FOIA in relation to part one of the request.

## Reasons for decision

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### Section 43 – commercial interests

12. Section 43(2) of FOIA states that information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any party (including the public authority holding it). Section 43(2) is a qualified exemption which means that, if a public authority is able to satisfy the test of prejudice, it must then go on to consider the balance of the public interest in disclosure.
13. The successful application of section 43(2) is dependent on a public authority's ability to demonstrate a clear link between disclosure and the commercial interests of a party. The test of prejudice is not a weak test; there must be a significant risk of the prejudice described in the exemption occurring and the prejudice must be real, actual or of substance and therefore capable of harming the interest.

14. In line with Tribunal decisions, the Commissioner will not consider claims that a third party's commercial interests would be harmed without some evidence that these reflect genuine concerns expressed by the third party involved. As the Home Office has not provided the Commissioner with such evidence the Commissioner cannot consider this aspect any further.
15. In this case, the only points specific to part one of the request were made by the Home Office as part of its internal review, which are set out in paragraph 8 above.
16. The Home Office has failed to provide the Commissioner with any arguments as to why it believes section 43(2) is engaged for part one of the request. In the absence of any further explanation, the Commissioner finds that the Home Office has failed to demonstrate how responding to part one of this request would identify any particular organisations, and, even were this possible, how their commercial interests would be harmed by such identification.
17. As a result, the Commissioner finds that section 43(2) is not engaged in relation to the information in scope of part one this request. She therefore requires the Home Office to comply with the step set out in paragraph 3 of this notice.

## **Other matters**

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18. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As she has made clear in her *'Good Practice Guidance No 5'*, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 57 working days for an internal review to be completed, despite the publication of her guidance on the matter.
19. She has also made a record of the Home Office's poor engagement with the investigation of this complaint.

## Right of appeal

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20. 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)

21. 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.
22. 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**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**