

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 August 2024

Public Authority: Oxford Direct Services Trading Limited

Address: St Aldates Chambers

109 St Aldates

Oxford

OX1 1DS

Decision (including any steps ordered)

1. The complainant has requested information from Oxford Direct Services Trading Limited (ODSTL) relating to its gul-e electric car charging system. ODSTL refused the request on the basis that section 43(2) (commercial interests) and section 12 (appropriate limit) of FOIA applied.
2. The Commissioner's decision is that ODSTL was correct to apply section 43(2) to withhold the information from disclosure.
3. The Commissioner does not require ODSTL to take any further steps.

Request and response

4. On 27 January 2024, the complainant wrote to ODSTL and requested information in the following terms:

"<https://gul-e.co.uk/about-us/>

1. How many personnel employed by ODS are working on development and deployment of the Gul-e, electric car charging system.
 2. Please provide the job titles and number of each personnel assigned to the Gul-e project.
 3. How much money to date has ODS spent on developing the Gule-e, electric car charging system. Please provide a detailed breakdown of costs, i.e., development costs, manufacturing, deployment, employees salaries etc.
 4. Please provide all sources and sums of funding received for Gule-e development.
 5. How many Gule-e installations has ODS deployed to date.
 6. How much money (net and gross profit) to date has ODS made from deploying Gule-e."
5. ODSTL responded on 9 February 2024, withholding information in relation to parts 3, 4 and 6 of the request on the basis that section 43(2) of FOIA applied. It disclosed the remainder of the information to the complainant.
6. Following an internal review ODSTL wrote to the complainant on 26 February 2024. It upheld its decision to apply section 43(2) to withhold the information.

Scope of the case

7. The complainant contacted the Commissioner on 27 February 2024 to complain about the way their request for information had been handled.
8. During the course of the Commissioner's investigation, ODSTL said that it would also apply section 12 to part 3 of the request if the Commissioner's decision was that section 43(2) was not applicable.
9. The Commissioner therefore considers that the scope of his investigation is to determine whether ODSTL was correct to apply section 43(2) to withhold the information. If section 43(2) does not apply to part 3 of the request, then he will also need to consider whether section 12 of FOIA applies.

Reasons for decision

Section 43(2) – prejudice to commercial interests

10. Section 43(2) provides 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).”
11. In order for a prejudice-based exemption, such as section 43, 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, i.e., disclosure ‘would be likely’ to result in prejudice or disclosure ‘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.
13. In this case the Commissioner has not found it necessary to see the withheld information. The complainant has not asked for a specific document, but has made a number of requests for specific types of financial information; primarily funding, costs and profits. ODSTL has provided the Commissioner with its full arguments in support of the application of the exemptions to these types of information. The Commissioner has therefore based his decision upon these arguments, together with the specific nature of the information falling within the scope of the complainant's request.

Does the information relate to a person's commercial interests?

14. The term 'commercial interests' is not defined in 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
15. The Commissioner accepts that the requested information relates to the development, production and retail of a product which is intended to compete in a competitive market. The Commissioner therefore accepts that the information relates to the commercial interests of ODSTL.

Is there a causal relationship between the disclosure and the foreseen prejudice?

16. ODSTL argued that the GUL-e project operates in the emerging and developing electric vehicle ('EV') cable channels market. It argued that revealing detailed financial information such as product development, manufacturing, and deployment costs could harm its future negotiations and its competitive stance.
17. It further argues that, given the sector's competitiveness, disclosing costs and profits would be likely to undermine its current supply-chain negotiations in the private sector, raising its expenses and impacting its market position.
18. It also considered that a disclosure of the information could also negatively impact its third-party private sector partner. However, it did not provide any further information on this, nor did it provide any submissions from third parties supporting this view.
19. The Commissioner notes that the requested information includes detailed information about ODSTL's funding, expenditure, profits and development costs regarding Gul-E.
20. He considers that a disclosure of information of this nature would provide information which would allow ODSTL's competitors valuable insight into its business plan which would place ODSTL at a commercial disadvantage when competing against them.

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/#432>

21. He also accepts ODSTL's argument that a disclosure of detailed financial information about its project would be likely to undermine it in future negotiations.
22. The Commissioner therefore accepts that a disclosure of the withheld information into a competitive market would be likely to cause the commercial prejudice foreseen by ODSTL.

The likelihood of the prejudice occurring

23. ODSTL argues that a disclosure of the information "would be likely" to cause the prejudice it has foreseen. The Commissioner has therefore considered whether the chance of prejudice occurring meets the lower threshold of being a real and significant risk.
24. The Commissioner considers that ODSTL's arguments are persuasive. The GUL-E project sits within a developing and competitive market. It is very likely that a disclosure of the information would be used by ODSTL's competitors to inform upon, and formulate their own business plans to better compete against ODSTL.
25. As the three tests have been met, the Commissioner has decided that the exemption in section 43(2) is engaged. He has therefore gone on to carry out the public interest test required by section 2(2)(b) of FOIA.
26. The test is whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The public interest test

The public interest in the information being disclosed

27. The complainant argues that as ODSTL is a public authority, there is a public interest in it disclosing information about its use of public money in order to develop, produce and sell the system.
28. The Commissioner accepts that as a public authority there is a public interest in ODSTL being clear about its use of public money, and in creating greater transparency over its decisions, and its financial decision making.
29. The Commissioner also notes that the issue of electric vehicles, and the charging systems they require, is a topical and important subject of current debate. There is a public interest in creating a greater understanding of how companies and public authorities are

implementing measures to enable and facilitate the change over from petrol and diesel engines to electric vehicles.

The public interest in the exemption being maintained

30. The Commissioner has accepted ODSL's explanation of the prejudice which would be caused to its commercial interests if the requested information were to be disclosed into the public domain.
31. A disclosure of the information would undermine ODSTL's competitiveness, and would be likely to prevent it from obtaining best value from the project. As ODSTL is a public authority, this would ultimately affect the public purse.
32. There is therefore a strong public interest in allowing ODSTL to compete in the commercial market on an equal footing with purely private companies.
33. Whilst ODSTL would not have access to similar information relating to its private competitors, the latter could use information such as the profits, costs and funding sources etc to directly inform their own projects, undermining ODSTL's position. A loss of its market competitiveness would create a detrimental effect upon ODSTL and the public purse. Any market advantages it has gained in developing its business plan and the commercial approach it has taken could be lost or undermined when compared against its competitors.
34. Prejudicing the commercial interests of one player in the market would distort competition in that market, which in itself would not be in the public interest.
35. In the case of Willem Visser v Information Commissioner EA/2011/0188, (1 March 2012), the appellant had requested a copy of a profit and costs schedule from a business plan. The First-tier Tribunal noted that there is a public interest in protecting the commercial interests of individual companies and ensuring they are able to compete fairly:

"If the commercial secrets of one of the players in the market were revealed then its competitive position would be eroded and the whole market would be less competitive, with the result that the public benefit of having an efficient competitive market would be to some extent eroded".

The balance of the public interest

36. The Commissioner has considered the arguments on both sides.
37. The Commissioner accepts that there is a public interest in creating greater transparency on the actions of ODSTL in regard to the development of Gul-E, and its use of public money to fund this. However, undermining ODSTL's competitiveness would potentially impact upon its potential profits at a cost to the public purse. It would also distort, and erode the market by reducing its overall competitiveness.
38. The Commissioner has therefore decided that the public interest in the exemption being maintained outweighs that in the information being disclosed in this case.
39. The council was therefore able to rely upon section 43(2) of FOIA to withhold the information from disclosure.

Section 12 – appropriate limits

40. As the Commissioner has decided that ODSTL was correct to withhold the requested information under section 43(2) of FOIA, he has not found it necessary to consider its application of section 12 to part 3 of the request.

Right of appeal

41. 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

42. 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.
43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Ian Walley
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