

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 25 January 2017

**Public Authority:** Cabinet Office

**Address:** 70 Whitehall

London

SW1A 2AS

### Decision (including any steps ordered)

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1. The complainant has requested information on the spending in respect of the government leaflet "Why the Government believes that voting to remain in the European Union is the best decision for the UK." The Cabinet Office ('CO') initially sought to withhold the information in reliance of section 43(2) (Commercial interests). During the Commissioner's investigation the CO disclosed the majority of the information, however, the remaining information was withheld on the basis of section 43(2) and section 41(1) (Information provided in confidence).
2. The Commissioner's decision is that the CO is not entitled to rely on the exemptions at sections 41(1) and 43(2) of the FOIA to withhold the information. She finds that:
  - the section 41(1) exemption is not engaged
  - the section 43(2) exemption has been correctly applied, however, the public interest favours disclosure of the information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the remaining withheld cost in respect of the leaflet.
4. The public authority must take these steps within 35 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

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5. On 7 April 2016 the complainant wrote to the CO and requested information in the following terms:

"I presume Williams Lea aren't receiving the entire £9m but I would be grateful if you would tell me how much they are receiving. I would also be grateful which other companies are involved and how much they are receiving for their involvement."
6. The CO responded on 6 May 2016. It stated that the requested information was withheld in reliance of the exemption at section 43(2) of the FOIA.
7. In requesting an internal review of the decision the complainant commented:

"I am unclear how this response squares with the government's policy – and legal requirement – for public bodies to publish spending above certain amounts.

The government has a clear commitment to the publication of information surrounding public spending and the Cabinet Office has not provided any argument as to why these suppliers should be treated any differently to the hundreds of thousands of suppliers who have information about their income received from the public purse routinely published every day of the week."
8. The CO acknowledged the request for internal review on 9 May 2016, however, a response was not forthcoming until 2 November 2016. It provided the majority of the spending on suppliers' services but continued to withhold some information in reliance of both section 43 and 41 of the FOIA. It provided no reasoning for its reliance on these exemptions.

## Scope of the case

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9. The complainant contacted the Commissioner on 6 July 2016 to complain that he had not received a response to his request for an internal review after 43 working days. On 19 July 2016 the Commissioner wrote to the complainant advising him that as there had been a protracted delay in responding to the request for internal review, she would take forward the complaint as an investigation into the application of section 43(2).

10. The Commissioner considers the scope of his investigation to be the CO's application of section 43(2) and also the late application of section 41 in withholding some of the requested information.

## Reasons for decision

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11. Section 41 states:

"Information is exempt information if –

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

12. The CO relied on the exemption at section 41, after its initial submission to the Commissioner, at the time of the internal review of 2 November 2016. The Commissioner subsequently requested the CO's reasoning for its reliance.
13. Section 41 provides an exemption for information provided in confidence. The Commissioner's first consideration is that the exemption will only be engaged if the information has been obtained by the public authority from another 'legal person'.
14. The CO's position is that the withheld information is subject to the terms and conditions of a binding contract signed by the parties which includes a confidentiality clause. The CO considers that this engages the exemption.
15. The Commissioner does not accept this argument. In considering her own guidance on this exemption she notes that the contents of a contract between a public authority and a third party generally do not constitute information obtained from another person. The terms of the contract have been mutually agreed by the respective parties, rather than provided by one party to another.
16. In explaining his view to the Commissioner the complainant cited the Commissioner's guidance on section 41 and specifically the Tribunal decision in *Department of Health v ICO* (EA/2008/0018, 18 November 2008). In this case the Tribunal determined that the contract did not fulfil the requirements of section 41(a) stating:

"If the Contract signifies one party stating: 'these are the terms upon which we are prepared to enter into a Contract with you' by the acceptance of that Contract the other party is simultaneously stating

'and these are the terms upon which we are prepared to enter into a Contract with you'. Consequently the Contract terms were mutually agreed and therefore not obtained by either party."

17. The Commissioner considers this to be relevant to the circumstances in this case and has concluded that the section 41 exemption is therefore not engaged. The application has fallen at the first 'hurdle'. Consequently she has not given any further consideration to the CO's arguments regarding breach of confidence.

18. Section 43(2) of FOIA states:

"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).

19. At the time of its initial response to the Commissioner on 2 September 2016 the CO explained its reliance on section 43(2) FOIA. It explained that it had entered into contracts with suppliers for the delivery of relevant services connected to the creation, distribution and promotion of the leaflet. It went on to advise that:

"The Cabinet Office will be publishing much of this information as part of its transparency returns concerning government spending. Some of this information is to be withheld as part of confidentiality agreements that the Cabinet Office has entered into with suppliers."

20. Before further considering the section 43 (2) exemption, the Commissioner would express her surprise that the CO had entered into confidentiality agreements that would directly oppose the government's openness and transparency agenda on such an important issue. However, she has received a copy of the applicable contract preface and accepts the confidentiality clause.

21. The CO explained that the confidentiality agreement protects the suppliers' "capacity to agree rates in conditions of commercial confidence without prejudicing their ability to conduct business with future partners."

22. The CO also argued that if it released information concerning confidential commercial arrangements other suppliers would be less likely to enter into contracts with the CO or would charge a price premium to take into account the potential lack of confidentiality. This would result in higher costs funded by taxpayers.

23. The Commissioner's further consideration of the application of this exemption is covered in a Confidential Annex.

24. The Commissioner accepts that the exemption is engaged, however, as set out in the Confidential Annex she has determined that the public interest favours disclosure.

### **Other matters**

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25. The complainant has repeatedly expressed his frustration at the CO's handling of his request, which he considered to be a straightforward request for information which should be published in accordance with the CO's transparency reports.
26. The Commissioner accepts and understands his position as she also faced prolonged delays in her investigation following the CO's initial submission.

## Right of appeal

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27. 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: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

28. 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.
29. 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** .....

**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**