

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 6 December 2023

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

#### Decision (including any steps ordered)

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1. The complainant requested to know the costs of housing asylum seekers at the former RAF Scampton airbase. The Home Office refused the request, citing the non-disclosure exemption at section 43 (Commercial interests) of FOIA.
2. The Commissioner's decision is that the Home Office was entitled to rely on section 43 to refuse the request.
3. No steps are required as a result of this decision.

#### Request and response

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4. On 28 June 2023, the complainant wrote to the Home Office and requested information in the following terms:  

"I understand you have now publicly committed to proceeding with plans to house asylum seekers at Scampton and are now moving to install people by August. Your plans are now clear and well announced and you must have conducted at least indicative costings per person and for using the site as a whole. Please release the latest costings for the Scampton site as a whole and per person housed."
5. The Home Office responded on 12 July 2023. It cited section 43(2) of FOIA to refuse the request.
6. The complainant requested an internal review on 12 July 2023, stating:

"If exact figures are deemed commercially sensitive I would accept approximations, provided they enable comparison with existing hotel costs."

7. The Home Office responded on 27 July 2023, maintaining the application of section 43 of FOIA. It said the information comprised estimated costs and that a current procurement exercise would be likely to be prejudiced if it was disclosed.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 2 August 2023 to complain about the way his request for information had been handled. He disagreed with the application of section 43 to withhold the requested information, saying:

"The HO [Home Office] acknowledges that it has estimates of the costs but is refusing to release it on the grounds that to do so would breach commercial confidences. I dispute this logic; they have already released via FOI information in relation to the cost of other sites (notably Linton on Ouse). If they have contracted a firm for Scampton they should release the details, if they have not, it's hard to believe they are on course to use the site on an emergency basis, which is the argument they are advancing in the courts."

9. The analysis below considers the application of section 43 of FOIA to refuse the request. In reaching his decision, the Commissioner has taken account of the circumstances as they were at the time the request was responded to, rather than as they are at the date of this decision notice.
10. The Commissioner has viewed the withheld information.

## **Reasons for decision**

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### **Section 43 – Commercial interests**

11. Section 43(2) of FOIA states that information is exempt if its disclosure under FOIA would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
12. In order for section 43(2), to be engaged, three criteria must be met:
  - the harm which the public authority envisages must relate to someone's commercial interests;

- the public authority must be able to demonstrate a causal relationship between disclosure and prejudice to those commercial interests. The resultant prejudice must be real, actual or of substance; and
  - the level of likelihood of prejudice being relied upon by the public authority must be met (ie it must be shown that disclosure would, or would be likely to, result in prejudice occurring).
13. The Home Office has applied section 43 of FOIA to withhold a breakdown of costs per person, and the total costs, of bringing the former RAF Scampton site into use. The costings have been submitted to it by a third party supplier ('the supplier'). Within the headline figure, the costs of individual elements of the proposed service are itemised. The projected costs have also been scaled up and down, to show how variations in the number of individuals to be accommodated affect the individual cost per person.
14. The Home Office said that, at the time of the request, it was still in negotiation with the supplier about the costs of setting up and operating asylum accommodation at RAF Scampton. The costs were therefore only indicative and had not been agreed by either party. They were subject to change until negotiations were finalised.
15. The costing information had been provided to the Home Office by the supplier on the understanding that it would remain confidential. This was both a long-standing and well-known Home Office practice when negotiating with suppliers, and a specific contractual condition under which the information was shared by the supplier. The information concerns charges relating to the supplier's commercial activities, which are conducted in a highly competitive environment. The Home Office explained:
- "These costs may change, as they have not been fully agreed by either party. The release of these specific figures would make available commercially confidential information to [the supplier]'s competitors, who would then gain commercial advantage, particularly for any current competition events or procurements that are running. It would also potentially deter [the supplier] from providing these services and would deter them from providing us with similar quotations in future. The Home Office would also be exposed, as competitors would know what we currently pay and could use that to submit higher prices during any future procurement events (i.e., not having genuine competition). We would also damage our relationship with [the supplier], which is strategic in nature and this loss of trust would materially affect our commercial and operational relationship in a detrimental way. Dealing with contract disputes would be more difficult, negotiating contract changes would be a challenge (with

probably less favourable pricing) and working relationships would become less positive.”

16. The Home Office said that the supplier had been consulted about the request and had objected to the disclosure of the withheld information. It had argued that disclosure would be “highly damaging” and that it would be likely to prejudice its commercial interests because it would enable competitors to work out its returns and its pricing model for the provision of ongoing services, and for services that are operated on behalf of the Home Office and others.
17. With regard to the three criteria set out in paragraph 12, 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.
18. The Commissioner is satisfied that the harm the Home Office envisages relates to the commercial interests of the supplier; the information contains commercially sensitive, detailed costings (including information regarding profit) which could be used by commercial rivals to tailor their bids when competing against the supplier for contracts.
19. The Commissioner also accepts that the Home Office’s arguments regarding harm to its ability to competitively negotiate best value for money, and the undermining of its relationships with suppliers, relate to its own commercial interests.
20. Secondly, the Commissioner is satisfied that the Home Office has shown that a causal link exists between disclosure of the withheld information and prejudice (or harm) to the supplier’s commercial interests. He considers it realistic that the withheld information would be of use to commercial rivals interested in tailoring competing bids, to make them more attractive.
21. He also considers that the Home Office’s ability to competitively negotiate with suppliers would be likely to be damaged by disclosure of the costs it was considering in connection with this contract. He finds it credible that concerns about the potential disclosure of this commercially sensitive information, which is not in the public domain, could deter other suppliers from working with the Home Office, thereby limiting its future tendering options.
22. Thirdly, the Commissioner accepts the Home Office’s position that the envisioned prejudice to the supplier, and to itself, ‘would be likely’ to occur (ie it is more than a remote, hypothetical possibility).
23. As the three criteria set out in paragraph 12 are met, the Commissioner is satisfied that the exemption provided by section 43(2) is engaged.

### **Public interest test**

24. Section 43 is subject to the public interest test, as set out in section 2 of FOIA. This means that although section 43 is engaged, the requested information must be disclosed unless the public interest in maintaining the exemption is stronger than the public interest in disclosure.

### **Public interest arguments in favour of disclosure**

25. The complainant did not offer any public interest arguments in favour of disclosing the information.
26. The Home Office acknowledged the public interest in transparency and accountability regarding the spending of public funds. It said disclosure of this information would help the public to assess whether the Home Office is getting best value for money in terms of its prospective contracts.

### **Public interest in maintaining the exemption**

27. The Home Office provided the following arguments:

“There is a public interest in government departments being able to secure contracts that represent value for money and anything that would undermine this is not in the public interest. Value for money can be best obtained where there is a healthy competitive environment, coupled with protection of the Government’s commercial relationships with industry, were [sic] this is not the case, there would be a risk that:

- Companies would be discouraged from dealing with the public sector, fearing disclosure of information that might damage them commercially, or
- Companies would withhold information where possible, making the choice of the best contractor more uncertain as it would be based on limited and censored data.”

### **Balance of the public interest**

28. When balancing the opposing public interests in a case, the Commissioner will decide whether it serves the public interest better to disclose the withheld information, or to withhold it, because of the interests protected by the relevant exemption.
29. The Commissioner accepts that, generally speaking, there is a presumption running through FOIA that openness is, in itself, to be regarded as something which is in the public interest. He also recognises

the need for transparency and accountability on the part of public authorities, as regards their spending of public money.

30. The Commissioner also recognises that the issue of asylum seeker housing is a matter of significant public debate. Disclosure of the withheld information would help inform the particular debate on whether individual hotels or larger scale accommodation represent better value for money.
31. However, he notes that the costs information here is 'indicative' and not 'actual'. This may limit the extent to which meaningful comparisons can be made with other types of accommodation.
32. The Commissioner is mindful that government bodies should be able to procure necessary products and services efficiently and effectively. There is, therefore, a public interest in them not being disadvantaged by their FOIA obligations, when in commercial negotiations with the private sector. Information provided by suppliers may need to be protected, so that best value for money can be obtained through open competition. To that end, there is a public interest in the Home Office being regarded as a trusted party and potential suppliers having confidence that they can share confidential commercial information with it.
33. The Commissioner has also had regard to the public interest in ensuring that disclosure under FOIA does not adversely impact the commercial interests of suppliers which do business with public authorities, without good reason. There is a public interest in ensuring that the commercial interests of suppliers are not damaged or undermined by the disclosure of information which is not in the public domain and which could adversely impact their future business. In this case, disclosure under FOIA would enable competitors to have access to pricing information that they would not otherwise be entitled to, because it was required to be provided to the Home Office as part of contract negotiations.
34. Having accepted in this case that disclosure would be likely to be damaging to the supplier's, and to the Home Office's, commercial interests, the Commissioner can see no stronger arguments for disclosure which are capable of justifying that potential for damage.
35. The Commissioner has considered the public interest arguments and accepts that disclosure would help to increase openness and transparency. However, given the nature of the commercial harm that would be likely to occur should the information be disclosed, the Commissioner finds that the balance of the public interest favours maintaining the exemption at section 43(2) of FOIA.
36. The Commissioner's decision is, therefore, that the Home Office was entitled to rely on section 43 of FOIA to withhold the information.

## Right of appeal

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37. 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)

38. 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.

39. 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 .....**

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