

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 June 2022

Public Authority: Ministry of Defence

Address: Main Building (Ground Floor, Zone D)
Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant has requested invoices about payments made to the Ministry of Defence (MoD) from Netflix.
2. The MoD withheld the requested information citing section 43(2) (commercial interests) of FOIA.
3. The Commissioner's decision is that section 43(2) is engaged in relation to the withheld information and the public interest lies in maintaining the exemption.
4. The Commissioner does not require the MoD to take any further steps.

Request and response

5. On 28 January 2021, the complainant wrote to the MoD and requested information in the following terms:

"In a previous FoI response [Ref: Redacted] you provided a list of TV and filming projects that the army has assisted with. One of these projects was filming for Netflix's The Crown, in 2019.

In relation to this project could you please state:

1. Where, when and what was provided to assist the production with their filming.

2. The initial communication from Netflix setting out what assistance they required from the Army
3. Any 'sign-off' correspondence to the army from Netflix at the end of the project where they express their gratitude for the assistance provided
4. Any details and copies of any invoices for sums that were billed to Netflix or the production company for the assistance that was provided."
6. On 15 March 2021 the MoD responded. It provided information in response to part 1 of the request. It also confirmed that it did not hold information in response to part 2 and 3 of the request. It confirmed that it held information in response to part 4 of the request but that it was exempt from disclosure under section 43(2).
7. Following an internal review the MoD wrote to the complainant on 31 March 2021. The MoD noted that section 43(2) had been applied in a blanket manner and disclosed redacted copies of the invoices in question. The Commissioner understands that the actual financial costs were redacted in line with section 43(2) and a small amount of personal information in line with section 40(2) (personal information).

Scope of the case

8. The complainant contacted the Commissioner on 13 June 2021 to complain about the way his request for information had been handled. The complainant only raised concerns about the MoD's application of section 43(2) and not section 40(2).
9. The Commissioner considers the scope of his investigation to be to determine whether the MoD is entitled to withhold the requested information under section 43(2).

Reasons for decision

Section 43(2) – commercial interests

10. 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).'

11. The Commissioner's guidance¹ states 'A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent.'

12. In order for a prejudice based exemption such as section 43(2) to be engaged there must be likelihood that disclosure would, or would be likely to, cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met in order to engage a prejudice based exemption:

- 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 – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

13. Consideration of the exemption at section 43(2) is a two-stage process: even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

¹ [Section 43 - Commercial interests | ICO](#)

The applicable interests

14. The MoD has explained that disclosure would be likely to 'hinder our ability to participate competitively in a commercial activity and to negotiate in a commercial environment.'
15. The Commissioner is satisfied that the arguments presented by the MoD outline how disclosure would prejudice the applicable interests within the relevant exemption. The first criteria has been met.

The nature of the prejudice

16. The Commissioner must now consider if there is a causal link between the information that is being withheld and the prejudice that section 43(2) is designed to protect.
17. Originally, the MoD withheld all information within the scope of the request under section 43(2). Then, it disclosed a redacted copy of the invoices where only the actual amounts were withheld.
18. The MoD has explained that 'While the actual amounts invoiced are a matter of commercial in confidence for the parties involved, the values were set by the MoD.' It has elaborated that 'Release could hinder our ability to participate competitively in a commercial activity and to negotiate in a commercial environment.'
19. The MoD is responsible for implementing the government's defense policy. However, it also subsidises its activities by collaborating with production companies such as Netflix. Just because the MoD agreed on a specific price with Netflix, this does not mean that this price is not subject to change and the Commissioner agrees that 'The release of invoices would provide a level of financial information that could prejudice any future income generation in this area because it would indicate to any contracting companies the price that they would be willing to pay.'
20. The complainant has argued that disclosure would not prejudice the MoD's commercial interests as different filming needs means that negotiations will be entered into on a case by case basis. For example, the complainant is concerned that the MoD would charge differently if vehicles, helicopters or other assets were involved, rather than just a band which is the asset provided to Netflix in this instance.
21. The MoD has elaborated that 'the inclusion of a breakdown of charges in the invoice subject to this complaint was due to an administrative error.' The MoD has explained that the complainant has submitted two previous requests for information relating to invoices (for Downton Abbey and No

Time To Die) and the breakdown of charges was withheld as the MoD did not wish to give away its pricing mechanism.

22. The Commissioner acknowledges the complainant's argument. Even though the MoD did not intend to disclose the breakdown of charges, it did and disclosure of the withheld information must be considered against the information that is already in the public domain.
23. Ultimately, having reviewed the withheld information, the Commissioner agrees that disclosure would provide a level of financial information that would provide production companies with a starting point around which to base their own negotiations. A production company may wish to utilise a tank rather than a band or it may wish to use the exact assets also used in the Crown. However, the Commissioner concurs that any information that may strengthen a production companies negotiating position also has the potential to prejudice the MoD's commercial interests.
24. The MoD has also indicated that 'Should information regarding charging be disclosed this could affect the level of interest in this service and effectively hinder the Army's ability to undertake income generation in the media marketplace.'
25. The Commissioner is not convinced by the above argument. Firstly, if disclosure were to affect the level of interest in this service it would only increase it and therefore pushing up the price that the MoD can charge for the use of its assets and resources. The Commissioner acknowledges that, as the headquarters of the British Armed Forces, the MoD has core obligations that cannot be compromised in favour of media collaboration. However, he does not accept that disclosure would affect the level of interest in the service in question to the point where the MoD's commercial interests would, or would be likely, to be prejudiced.
26. Even though the Commissioner does not accept the above argument, he recognises that, whilst it is first and foremost a government department, the MoD also operates as a commercial enterprise. Having considered the MoD's arguments, and the withheld information, the Commissioner is satisfied that section 43(2) is engaged.

Likelihood of the prejudice

27. The complainant has expressed their concern that, to engage section 43(2) there must be a **significant** risk of prejudice and not just a remote possibility.
28. A prejudice based exemption such as section 43 must be engaged on either the basis of 'would' or 'would be likely to'. These terms have separate and distinct meanings in this context.

29. The higher threshold of prejudice is defined by the Commissioner's guidance² as 'the chain of events is so convincing that prejudice is clearly more likely than not to arise.' The chance of prejudice has to be significant to engage this higher threshold of prejudice and greater than 50%.
30. The MoD has confirmed to both the complainant and the Commissioner that it has applied the exemption on the basis of the lower threshold of prejudice, that disclosure 'would be likely' to result in prejudice.
31. The lower threshold is defined in the Commissioner's guidance as 'there must be more than a hypothetical or remote possibility of prejudice occurring; there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%.'

Is the exemption engaged?

32. Having considered the withheld information and the MoD's arguments, the Commissioner believes that the three criteria as outlined in paragraph 12 have been met.
33. He also accepts that the exemption has been engaged on the lower threshold of prejudice which means it will hold less weight when balancing the public interest.

The public interest test

Public interest arguments in favour of disclosure

34. The MoD has identified that disclosure would promote transparency, openness and accountability into how the MoD operates and makes decisions in relation to the use, and hiring, of its assets.
35. The MoD has explained that disclosure would also promote public understanding of income, and as a result support for the armed forces, that the MoD generates from this, and similar, activities.
36. The MoD has also explained that disclosure would demonstrate that the MoD operates at a value for money rate in using its assets in this way.

² [the prejudice test.pdf \(ico.org.uk\)](https://ico.org.uk/the-prejudice-test.pdf)

Public interest arguments in favour of maintaining the exemption

37. The MoD has largely recycled its arguments discussed within paragraphs 18 – 23 in support of why the actual costs within the invoices should not be disclosed.
38. The Commissioner notes that any monies generated by this and similar activities, from Netflix or any other production company, is used to subsidise the British Armed Forces. The Commissioner does not consider it within the public interest to potentially prejudice such negotiations before they have begun.

The balance of the public interest

39. The Commissioner considers that the balance of the public interest lies in maintaining the exemption in this instance.
40. The MoD has explained that 'The release of information has been met in the disclosure of the invoices which provides a breakdown of the cost make up, albeit the actual amounts invoiced have been withheld under section 43(2) to protect MOD's commercial interests.'
41. At this stage the Commissioner considers it important to distinguish between what is within the public interest and what is interesting to the public. The public may be interested to know the amounts contained within the invoices in question but it is not within the best interests of the public to prejudice any supplementary funds earned to support the British Armed Forces.

Right of appeal

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@justice.gov.uk

Website: 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

Alice Gradwell
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF