

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 July 2023

Public Authority: Department for Culture, Media and Sport
Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested details of payments to external consultants to advise on the privatisation of Channel 4. The Department for Culture, Media and Sport ("DCMS") refused to provide it, citing section 43(2) – commercial interests – as its basis for doing so
2. The Commissioner's decision is that DCMS is entitled to rely on section 43(2) as its basis for withholding the requested information.
3. The Commissioner does not require further steps.

Request and response

4. On 13 April 2022 the complainant made a request to DCMS for information of the following description under FOIA.

"Please could you state the total sum spent to date by DCMS on external consultants to advise on the privatisation of Channel 4.

Please provide a breakdown of the total cost by the firm or independent consultant engaged.

Please note that just knowing the sum and company/provider used, without any further breakdown of hourly cost or scope of work, could not prejudice the commercial interests of either the government or the third party consultant.”

5. On 23 May 2022 DCMS responded. It explained that JP Morgan had been appointed to provide corporate finance advice and that Freshfields Bruckhaus Deringer had been appointed to provide commercial legal advice, with both appointments being “in relation to a change of ownership of Channel 4 Television Corporation (C4C)”. It argued that, contrary to the complainant’s assertion, it believed that the release of the other information he had requested would engage section 43(2) – prejudice to commercial interests. It acknowledged that this exemption was subject to a public interest test but argued that the public interest favoured maintaining this exemption.
6. The complainant sought an internal review on 23 May 2022 but received no response at that time. The Commissioner wrote to DCMS on 2 August 2022 asking it to provide an internal review. Unfortunately, it did not. Given the length of time the complainant had waited to receive a response to his request for internal review despite the Commissioner’s intervention, the Commissioner accepted this complaint for investigation.

Scope of the case

7. The complainant contacted the Commissioner on 24 August 2022 to advise that no response to their request for internal review had been received and to complain about DCMS’ use of section 43(2) in response to his request. DCMS eventually completed an internal review and sent to the complainant but only after a further several months and after DCMS had sent the Commissioner its submissions and a copy of the withheld information. DCMS upheld its use of section 43(2) in its internal review. In its submissions to the Commissioner, DCMS also advised:

“Upon further review of the specifics of the case following your letter, we discovered that, in error, we did not disclose that we had commissioned KPMG for some work on Channel 4 privatisation. We will therefore be disclosing this fact to the applicant in our response to the internal review.”
8. The Commissioner considers that the scope of his investigation is to consider DCMS’ reliance on section 43(2) as its basis for non-disclosure. Failure to conduct an internal review or delay in doing so is not, of itself, a breach of FOIA but the Commissioner has commented on this in the Other Matters section of this Notice.

Reasons for decision

Section 43 – commercial interests

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.
11. In order for a prejudice based exemption, such as section 43, to be engaged the Commissioner believes that three criteria must be met:
 - 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 should 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, ie disclosure ‘would be likely’ to result in prejudice or ‘would’ result in prejudice.
12. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be a real and significant risk. With regard to the higher threshold, in the Commissioner’s view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

DCMS’ position

13. In this case, DCMS insisted that disclosure of this information would prejudice its own commercial interests. If DCMS fails to make the argument that prejudice “would” arise, the Commissioner considers whether the lower threshold of “would be likely” is applicable.
14. The Commissioner asked DCMS a series of questions. These questions are based on the Commissioner’s considerable experience of dealing

with section 43(2) cases including a multitude of cases that have been considered at the First-tier Tribunal (Information Rights). Unfortunately, DCMS did not specifically answer each question. Instead it submitted two brief paragraphs in support of its position written with the questions in mind. The Commissioner recognises that a public authority is free to answer as it chooses (unless put under a formal legal obligation such as an FOIA section 51 Information Notice). However, if a public authority wishes to provide compelling legal arguments, it should endeavour to address each question the Commissioner puts to it.

15. DCMS argued that disclosure would be likely to prejudice commercial interests in two ways:
 - “DCMS’ ability to participate competitively in the procurement of legal and corporate advisory services”; and
 - “DCMS’ ability to run a competitive sale process for Channel 4”.
16. It explained that prejudice would arise “as the disclosure of fees of external advisers during an ongoing transaction relating to Channel 4 would be detrimental to the commercial interests of DCMS as the seller because if disclosed, the fees would indicate the level of preparedness and expected complexity of the transaction and assessment of the value of the asset. This would also damage our relationships with these organisations given there are confidentiality provisions in their contracts and at least one of the advisors have verbally indicated they would not be content with the release of this information. The release therefore would make it more difficult for DCMS to maintain good relations with suppliers, and damage our competitive edge in future procurements”.

The Commissioner’s conclusion

17. The term ‘commercial interests’ is not defined in the FOIA. However, the Commissioner has considered his guidance on the application of section 43, which clarifies that: “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.”¹
18. The information withheld in this case is a top level figure rather than a detailed breakdown of, for example, what work is required or any penalty clause information. DCMS has not provided any information to

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

show that, for example, this detail would be known by other consultants who were unsuccessful in any selection process to provide this work. Nor is it clear from the information provided to the Commissioner whether this refers to whole or partial work.

19. Similarly, DCMS did not provide any copies of contractual references to confidentiality although the Commissioner has no reason to doubt that they exist. In the Commissioner's experience, public sector contracts normally make reference to the public authority's obligations under FOIA and therefore any contractor should reasonably expect a degree of transparency about their contractual arrangement, particularly where that relates to the spending of public money.
20. The Commissioner has considered DCMS' highly limited arguments. Considering the three criteria outlined above, he agrees the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed relates to the applicable interests described in section 42.
21. The Commissioner has considered whether a causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. The only compelling argument that DCMS has produced in this regard is to assert that the matter was live at the time of the request. The Commissioner is satisfied that resultant prejudice which is alleged where a matter is live is of some substance.
22. Turning now to the level of likely prejudice, DCMS asserted that two prejudicial outcomes would arise as a result of disclosure. As to "DCMS' ability to participate competitively in the procurement of legal and corporate advisory services", the Commissioner is not convinced that such prejudice "would" definitely arise. All those who provide consultant services to a public authority must reasonably expect a greater degree of transparency about how much their services cost the public purse. FOIA has been in force for nearly 20 years and this is a well understood consequence of accepting public money for such services.
23. However, he recognises that, given the matter was live at the time of the request, it would be reasonable for a contractor to expect a degree of confidentiality of such headline costs for a limited period. The figures requested are not especially detailed regarding the contract in question. That said, the Commissioner accepts it is more than a hypothetical possibility that disclosure at this stage would make it somewhat more difficult for DCMS to procure consultant services and corporate advisory services in the future where it discloses live information. He therefore agrees that, on this point, disclosure would be likely to (as opposed to "would") give rise to an envisaged prejudicial outcome.

24. As regards the second prejudicial outcome asserted by DCMS, the Commissioner is even less persuaded, based on the limited information that DCMS has provided. DCMS said disclosure "would be detrimental to the commercial interests of DCMS as the seller [of Channel 4] because if disclosed, the fees would indicate the level of preparedness and expected complexity of the transaction and assessment of the value of the asset".
25. It provided no explanation as to how disclosure would do this other than to assert it to be so. It did not, for example, explain what other information was available which would assist even an informed outsider to "understand the level of preparedness and expected complexity of the transaction and assessment of the value of the asset". Had it done so, the Commissioner would have given more weight to this assertion.
26. He is, therefore, unable to conclude that disclosure would or would be likely to undermine DCMS' commercial position as the seller of Channel 4.
27. In summary, the Commissioner agrees a likely prejudicial effect on DCMS' commercial interests when negotiating future contracts were it to release live contractual detail, even at this very high level of commercial detail. He has no reason to dispute DCMS' assertion that the contractors in question would object to such a disclosure but he would have preferred to see evidence that this was the case in order to give any weight to this assertion. This could take the form, for example, of a copy of a brief email exchange between the parties or even a copy of a record of a specific phone call where any objection was made.
28. However, he does not agree a likely prejudicial effect on DCMS' commercial position as seller of Channel 4 in the absence of anything other than an assertion from DCMS that this would arise. Had DCMS explained to any extent why this alleged prejudicial outcome would or would have been likely to arise he would have taken that explanation into account and may have reached a different conclusion.
29. Given the above, the Commissioner agrees that section 43(2) is engaged, albeit not for all the reasons cited by DCMS.
30. Section 43(2) is subject to a balance of public interest test. DCMS can only maintain section 43(2) if the public interest in doing so outweighs the public interest in disclosure.

Public interest test

31. The complainant set out the following arguments in favour of disclosure.

32. He said that DCMS' arguments were highly generic and it "is not clear how a disclose of fee income would give any indications of the kind suggested about the value of Channel 4".

33. He also disputed whether disclosure would give rise to any meaningful damage to DCMS' relationship with contractors. He said

"Almost all public contracts include freedom of information provisions, which are standard practice in the public sector. A verbal indication, not even formally committed to paper, from a partner, is extremely weak grounds for refusal. By comparison, MoD [Ministry of Defence] were able to provide equivalent information in full in relation to a similar request about the National Flagship".

34. He added:

"There is a very clear public interest in transparency around the use of public money, given widespread concerns about whether the decision to [sell] Channel 4 made commercial sense in the first place. That should weigh more heavily in the public interest.

DCMS' arguments

35. As noted above, DCMS' arguments were very thin. In addition to the arguments about likely prejudice which are set out above it said

"On balance we contend that the public interest falls in favour of withholding the requested information".

36. The Commissioner had asked it to set out its arguments for and against disclosure in the public interest and why it had decided on balance that the public interest favoured maintaining the exemption at section 43(2).²

The Commissioner's decision

37. In January 2023, the government announced it was not selling Channel 4 but would, instead, be undertaking some reforms of it.³ However, at the time of the request, this was not the case. The Commissioner must

² <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/key-questions-for-public-authorities-foi-act-2000/#43>

³ [Channel 4 to remain publicly owned with reforms to boost its sustainability and commercial freedom - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/channel-4-to-remain-publicly-owned-with-reforms-to-boost-its-sustainability-and-commercial-freedom)

look at the circumstances prevailing at the time for response to the request. The sale of Channel 4 was still under consideration at that time.

38. As set out above, the Commissioner is only satisfied that the exemption at section 43 is engaged at all because the matter was live at the time of the request. He recognises that there was considerable public debate about the sale of Channel 4, including the relative costs and benefits to the public purse. There is a strong public interest in informing that debate which disclosure would readily serve. DCMS' other arguments for withholding the information are limited and, where they are made, unsupported by further explanation to the Commissioner.
39. Having assessed the withheld information itself and applied the relevant considerations set out above to it, by a very narrow margin the Commissioner has concluded that the public interest favours maintaining the exemption. He has reached that view because the matter was live at the time of the request. He may well reach a different view were the request to be made now that the sale is not going ahead (or, even if that were not the case, had the matter no longer been live in the same way). In light of that, he would expect DCMS to make more detailed arguments to him in the event that it still refused to disclose this information upon request and where that refusal was brought to him as a complaint.

Other matters

40. FOIA does not require a public authority to offer an internal review, but good practice recommendations are set out in the Code of Practice issued under section 45 of FOIA. The Code of Practice was updated and reissued by the Cabinet Office in 2018.⁴
41. Paragraph 5.8 of the Code recommends that
- "The internal review procedure should provide a fair and thorough review of procedures and decisions taken in relation to the Act."
42. Paragraph 5.9 further recommends that:
- "The public authority should in all cases re-evaluate their handling of the request, and pay particular attention to concerns raised by the applicant."

⁴ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

43. The Commissioner considers this to be an important process for a number of reasons. Although internal reviews are not a statutory requirement under FOIA, they provide a valuable opportunity for a requester to explain why they may disagree with the way their request has been handled by a public authority. The public authority may change its mind in whole or in part or use the opportunity to explain itself more clearly to the requester.
44. The Commissioner is disappointed that DCMS failed to provide a timely⁵ internal review despite his own intervention asking it to do so. It eventually did so during the course of the Commissioner's investigation but, disappointingly, the arguments it set out for the complainant were as limited as the ones it made to the Commissioner.

⁵ See paragraphs 5.4 and 5.5 of the Code of Practice.

Right of appeal

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

Website: 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

Alexander Ganotis
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF