

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 27 July 2020

**Public Authority:** Ministry of Justice  
**Address:** 102 Petty France  
London  
SW1H 9AJ

#### Decision (including any steps ordered)

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1. The complainant requested information relating to the cost of card payment facilities.
2. The Ministry of Justice (MoJ) provide some information within the scope of the request but refused to provide the remainder, citing sections 41 (information provided in confidence) and 43 (commercial interests) of the FOIA.
3. The Commissioner's decision is that the information is exempt from disclosure on the basis of section 41(1).
4. The Commissioner requires no steps to be taken as a result of this decision.

#### Request and response

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5. On 1 November 2019, the complainant wrote to the MoJ and requested information in the following terms:

*"How much does it cost to issue the AllPay card, and of each £10 I pay?*

*What amount does the court end up with after the retailer and AllPay Ltd have taken their fees? Please answer for both the card method (default) and the direct debit method?*

*Please provide a total overall figure for the amount that AllPay Ltd*

*will take and the amount that HMCTS will receive from payment of a £660 fine made across £10 weekly instalments”.*

6. The MoJ responded in a letter dated 18 November 2019, (although it later referred to the response being provided on 26 November 2019). It provided information within the scope of the request.
7. The complainant wrote to the MoJ on 27 November 2019 seeking clarification of its response.
8. Following further correspondence, the complainant requested an internal review on 10 January 2020. He disputed that the MoJ's response fulfilled his request of 1 November 2019. He told the MoJ:

*“My question and followup are quite clear in that I am not asking what is the cost to ME of the card, but what is the cost to the MoJ”.*

9. Following an internal review, the MoJ wrote to the complainant on 29 January 2020. It upheld its original position, clarifying that the further information requested - relating to how much the service costs the MoJ - is exempt from disclosure by virtue of section 43(2) (commercial interests) of the FOIA.

## **Scope of the case**

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10. Following earlier correspondence, on 24 February 2020 the complainant provided the Commissioner with the necessary documentation to support his complaint about the way his request for information had been handled.
11. He disputed that it was in the public interest to withhold the requested information. He told the Commissioner:

*“I am not asking for a detailed breakdown of business workings, but it is clear I am asking simply what percentage of a certain amount that I pay is taken as a cut by the third party processor”.*
12. During the course of her investigation, the MoJ responded to the Commissioner citing both section 43 and section 41 (information provided in confidence) of the FOIA.
13. In view of the apparent discrepancy between the correspondence provided by the complainant and what the MoJ considered to be the relevant exemptions in this case, the Commissioner sought clarification of the position.
14. The MoJ confirmed to the Commissioner that both exemptions apply to all of the requested information.

15. In the circumstances, the MoJ wrote to the complainant advising him that he did not receive the correct internal review correspondence. It confirmed that it considered that both sections 41 and 43 applied in this case.
16. The analysis below considers the MoJ's application of section 41 to the disputed information. That information comprises the cost to the MoJ of issuing a payment card and the associated transaction charges.
17. The Commissioner also addresses the issue of the internal review correspondence sent to the complainant in 'Other matters' below.

## **Reasons for decision**

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### *Section 41 information provided in confidence*

18. Section 41 sets out an exemption from the right to know where the information was provided to the public authority in confidence.
19. Section 41 of the FOIA states that:
  - (1) Information is exempt information if—*
    - (a) it was obtained by the public authority from any other person (including another public authority), and*
    - (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.'*
20. Therefore, for this exemption to be engaged, two criteria have to be met: the public authority has to have obtained the information from a third party and the disclosure of that information must constitute an actionable breach of confidence.
21. In her guidance on section 41<sup>1</sup>, the Commissioner acknowledges:

*"[Section 41] is designed to give those who provide confidential information to public authorities, a degree of assurance that their*

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

*confidences will continue to be respected, should the information fall within the scope of an FOIA request”.*

*Was the information obtained by the MoJ from another person?*

22. Section 41(1)(a) requires that the requested information must have been obtained by the public authority from another person. In her guidance on section 41, the Commissioner acknowledges that, in this context, the term 'person' means a 'legal person'. This could be an individual, a company, another public authority or any other type of legal entity.
23. The MoJ confirmed that the information under consideration was provided by Allpay Ltd (the Supplier).
24. From the evidence she has seen, the Commissioner is satisfied that the withheld information was obtained by the MoJ from another person and therefore met the requirements of section 41(1)(a).

*Would disclosure of the information constitute an actionable breach of confidence?*

25. In considering whether disclosure would constitute an actionable breach of confidence, the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd [1968] FSR 415*. That judgment suggested that the following three-limbed test should be considered in order to determine if information was confidential:
  - whether the information had the necessary quality of confidence;
  - whether the information was imparted in circumstances importing an obligation of confidence; and
  - whether disclosure would be an unauthorised use of the information to the detriment of the confider.
26. Further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

*Does the information have the necessary quality of confidence?*

27. For the information to have the necessary quality of confidence it must not be trivial and not otherwise available to the public. Information which is of a trivial nature, or already available to the public, cannot be regarded as having the necessary quality of confidence.
28. The Commissioner recognises that information should be worthy of protection in the sense that someone has a genuine interest in the contents remaining confidential.

29. In this case, the MoJ told the Commissioner:

*"The information is commercially sensitive, as it relates specifically to Allpay Ltd's contractual pricing for the MoJ. It is not otherwise accessible and it is of importance to Allpay Ltd".*

30. Having considered the withheld information, the Commissioner is satisfied that it is more than trivial and not already in the public domain. She is also satisfied that Allpay would have a genuine interest in the information remaining confidential.

31. The Commissioner is therefore satisfied that the withheld information in this case has the necessary quality of confidence required to sustain an action for breach of confidence, and as such she considers that this limb of the confidence test is met.

*Was the information imparted in circumstances importing an obligation of confidence?*

32. Even if information is to be regarded as confidential, a breach of confidence will not be actionable if it was not communicated in circumstances that created an obligation of confidence.

33. The Commissioner's guidance recognises that there are essentially two circumstances in which an obligation of confidence may apply:

*"The confider has attached explicit conditions to any subsequent use or disclosure of the information (for example in the form of a contractual term or the wording of a letter); or*

*The confider hasn't set any explicit conditions, but the restrictions on use are obvious or implicit from the circumstances. For example, a client in therapy wouldn't need to tell their counsellor not to divulge the contents of their sessions to others, it is simply understood by both parties that those are the rules".*

34. In this case, with regard to the second limb of the test, the MoJ considered that the information was provided in circumstances importing an obligation of confidence on the basis that it was communicated during a procurement process, with an implied level of confidentiality regarding the commercial arrangements.

35. Having considered the 'reasonable person' test used by Judge Megarry in the *Coco v Clark* case, the Commissioner accepts that there is an expectation of confidence on the part of the provider that the information provided was shared in confidence and will not be disclosed to the public. The Commissioner therefore accepts that there is an obligation of confidence in this case. As such she considers that this limb of the confidence test is met.

*Would disclosure be of detriment to the confider?*

36. Having concluded that the information withheld in this case has the necessary quality of confidence, and was imparted in circumstances giving rise to an obligation of confidence, the Commissioner has proceeded to consider whether unauthorised disclosure could cause detriment to the confider.

37. Her guidance on that point states:

*"If the requested information is commercial in nature then the disclosure will only constitute a breach of confidence if it would have a detrimental impact on the confider".*

38. The MoJ's position is that disclosure would cause detriment to the confider, namely AllPay Ltd:

*"...because of the current procurement process that is ongoing with the MoJ, and also any future competitions Allpay Ltd may wish to participate in [in] the future".*

39. With respect to its reference to procurement, the Commissioner accepts that the MoJ told the complainant, albeit with respect to section 43:

*"It is likely to be damaging for a third party should the MoJ disclose information which allows the third party's competitors to copy or undermine their approach to pricing and delivery of the services".*

40. The Commissioner is mindful that the complainant explained that he was not asking for *"a detailed breakdown of business workings"*. Nevertheless, she recognises that information relating to the amount of the 'cut' taken by a third party could be of value to competitors. Furthermore, she is not aware that the Supplier has agreed to the disclosure of the requested information.

41. As such, she considers it plausible that disclosure would cause detriment to the confider and is satisfied that it would be an unauthorised use of the information. The Commissioner is therefore satisfied that this limb of the confidence test is also met.

*A legal person must be able to bring an action for breach of confidence*

42. Section 41(b) provides that the breach of confidence must be actionable by either the legal person who gave the information to the public authority, or by any other legal person.

43. The MoJ considered that failure to treat the requested information as being held in confidence would constitute an actionable breach of confidence for which proceedings could be initiated by AllPay Ltd.

44. In her guidance on the section 41 exemption, the Commissioner states:

*"It is not necessary for the authority to establish that a particular person would be likely to bring a claim for breach of confidence, only that a person would be able to do so".*

45. The Commissioner is satisfied that a person, in this case AllPay Ltd, would be able to bring a claim for breach of confidence.

46. The final part of the test for engaging section 41 is whether the action of breach of confidence is likely to succeed.

*Is there a public interest defence for disclosure?*

47. Although section 41 is an absolute exemption, and does not need to be qualified by a public interest test under section 2 of the FOIA, case law on the common law of confidence suggests that a breach of confidence will not succeed, and therefore will not be actionable, in circumstances where a public authority can rely on a public interest defence.

48. In its correspondence with the Commissioner, the MoJ acknowledged that disclosure:

*"... would maintain a sense of openness and transparency from both the MoJ and Allpay when considering and responding to requests made under the FOIA".*

49. It also recognised that disclosure would enable members of the public to understand how payments are structured between the MoJ and the Supplier.

50. However, in the circumstances of this case, it considered that the public interest in disclosure was outweighed by the stronger public interest in favour of preserving the principle of confidentiality.

*The Commissioner's view*

51. In a case such as this, the test is whether there is a public interest in disclosure which overrides the competing public interest in maintaining the duty of confidence.

52. This test does not function in the same way as the public interest test for qualified exemptions, where the public interest operates in favour of disclosure unless outweighed by the public interest in maintaining the exemption. Rather, the reverse is the case. The test assumes that the public interest in maintaining confidentiality will prevail unless the public interest in disclosure outweighs the public interest in maintaining the confidence.



53. The Commissioner has considered whether there is any overriding public interest in the disclosure of the requested cost information that would justify an actionable breach of confidence.
54. The Commissioner acknowledges that disclosure would add to the public's understanding of the cost to the MoJ, and therefore the public purse, of the system.
55. She recognises that some weight should always be afforded to the general public interest in ensuring that public authorities remain transparent, accountable and open to scrutiny.
56. In contrast, she has also considered the wider public interest in preserving the principle of confidentiality and the impact of disclosure on the interests of the confider. In that respect, she is mindful of the commercial impact on the interests of the confider where disclosure would reveal information that would assist competitors.
57. In weighing the above public interest arguments for and against disclosure, the Commissioner has taken account of the wider public interest in preserving the principle of confidentiality. She is mindful of the need to protect the relationship of trust between confider and confidant and not to discourage, or otherwise hamper, a degree of public certainty that such confidences will be respected by a public authority.
58. The role of the Commissioner is to regulate access to recorded information under the FOIA. Her role in this case is simply to consider if, at the time of the request, the public interest in disclosure outweighs the competing public interest in maintaining a confidence.
59. Having considered all the circumstances of this case, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information. Therefore the Commissioner finds that the information was correctly withheld under section 41 of the FOIA.

#### *Other exemptions*

60. In light of the above, the Commissioner has not gone on to consider the MoJ's application of section 43 to the same information.

#### **Other matters**

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61. The Commissioner is concerned to note the differing versions of the internal review correspondence that became apparent during the course of her investigation.



62. The Commissioner accepts that, in preparing a response to a requester, the response may go through a number of drafting stages.
63. However, she expects public authorities to have due regard to version control when managing changes to documents and, as in this case, determining that the appropriate correspondence is issued to a requester.

## **Right of appeal**

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64. 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@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

65. 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.

66. 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 .....**

**Laura Tomkinson  
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