

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 May 2024

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

Decision (including any steps ordered)

1. The complainant has requested to know the amount that was paid to a hotel which was due to house asylum seekers, prior to those plans being dropped. The Home Office refused the request, citing section 43 (Commercial interests) of FOIA.
2. The Commissioner's decision is that the Home Office was entitled to cite section 43(2) to refuse the request.
3. The Commissioner does not require steps as a result of this decision.

Request and response

4. On 11 October 2023, the complainant wrote to the Home Office and requested information in the following terms:

“Please inform me how much the Home Office has paid for the reservation of rooms at the [hotel name and location, redacted] during the period 3/7/2023 and 10/10/2023?”
5. The Home Office responded on 8 November 2023. It cited section 43(2) (Commercial interests) of FOIA to refuse the request.

6. The complainant requested an internal review on 13 November 2023. The Home Office provided the outcome on 31 January 2024, maintaining its application of section 43(2) to refuse the request.

Scope of the case

7. The complainant contacted the Commissioner on 12 February 2024 to complain about the Home Office's decision to refuse the request.
8. The analysis below considers the application of section 43 to refuse the request. The Commissioner has commented on the delay in providing the internal review in "Other matters".

Reasons for decision

9. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
10. 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).
11. The Home Office's position is that disclosure would be likely to prejudice the commercial interests of both the Home Office, and the hotel owners.
12. The complainant disputed that the information could prejudice anyone's commercial interests, saying he had asked only for an overall figure.
13. The Home Office said that while a single figure had been requested, it could easily be cross referenced with information in the public domain, and other information, to allow a more granular costs breakdown to be deduced:

"It may help if I explain that it is well known within this particular commercial marketplace 'what' services, the Home Office needs to procure when it seeks to accommodate asylum seekers in hotels. The time period of the stay is clear in the request, and the number of rooms can easily be found on the hotel website; therefore, if the total cost was to be disclosed – as per the request - competitors could easily calculate a per room, per night rate."

14. It said that competitors could then use this information to undercut the current service provider, when bidding for future Home Office contracts. It explained that the Home Office has had many discussions with suppliers on this issue, and they have made clear their disinclination to have their overall room rate shared publicly (including sharing one overall aggregated figure, if it would allow for the overall room rate to be deduced).
15. The Home Office argued that disclosing the requested information would also be likely to undermine the Home Office's own commercial negotiations, as suppliers would be less likely to engage in negotiations or procurement of future contracts if they have doubts about the Home Office's ability to protect commercially sensitive information. This would reduce the range of potential suppliers willing to procure for Home Office contracts, and therefore likely increase costs to the Home Office, making it more difficult to obtain value for money for the taxpayer.
16. The information relates to asylum seeker accommodation and the Home Office said:

"We have a duty of confidentiality to our suppliers which is as much contractually binding as it is reputationally important. Schedule 10 of the Asylum Accommodation contracts determines that the costs requested in the FOI are considered commercially sensitive:

"Both Parties agree that the following is deemed to be "Commercially Sensitive Information" for the purposes of the Contract and the obligations set out in this Contract generally and Clause 12 (Data Protection and Freedom of Information)."
17. The Home Office argued that disclosure would breach these confidentiality provisions, placing the Home Office at risk of reputational and financial detriment.
18. With regard to the three criteria set out in paragraph 10, the Commissioner is satisfied that the prejudice envisaged by the Home Office relates to its commercial interests and those of the third party.

His guidance¹ explains that a commercial interest relates to a legal person's ability to participate competitively in a commercial activity and the Home Office's arguments are concerned with those matters.

19. Next, the Commissioner has considered whether a causal link exists between the disclosure of the requested information and likely prejudice to commercial interests. He was easily able to find the number of rooms for the hotel, online, and he has taken account of the Home Office's argument that there is a 'known' package of services that comes with asylum accommodation tendering. Therefore, he accepts that it would be possible for competitors to deduce from the withheld information, a more granular breakdown of the costs figure.
20. At the time of the request, the costs information was current. The Commissioner acknowledges that this is information which would be likely to undermine the current hotel owner's commercial interests **if**, in the near future, they tender for similar contracts. However, the Home Office has not argued that this is their intention. The Commissioner notes that the hotel closed to the public following the decision to house asylum seekers there, but it has reportedly been refurbished and is now open and accepting bookings. This suggests that, at least for now, it does not intend to tender for such contracts.
21. Taking this into account, the Commissioner is not satisfied that the Home Office has shown that the hotel owner's commercial interests would be likely to be prejudiced if the information was disclosed.
22. However, he finds the Home Office's arguments about prejudice to its own commercial position, more persuasive. He finds it credible that private sector businesses would be discouraged from contracting with the Home Office if they believe information which may damage them commercially, could be disclosed (such as providing an insight into their pricing structures, to competitors), particularly where the contract has recognised such information to be 'sensitive'. Furthermore, disclosing information which would allow the pricing structure to be deduced would clearly weaken the Home Office's negotiating position when tendering future contracts with suppliers. Knowledge of the price it had recently paid for accommodation would be likely to make it more difficult for the Home Office to negotiate lower rates. Clearly, this would result in the Home Office not securing the best possible deal.

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

23. Lastly, the Commissioner is satisfied that the Home Office has shown in its arguments that the envisaged prejudice to its own commercial interests 'would be likely to' occur.
24. As the three criteria set out in paragraph 10 are met in respect of the Home Office's own commercial interests, the Commissioner is satisfied that the exemption provided by section 43(2) is engaged.

Public interest test

25. Section 43(2) is subject to the public interest test, as set out in section 2 of FOIA. This means that although the exemption 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

26. The complainant has not said why the public interest favours disclosure, but he has expressed the view that public money has been wasted because, although paid for, the accommodation was never occupied by asylum seekers.
27. The Home Office said:

"The Home Office recognises that there is a general public interest in transparency and openness in Government. Disclosure may also provide accountability in terms of the decision-making and spending of public money. We accept that there is a public interest in ensuring value for money through the disclosure of information on the use of public funds, particularly on controversial and news-worthy subjects such as asylum accommodation. This includes projects – as in this particular case - that do not progress through their expected lifecycle."

Public interest in maintaining the exemption

28. The Home Office argued that government departments must try to obtain best value for money when contracting with service providers, and anything that would undermine its ability to do this is not in the public interest. It said value for money can be best obtained where there is a healthy competitive environment, coupled with protection of the Government's commercial relationships with service providers:

"...we maintain it is not in the overall public interest to provide the transparency expected by the requester in this case... Disclosure of this information would not be in the public interest as there would be likely to be operational, legal, and financial implications for the Home

Office. There would be likely to be commercial and reputational damage to the supplier themselves, which may deter future suppliers from working with the Home Office. This would be detrimental to the Home Office's ability to obtain value for money and negotiate effectively for future contracts. Value for money can be best obtained where there is a healthy competitive environment, and this would be likely to be at risk if the requested information was to be released. It is in the wider public interest to spend public money wisely, not to have to pay more than is needed to procure services, due to a reduced 'pool' of suppliers."

Balancing test

29. When balancing the opposing public interests in a case, the Commissioner will decide whether it serves the public interest better to disclose the information in question, or to withhold it, because of the interests protected by the relevant exemption.
30. 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, regarding the spending of public money and obtaining value for money. He notes that, in this case, the public purse funded accommodation which was never used.
31. However, the Home Office has emphasised its ongoing need to be able to participate competitively in a commercial market. There is undoubtedly a public interest in allowing the Home Office to withhold information which, if disclosed, would negatively affect its ability to tender effectively and provide asylum accommodation which is both fit for purpose, and value for money.
32. On balance, while he recognises that the concerns the complainant has raised do themselves touch on issues of value for money, the Commissioner finds that there is a stronger public interest in preserving the Home Office's ongoing ability to attract, and to negotiate competitively with, a wide range of third-party suppliers, when providing asylum accommodation. Protecting its position in this way will, overall, result in better value for money for the taxpayer. Therefore, in this case, the Commissioner finds that the public interest favours maintaining the exemption.
33. It follows that the Commissioner's decision is that the Home Office was entitled to rely on section 43(2) of FOIA to withhold the information.

Other matters

34. There is no obligation under FOIA for a public authority to provide an internal review process. However, it is good practice to do so, and where an authority chooses to offer one, the Code of Practice established under section 45 of FOIA sets out, in general terms, the procedure that should be followed. The Code states that reviews should be conducted promptly and within reasonable timescales.
35. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
36. In this case, the Home Office took 54 working days to provide the internal review.
37. The Commissioner has made a record of this delay, for monitoring purposes.

Right of appeal

38. 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

39. 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.
40. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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