

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 July 2024

Public Authority: Foreign, Commonwealth & Development Office

Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted a request to the Foreign, Commonwealth & Development Office (FCDO) seeking a copy of a contract between it and Zinc Network Ltd. It initially withheld the contract in full on the basis of sections 43(2) (commercial interests), 38(1)(a) and (b) (health and safety) and 40(2) (personal data) of FOIA. It subsequently disclosed a redacted version of the contract, relying on the previously cited exemptions to withhold parts of it.
2. The Commissioner's decision is that the majority of the redacted material is exempt from disclosure on the basis of section 43(2) of FOIA and that section 40(2) provides a basis to redact personal data contained in the contract.
3. However, the Commissioner has also concluded that the part of the contract containing the statement of the FCDO's requirements is not exempt from disclosure on the basis of section 43(2) of FOIA. Furthermore the redactions made on pages 3 and 7 of the contract are not exempt from disclosure on the basis of section 38(1)(b) of FOIA.
4. The Commissioner requires the FCDO to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with a copy of the statement of the FCDO's requirements and provide the complainant with revised copies of

pages 3 and 7 of the contract with the redactions made on the basis of section 38(1)(b) removed.

5. The public authority must take these steps within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. The complainant submitted the following request to the FCDO on 28 July 2023:

"In December 2022, the FCDO announced that it had agreed a contract with Zinc Network Ltd valued at £9,450,000.

The notice is here:

<https://www.contractsfinder.service.gov.uk/notice/f3b7a33f-e1c8-4435-92ae-a84ce9e8d6e8?origin=SearchResults&p=1>

Please provide me with a copy of the contract. If any parts of the contract cannot be disclosed for any reasons, please redact these so that the remainder of the document can be disclosed."

7. The FCDO responded on 6 December 2023.¹ It explained that the contract was considered to be exempt from disclosure on the basis of sections 43(2), 38(1)(a) and (b) and 40(2) of FOIA.
8. The complainant contacted the FCDO on the same day and asked for an internal review. He sought to challenge the application of all of the exemptions cited.
9. The FCDO provided the complainant with the outcome of the internal review on 7 May 2024. It disclosed a redacted version of the contract and explained that the remaining information was exempt from disclosure on the basis of the exemptions cited in the refusal notice.

¹ The Commissioner had previously issued a decision notice on 23 November 2023 requiring the FCDO to provide a substantive response to this request <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4027556/ic-266161-r9j6.pdf>

Scope of the case

10. The complainant contacted the Commissioner on 6 February 2024 about the FCDO's decision to withhold the information he had requested, and at that stage, its failure to complete the internal review.
11. Following the partial disclosure of information at the internal review stage, this decision notice focuses on whether the remaining information is exempt from disclosure on the basis of the exemptions cited by the FCDO.

Reasons for decision

Section 43 – commercial interests

12. Section 43(2) 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).'

13. The vast majority of the information which the FCDO continues to withhold has been withheld on the basis of section 43(2) of FOIA. This includes the following documents which form annexes to the contract:
 - i) The statement of the FCDO's requirements (SoR).
 - ii) Supplier's tender / Risk management document.
 - iii) Schedule of Zinc's Prices and Rates.
 - iv) OIP Activity Budget.
14. It also applied section 43(2) to a number of small redactions to the wording in the contract itself.

The FCDO's position

15. In support of its reliance on section 43(2) of FOIA, the FCDO provided the Commissioner with the following overarching submissions:
16. FCDO, Zinc and their sub-contractors would be commercially prejudiced if the redacted information in the contract was disclosed. The disclosure of the information would harm both parties' ability to negotiate and compete in the commercial environment so impeding both parties from generating income or providing value for money. The result of disclosure

would be both parties having a weakened negotiating position on other contracts and procurements which would prevent the FCDO from obtaining the best value for money for the public purse and cause Zinc to be competitively disadvantaged.

17. Revealing this information would mean that the FCDO's commercial interests would be compromised if its potential partners no longer had trust that commercially sensitive information about their work with the FCDO would remain confidential. FCDO's work depends very heavily on open and effective relations with its partners and commercial organisations. The FCDO argued that if it lost its reputation for respecting confidentiality the partner in this case would be reluctant to work with it in the future. Similarly, the FCDO argued that disclosure could also have a similar impact on other partners, including contractors and non-government organisations, overseas governments and institutions, on whose cooperation the FCDO and the UK government depends to promote development, peace and security.
18. With regard to the specific documents listed at paragraph 13, in respect of i), the FCDO explained that due to the sensitivity level of the project this document was only shared with a suppliers who were part of the Conflict, Stability and Security Fund Framework.² This would have been issued to the suppliers under the rules of confidentiality set out in FCDO's Instructions to Tender (ITT) where it states that all material issued in connection with the ITT shall remain the property of FCDO and shall be used only for the purpose of this procurement exercise. Upon the conclusion of this procurement process any unsuccessful suppliers must either return or securely destroy all of the information provided to them as part of this ITT. The FCDO explained that given the confidential nature of the procurement process and the information contained in the SoR it had withheld this document in full.
19. In respect of ii), the FCDO explained that this contained commercially sensitive information relating to the risks of the contract and the safeguarding of staff.
20. In respect of iii), the FCDO explained that this contained commercially sensitive information such as rates and personal information where names and job titles are mentioned.

² <https://www.gov.uk/government/organisations/conflict-stability-and-security-fund>

21. In respect of iv), the FCDO explained that this contained commercially sensitive information such as rates and personal information where names and job titles are mentioned.

The Commissioner's position

22. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers 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 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 – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there 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.
23. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the FCDO relates to the interests which the exemption contained at section 43(2) is designed to protect.
24. With regard to the second and third criteria, the Commissioner accepts that disclosure of the information that would reveal details about Zinc's pricing structure clearly risks undermining its commercial interests if such information was disclosed. This is on the basis that such information would be likely to put Zinc at a disadvantage, in comparison to its competitors, in any future similar tendering exercise. Equally, the Commissioner accepts that disclosure of such pricing information could risk undermining the FCDO's ability to negotiate similar contracts with other suppliers in the future.
25. Furthermore, the Commissioner accepts that disclosure of the information in documents ii) to iv) that goes beyond the pricing information would provide an insight into how Zinc intends to fulfil the contract. The Commissioner accepts that such information can legitimately be seen as commercially sensitive as it would provide Zinc's

competitors with an insight into its ways of working. As a result the Commissioner accepts that the FCDO's broader argument that disclosure of such information could harm its reputation amongst commercial parties for being a trusted party for confidential information could be at risk. In turn the Commissioner accepts that this could result in an impact on the willingness of some parties to engage with the FCDO in the future.

26. On the basis of the above, the Commissioner therefore accepts that there is a real risk of prejudice occurring to both Zinc and the FCDO's commercial interests if the information contained in documents ii) to iv) were to be disclosed under FOIA. For similar reasons the Commissioner considers section 43(2) to apply to the small amount of text redacted from the contract itself.
27. However, the Commissioner is not persuaded that the arguments advanced by the FCDO in respect of section 43(2) demonstrate that a causal relationship exists between the potential disclosure of document i), ie the SoR, and prejudice to either the FCDO's or Zinc's commercial interests. The Commissioner has reached this finding on the basis that the section 43(2) arguments focus on the disclosure of material provided to the FCDO in confidence which are said to contain the commercially sensitive material of a third party, ie Zinc.
28. The SoR is, by definition, an FCDO created document. Although the Commissioner notes that this was not made public, it was provided to interested contractors as highlighted above. Furthermore, whilst the Commissioner accepts the FCDO's position regarding the sensitivity of this type of work, and thus why the SoR was not shared more widely, he does not accept that the FCDO's section 43(2) submissions provide a basis to support a finding that disclosure of this document would be likely to prejudice either the FCDO's or any third parties' commercial interests. In other words, any harm that may follow from the disclosure of this document is not harm, which on the basis of the FCDO's submissions, can be said to be one of commercial prejudice.
29. In summary then, the Commissioner accepts that section 43(2) applies to all of the information to which the FCDO has cited this exemption with the exception of the document listed at i) above.

Public interest test

30. Section 43 is a qualified exemption and in line with the requirements of section 2 of FOIA the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption in cited outweighs the public interest in disclosing the information.

31. The FCDO argued that there is a strong public interest in ensuring that the commercial interests of suppliers are not damaged or undermined by disclosure of information which is not in the public domain and which could adversely impact on future business. The FCDO also argued that it was against the public interest for its own commercial interests to be harmed in respect of future negotiations. It also argued that it was against the public interest for it to be faced with a smaller pool of potential commercial partners as this would undermine its ability to achieve the outcomes set out in paragraph 17.
32. The complainant argued that there was a clear public interest, given the level of public money involved (the value of the contract being £9,450,000 as stated in the link cited in the request), for there to be greater transparency regarding this contract. Furthermore, the complainant suggested that the only way disclosure could harm the FCDO's reputation is if the contract is in some way morally or commercially controversial - in which case the public interest for disclosure is even greater.
33. The Commissioner acknowledges that there is a legitimate public interest in understanding the commercial basis upon which the FCDO enters into contracts, particularly where significant sums of money are involved. In the circumstances of this case the Commissioner also acknowledges that whilst this area of work, ie foreign information manipulation, disinformation and interference, is as the FCDO has noted, a sensitive one it is also one which is topical and of interest to the public. Disclosure of the information which the Commissioner accepts is exempt from disclosure on the basis of section 43(2) would provide a significant insight into the nature of the work being taken as part of this contract.
34. However, the Commissioner agrees with the FCDO that there is a clear public interest in ensuring that its commercial interests are not harmed and that it is able to secure best value for public money. Furthermore, in the Commissioner's opinion there is a very strong public interest in ensuring fairness of competition and in his view it would be firmly against the public interest if Zinc's commercial interests were harmed on the basis that it has entered into a contract with the FCDO.
35. In conclusion, and taking into account the above considerations, the Commissioner has concluded that the public interest favours maintaining section 43(2).

Section 38 – health and safety

36. The FCDO argued that documents ii) to iv) were exempt from disclosure on the basis of section 38(1)(b).³ As the Commissioner has already concluded that such information is exempt on the basis of section 43(2), he has not considered whether section 38(1)(b) also applies to this information.
37. However, the FCDO also argued that section 38(1)(b) applied to two small redactions of text on pages 3 and 7 of the contract.
38. Section 38(1)(b) states that:
- “(1) Information is exempt information if its disclosure under this Act would, or would be likely to...
- ... (b) endanger the safety of any individual.”

The FCDO’s position

39. In support of its reliance on this exemption the FCDO explained that this had been applied because release of certain information could potentially reveal details of Zinc employees and Zinc’s links to their downstream partners. Given the sensitive nature of the work the company is carrying out this information could then be used by hostile actors to target those employees and partners. Release of this information would therefore be likely to endanger the safety of the individuals.

The Commissioner’s position

40. With regard to the three limb test above, the Commissioner accepts that the potential prejudice described by FCDO does relate to the interests which the exemption contained at section 38(1)(b) is designed to protect. This limb is therefore met.
41. In relation to the second and third limbs, the Commissioner acknowledges the FCDO’s position regarding the identification of individuals involved in this work and why such identification could, potentially, result in harm occurring to them. However, with regard to the specific information redacted on this basis of this exemption on

³ Although the refusal notice cited sections 38(1)(a) and (b), the FCDO’s submissions to the Commissioner concerned section 38(1)(b).

pages 3 and 7 of the contract, the Commissioner is not clear how such information could lead to any such individuals being identified.

42. As a result, he does not accept that there is a causal link between the disclosure of such information and harm of the nature envisaged by the FCDO occurring. Such information is therefore not exempt from disclosure on the basis of section 38(1)(b) of FOIA.

Section 40 – personal data

43. The FCDO explained that on the basis of section 40(2) it had redacted the names, job titles and contact details of an FCDO official and similar information regarding representatives of Zinc.
44. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
45. In this case the relevant condition is contained in section 40(3A)(a).⁴ This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
46. It is common practice for a public authority to argue that the names and contact details of junior officials are exempt from disclosure under FOIA on the basis of section 40(2) as disclosure would contravene the principles set out in Article 5 of the GDPR. Furthermore, unless there are very case specific circumstances, the Commissioner accepts that the names and contact details of the junior officials are exempt from disclosure on the basis of section 40(2) of FOIA. This is in line with the approach taken in the Commissioner's section 40 guidance.⁵ Therefore, in this case the Commissioner adopts the reasoning set out in these previous decision notices which found that the personal data of junior officials was exempt from disclosure on the basis of section 40(2) of FOIA.⁶

⁴ As amended by Schedule 19 Paragraph 58(3) DPA.

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https://ico.org.uk/media/fororganisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf - see page 12

⁶ IC-114449-B7P7 <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022310/ic-114449-b7p7.pdf> Paragraphs 49-71 and IC-110922-T9R1

47. Furthermore, the Commissioner is also satisfied that disclosure of similar information about the representatives from Zinc would be a breach of data protection principles as it would result in the disclosure of personal information about them that they would not necessarily expect to be made public. In addition, disclosure of such information would not contribute to or meet in any way the public interests considered above. Such information is therefore also exempt from disclosure on the basis of section 40(2) of FOIA.

Other matters

48. FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe.⁷ The Commissioner expects that most internal reviews should be completed within 20 working days, and even for more complicated requests, reviews should be completed within a total of 40 working days.⁸ In this case, as noted above, the FCDO did not complete the internal review within this timeframe.

<https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4022447/ic-110922-t9r1.pdf> paragraphs 39-62.

⁷ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

⁸ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal>

Right of appeal

49. 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

50. 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.
51. 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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