

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 28 February 2022

**Public Authority:** Office for National Statistics  
**Address:** Government Buildings  
Cardiff Road  
Newport  
South Wales  
NP10 8XG

#### **Decision (including any steps ordered)**

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1. The complainant requested the cost of advertisements placed in the Guardian and Observer newspapers. The Office for National Statistics ("the ONS") relied on section 43 of FOIA (commercial interests) to withhold the requested information.
2. The Commissioner's decision is that the requested information engages section 43(2) of FOIA and that the balance of the public interest favours maintaining the exemption.
3. The Commissioner does not require further steps to be taken.

#### **Request and response**

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4. The complainant originally requested information of the following description:

"Under the Freedom of Information Act 2000 would you please tell me the cost of your advertisements about the census in "The Guardian" of 13.2.21 and "The Observer" of 14.2.21."

5. On 16 March 2021, the ONS responded. It refused to provide the requested information. It relied on section 43 of the FOIA to withhold the information.
6. The complainant requested an internal review on 17 March 2021. The ONS sent the outcome of its internal review on 14 July 2021. It upheld its original position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 16 July 2021 to complain about the way his request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to determine whether the ONS has correctly applied section 43 of the FOIA to withhold the requested information.

### **Reasons for decision**

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9. Section 43(2) of FOIA 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).”
10. The exemption can be engaged on the basis that disclosing the information either “would” prejudice commercial interests, or the lower threshold that disclosure only “would be likely” to prejudice those interests. For the Commissioner to be convinced that prejudice “would” occur, she must be satisfied that there is a greater chance of the prejudice occurring than not occurring. To meet the threshold of “would be likely to” occur, a public authority does not need to demonstrate that the chance of prejudice occurring is greater than 50%, but it must be more than a remote or hypothetical possibility.
11. In the Commissioner’s view it is not sufficient for a public authority to merely assert that prejudice would be likely to occur to another party’s commercial interests to engage the exemption. Nor is it sufficient for the other party to assert that such prejudice would be likely to occur. The public authority must draw a causal link between disclosure of the information and the claimed prejudice. It must specify how and why the prejudice would occur.

## The ONS' position

12. The ONS explained to the Commissioner that it had entered into a contract with a third party called OmniGOV in order to run a series of media adverts raising awareness of the Census. The contract had covered the placing of the two advertisements specified in the request, but the ONS explained that similar advertisements had also run in other newspapers including the Telegraph, the Times, the Sun, the Mail and the i newspaper – as well as their Sunday equivalents.
13. Through its contract with OmniGOV the ONS explained that it had been able to negotiate a discount compared to the usual rate for advertising of this type however, it considered that disclosing the rate that had been agreed would prejudice the commercial interests of both the newspapers, OmniGOV and the ONS itself.

14. In respect of the newspapers, the ONS noted that:

“Releasing this price would give all future negotiators with The Guardian a target/base price. Negotiations would no longer occur based on the merit of the two sides. Buyers would instead look to obtain the lower price as they know that The Guardian have settled for this before.

“Also, if we were to release this information under FOI, the newspapers in question would lose existing custom and/or revenue. This is because current customers would be able to see our published FOI figure at the discounted price and argue that they should also receive this price, and obtain services from alternative newspapers if they do not oblige. Therefore, the release of this information would hinder the newspaper’s ability to compete effectively in a commercial environment.”

15. OmniGOV’s commercial interests would also be prejudiced by disclosure because:

“As the requested information would be commercially damaging to the newspapers in question, this would harm OmniGOV’s reputation for safeguarding their partner organisations’ commercially sensitive information. This would cause a loss of customer confidence in OmniGOV, negatively impacting their ability to obtain discounted services in the future. It would also impact their ability to obtain future contracts with these newspapers and also other services all together, for fear that their commercially sensitive information would be released.

“Releasing this information would also enable OmniGOV’s competitors to use this information to OmniGOV’s disadvantage

when competing at future tender exercises. Competitors could use the price we publish to know where to pitch their offer to guarantee a win against OmniGOV.

“Furthermore, OmniGOV may not be considered by other publishers in the future if they believe that there would be no scope for profit from the contract.”

16. The ONS supported its submission by providing copies of correspondence with OmniGOV in which the company set out why it considered that its commercial interests would be prejudiced by disclosure.
17. Finally, the ONS argued that its own commercial interests would be harmed by disclosure because of a loss of confidence in its suppliers that the ONS would keep their commercially sensitive information confidential:

“We would be disadvantaged at tendering processes in future with OmniGOV in particular, but also other companies, as they would not wish for the same commercial prejudice to occur from entering into an agreement with us. Therefore, not only would we very likely lose our existing arrangements with suppliers, but we would also have a reduced pool of contractors with which we could work in the future. Both of these consequences would reduce our chances of receiving services at an advantageous price for us and the taxpayer.”

### **The complainant's position**

18. When seeking an internal review, the complainant queried the extent to which anyone's commercial interests might be prejudiced, arguing that:

“It is irrelevant whether the disclosure of this information jeopardises ONS's relationship with these newspapers. Nor do I see how the ONS can have 'commercial' interests when it is not a trading body in competition with others.”

### **The Commissioner's view**

19. The Commissioner accepts that disclosure of this information would prejudice the commercial interests of the newspapers concerned, OmniGov and, to a lesser extent, the ONS itself.
20. Newspaper advertising is a competitive market. Whilst many publications will publish standard rates for advertising, in practice they will often be prepared to accept a lower rate – particular if the buyer wishes to buy more than one advert, or is likely to be a repeat customer.

21. Therefore within any copy of a newspaper, there is likely to be a divergence of prices that have been paid for similar advertising space. In order to maximise its revenue, the newspaper must protect the exact prices it has accepted. If it does not, as the ONS has noted above, customers who would otherwise have been happy with the price they paid will demand lower prices in future – based on having seen that the newspaper has accepted a lower price from a different company.
22. Whilst the ONS is an unusual client, revealing the price that it had paid would demonstrate to other companies that advertise in those newspapers, a benchmark price that the newspaper was willing to accept. Those other companies would then set their negotiating positions based on that benchmark and, if they were not offered it, may walk away entirely. This would affect the newspaper's revenue and make it more difficult to fund its journalism.
23. Turning to OminGOV, the Commissioner also accepts that its commercial interests would be harmed by disclosure. OmniGOV agrees advertising costs with the ONS then uses its expertise to place those adverts at the lowest cost that it can achieve.
24. Disclosing the prices that OmniGOV is able to achieve would give its competitors important information about the prices they need to quote in order to undercut OmniGOV and therefore win OmniGOV's contracts as they come up for renewal.
25. Disclosure of pricing information is also likely to harm OmniGov's relationship with publishers. Firstly, publishers are less likely to work with OmniGOV if they fear that its relationship with public bodies could result in the publication of information they (the publishers) consider to be commercially sensitive. Secondly, if OmniGOV is seen as being able to negotiate sizeable discounts, fewer publishers are likely to be willing to work with the company as they will judge that they will not be able to negotiate a profitable deal. This will harm OmniGOV's ability to strike deals as there will be a smaller pool of suppliers willing to do business with it.
26. Finally, the Commissioner turns to the ONS and, again, agrees that there is a real possibility of commercial harm occurring.
27. Firstly, contrary to the complainant's position, ONS is a "trading body" in that it must procure goods and services in a competitive market – even if it does not supply goods or services on a commercial basis. As a publicly-funded body, the ONS has a duty to maximise value for money when it procures those services – meaning that it does have commercial interests that it needs to protect.

28. ONS may find it more difficult to strike deals with private sector suppliers in future if those suppliers fear that their commercially sensitive information will be disclosed.
29. Secondly, disclosing the price the ONS is willing to pay for a particular service will harm its ability to negotiate further deals in a competitive marketplace. If suppliers consider that the ONS has paid "over the odds" they will adjust their negotiating positions on the basis that it is likely to do so again in future – making it harder for the ONS to achieve value for money. Alternatively, if the ONS is seen to have achieved much lower than the market rate, suppliers will be dissuaded from bidding for work as they will judge that they are unlikely to be able to secure a profitable contract – this in turn reduces the pool of potential suppliers and hence price competition.
30. The Commissioner is not convinced that the prejudice to the ONS' commercial interests is more likely than not. He notes that the Census only occurs every ten years and the ONS will therefore not need to tender for such advertising again for quite some time. The ONS has not indicated that it regularly takes out advertising space and therefore the Commissioner considers that the price agreed for these specific advertisements would give a relatively limited indication of ONS' negotiating position in respect of future contracts – particularly those not involving advertising.
31. The Commissioner also notes that FOIA is a mature piece of legislation and companies that choose to enter into contracts with public bodies are (or, at least, should be) aware of the obligations the legislation places on those bodies to divulge information.
32. That being said, the Commissioner does accept that the possibility of prejudice to the ONS' commercial interests is more than merely hypothetical. Furthermore he also accepts that, for the newspapers involved and for OmniGOV, the chance of prejudice is more likely than not.
33. The Commissioner therefore accepts that section 43(2) of FOIA is engaged.

### **Public interest test**

34. A public authority is still obliged to disclose commercially sensitive information unless it can demonstrate that the balance of the public interest favours preventing the commercial detriment from occurring.
35. Because the Commissioner has accepted that some degree of prejudice is likely to result from disclosure, there will always be some inherent public interest in preventing this from happening. How strong that

interest is will depend on the likelihood and severity of the envisaged prejudice.

36. In this case, the Commissioner has found that the likelihood of prejudice (at least to the newspapers and OmniGov) is more likely than not. This carries significant weight in the public interest test.
37. As well as the usual interests in transparency and accountability, the complainant argued that the public interest should favour disclosure because:

“I see the two advertisements in question as a waste of public money since they said little to a readership which would have known about the census. Hence the greater public interest lies in openness in order to discourage misuse of funds.”
38. In explaining why the public interest should favour maintaining the exemption, the ONS highlighted the prejudice that it considered would occur and argued that there was a strong interest in preventing that prejudice from occurring. On the contrary, it argued that the public interest lay in preserving a competitive market.
39. Secondly, the ONS noted that it had already published a great deal of information about its spending on the Census, both pro-actively and in response to other FOI requests – which it had published on its website. It argued that the availability of this information reduced the public interest in specific items of spending.
40. In the circumstances of this case the Commissioner considers that the balance of the public interest favours maintaining the exemption.
41. The ONS has explained that the adverts identified in the request formed part of a larger advertising campaign spread over a wide variety of titles which, between them, have a much more diverse readership than the Guardian and the Observer. Had the ONS only targeted these newspapers, there may well have been a stronger public interest in understanding why these readerships were target, but this was not the case.
42. The Commissioner is not aware of any evidence which would suggest that the Guardian and Observer readers were more likely than readers of any other newspaper – or indeed non-newspaper readers – to be aware of the Census. There is certainly no evidence to support the complainant’s assertion that all readers would already be aware. Even if awareness was higher amongst readers of these newspapers it does not follow that none of the adverts would have reached readers who were not aware – thus fulfilling the function of the advert.

43. The Commissioner recognises that there is always a public interest in public authorities being transparent and accountable for the way they spend taxpayers' money. However, in the circumstances of this case, she considers that there is a much stronger interest in protecting the newspapers and OmniGOV from suffering commercial harm through their contractual relationship with a public body. The public interest lies in preserving a competitive marketplace in which public bodies can achieve value for money and in which private companies can negotiate profitable terms.
44. The Commissioner is therefore satisfied that, in the circumstances of this case, the public interest favours maintaining the exemption.



## Right of appeal

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45. 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: 0203 936 8963

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)

46. 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.
47. 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 .....**

**Roger Cawthorne**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**