

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 4 September 2019

**Public Authority:** The Cabinet Office

**Address:** 70 Whitehall  
London  
SW1A 2AS

### Decision (including any steps ordered)

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1. The complainant submitted a request to the Cabinet Office seeking information about the decision to cancel a procurement framework by the Crown Commercial Service. The Cabinet Office disclosed some of the information requested but sought to withhold further information on the basis of section 43(2) of FOIA. The Commissioner has concluded that only some of this information is exempt from disclosure on the basis of section 43(2). However, the Commissioner does accept that for the information which is exempt from disclosure on the basis of this exemption the public interest favours withholding this information.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
  - Provide the complainant with a copy of the information which she has concluded is not exempt from disclosure on the basis of section 43(2) of FOIA. The Commissioner has provided the Cabinet Office with a confidential annex which identifies this information.
3. 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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4. The complainant submitted the following request to the Cabinet Office on 21 May 2018:

*'Last September you cancelled the award of Lot 1 of the Management Consultancy Framework (RM3745) and made the statement that this was due to a construct error in the criteria which did not adequately assess the Bidder's quality of delivery to the level required.*

*Now that bidding for the replacement framework has finished and there is no way the release of information could provide any competitive advantage to bidders, I would like to ask you to provide more information on what the "construct error" was.*

*Please can you provide the following information under the Freedom of Information Act:*

*1. When was the construct error first discovered by your team (approximately)? Given that the bids were submitted in March and details of the cancellation did not emerge until September, it appears likely that it was towards the latter end of this period.*

*2. Did your team evaluate the 177 tenders submitted for Lot 1 before the construct error was discovered?*

*3. Did you at any stage before the decision was made to cancel Lot 1 have a draft or initial list of the highest scoring suppliers?*

*4. If you had such a list, please can you provide details of how many of the top 30 suppliers on it were SMEs and how many were large firms?*

*5. Please can you supply a list of the names of any external private sector companies involved in the framework design and/or evaluation together with the roles they undertook.*

*6. Please can you provide any internal reports or memoranda discussing the construct error and the proposal to cancel the award of Lot 1.<sup>1</sup>*

5. The Cabinet Office contacted the complainant on 19 June 2018 and confirmed that it held information falling within the scope of his request but it considered this to be exempt from disclosure on the basis of

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<sup>1</sup> The procurement framework in question was run by the Crown Commercial Service, an executive agency of the Cabinet Office, and is the biggest public procurement organisation in the UK.

section 43(2) (commercial interests) of FOIA and it needed additional time to consider the balance of the public interest test. The Cabinet Office sent a further public interest test letter on 17 July 2018 albeit citing section 31 (law enforcement) of FOIA rather than section 43.

6. The Cabinet Office provided the complainant with a substantive response to his request on 2 November 2018.<sup>2</sup> It provided him with a response to questions 1 to 5 of his request but explained that it considered the information falling within the scope of question 6 to be exempt from disclosure on the basis of section 43(2) of FOIA. No mention was made of the section 31 exemption.
7. The complainant contacted the Cabinet Office on 3 November 2018 in order to ask for an internal review into the response given to questions 1, 2 and 6.
8. The Cabinet Office informed him of the outcome of the internal review on 3 January 2019. The Cabinet Office provided him with further information in order to answer questions 1 and 2 but explained that it remained of the view that the information sought by question 6 was exempt from disclosure on the basis of section 43(2) of FOIA.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 4 January 2019 and asked her to investigate the Cabinet Office's reliance on section 43(2) to withhold the information falling within the scope of question 6. He argued that such information was not covered by section 43(2) and even if this exemption was engaged then the public interest favoured disclosure of the information.

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<sup>2</sup> The Cabinet Office's response followed a previous decision notice, FS50784782, which the Commissioner had issued on 18 October 2018. That notice ordered the Cabinet Office to issue a substantive response to the request and that it had breached section 17(3) by failing to complete its public interest considerations within a reasonable timeframe.

## Reasons for decision

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### Section 43 – commercial interests

10. 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).'*

11. 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 to discharge.

#### *The Cabinet Office's position*

12. In its submissions to the Commissioner the Cabinet Office argued that disclosure of the withheld information would be likely to harm both the commercial interests of the Crown Commercial Service (CCS) and be likely to harm the commercial interests of CCS' suppliers.

13. With regard to CCS' commercial interests the Cabinet Office explained that the public sector buying landscape is somewhat fragmented; whilst CCS is the largest public buying organisation it is not the only purchasing body that offers management consultancy services to the public sector – Yorkshire Purchasing Organisation, North East Purchasing

Organisation and several others also offer these services and are considered competitors to CCS.

14. The Cabinet Office argued that disclosure of the withheld information would offer these competitors a unique insight into how CCS operates when awarding its commercial arrangements, especially in complex scenarios, such as when difficult decisions such as cancelling a lot are taken.
15. Furthermore, the Cabinet Office argued that disclosure of the information may lead customers to use CCS' competitors deals for future commercial activity and some suppliers may choose not to bid on future CCS procurements.
16. With regard to the interests of the CCS' suppliers who tendered for the Lot 1 contract, the Cabinet Office explained that as a matter of course CCS publishes the names of suppliers who are awarded spaces on its framework agreements and other commercial vehicles. However, the procurement process of Lot 1 was never completed and therefore the release of any information about suppliers who chose to bid (or not bid) is considered to be commercial sensitive. The Cabinet Office explained that this was standard practice for all procurements that did not conclude for whatever reason.
17. Furthermore, the Cabinet Office explained that disclosure of the withheld information would be disruptive and damaging to the market as a whole, both the supply and demand side, because of the insight the information would provide and the analysis which could be conducted from it.

#### *The complainant's position*

18. The complainant argued that disclosure of the withheld information would not be likely to prejudice the commercial interests of either CCS or its suppliers. In support of this position the complainant argued that CCS is a large organisation with numerous frameworks and is, and will remain, the key buying organisation for the UK public sector. He argued that it was highly unlikely that this will be significantly impacted through the disclosure of information about one procurement that had difficulties. In particular he disputed the Cabinet Office's view that potential suppliers would be deterred from bidding for future contracts. He also argued that if the information simply related to details of the construct error then there would be no need to disclose information concerning suppliers' bids.

#### *The Commissioner's position*

19. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the

Cabinet Office clearly relates to the interests which the exemption contained at section 43(2) is designed to protect.

20. With regard to the second criterion, and the CCS' commercial interests, the Commissioner accepts that CCS is not the only purchasing body that offers management consultancy services to the public sector. She also accepts that disclosure of the withheld information would provide a detailed insight into the decision to cancel this particular lot. In light of this Commissioner accepts that it is plausible to argue that disclosure of the withheld information could potentially provide CCS' competitors with an insight into their organisation, which in theory, such competitors could potentially find beneficial or useful. However, in respect of the third criterion, the Commissioner is not persuaded that the risk of such prejudice occurring is one that is anything more than hypothetical. Whilst the information is detailed in nature, and would the Commissioner accepts provide CCS competitors' with a unique insight, the Cabinet Office has not set out how this unique insight would actually provide CCS' competitors with a commercial advantage and/or actually result in harm to CCS' commercial position. Similarly, the Commissioner considers the argument that disclosure would result in customers using other organisations rather than CCS, and/or some suppliers not bidding on future CCS procurements, to be a speculative one given the information already in the public domain about the factors that led to this Lot being cancelled – ie the Cabinet Office had confirmed that the Lot 1 was cancelled due to a construct error - and also CCS' position as the largest purchasing body in the UK.
21. With regard to the second criterion, and interests of CCS suppliers, the Commissioner notes that it is standard practice not to disclose the names of suppliers who bid (or indeed did not bid) for procurement processes that are not completed. The Commissioner also acknowledges that there is a considerable information contained in the withheld information setting out both details of the suppliers' bids themselves and also an analysis of such bids. The Commissioner accepts that disclosure of such information would be likely to distort the marketplace by providing individual suppliers with a direct insight into the nature of bids provided by their direct competitors. Consequently, in the Commissioner's view there is a causal link between disclosure of the withheld information and harm occurring to the interests of CCS' suppliers and furthermore that there is more than a hypothetical risk of such prejudice occurring.
22. In summary then, the Commissioner accepts that disclosure of the withheld information would be likely to prejudice the commercial interests of suppliers who tendered for the Lot 1 contract. However, she is not persuaded that disclosure of the withheld information would be likely to harm the commercial interests of the CCS. In light of this finding the Commissioner has reached the following conclusions:

- Some of the documents in the scope of the request are not exempt from disclosure on the basis of section 43(2);
- Some of the documents are exempt, in their entirety, on the basis of section 43(2) of FOIA; and
- For a remaining category of documents, section 43(2) only covers part of the contents of the document.

*The public interest test*

23. Section 43 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
24. As the Commissioner has concluded that some of the withheld information is not exempt from disclosure on the basis of section 43(2), she has simply considered the application of the public interest test to the information which she accepts is exempt.

*Public interest in favour of disclosing the information*

25. The complainant explained that his reason for asking for the information was because this was a major procurement framework which attracted considerable interest especially from SMEs, with 177 responses and the effort each of those businesses put in to creating their tenders. The complainant explained that his estimate is that the combined cost to those businesses of bidding for the aborted lot was between £500,000 and £1m. The complainant noted that the reason for cancelling the lot was stated as due to a 'construct error' being discovered during the evaluation. The complainant argued that there was considerable disquiet from bidders and trade bodies about the lot being cancelled, with suggestions in the industry that it was because the Government's favoured 'Big 4' suppliers did not make the cut; the complainant argued that cancelling a lot just because the favoured suppliers were not on it would be a considerable abuse of process.
26. He therefore argued that there was a considerable public interest in the disclosure of the information for the following reasons:
  - There was clearly a problem with this Lot and it is in the public interest to disclose as a learning point for CCS and other contracting bodies.
  - There has been a suspicion of wrongdoing here and there is a strong public interest to show whether or not this is the case.
  - There is no exemption permitted to avoid embarrassment.
  - There is a strong public interest in disclosure due to the cost to the consulting industry.

*Public interest in favour of maintaining the exemption*

27. In its refusal notice the Cabinet Office identified the following two arguments to support its view that the public interest favoured maintaining the withheld information:

- Preserving relationships of trust and confidence and the free flow of information between the CCS and suppliers who chose to bid for this commercial arrangement is paramount. The disclosure of information and discussions concerning suppliers bids into the public domain may jeopardise this relationship, which is fundamentally important in maintaining for the most effective delivery of public services; and
- Potential bidders for future contracts may be deterred from competing and sharing commercially sensitive information with CCS which would negatively impact upon the quality and quantity of Governments' supplier base.

28. The Commissioner invited the Cabinet Office to comment on the complainant's allegation that there is a compelling public interest in disclosure of the information given the suspicion of wrongdoing in respect of how the procurement process was conducted; more specifically that the process was cancelled because the government's favoured 'Big 4' suppliers did not make the shortlisted bidders. In response the Cabinet Office emphasised that Lot 1 was cancelled because of a construct error within the design of that particular lot, more specifically that the questions in the original tendering process did not sufficiently address suppliers' capability to handle complex projects. The Cabinet Office argued that the CCS would have been failing both the wider market and the taxpayer if Lot 1 had been awarded in this guise and it redacted quickly once this error was identified.

*Balance of the public interest test*

29. The Commissioner agrees that there is a strong public interest in the disclosure of the information which she accepts is exempt from disclosure on the basis of section 43(2) of FOIA, essentially because of the specific points identified by the complainant at paragraph 26 above. In the Commissioner's opinion disclosure of this information would go some way to meeting these public interests. However, in the Commissioner's opinion there is a very strong public interest in ensuring fairness of competition and in her view it would be firmly against the public interest if a third party's commercial interests, in this case the interests of the suppliers who submitted bids for Lot 1, were harmed simply because they had submitted such bids. The Commissioner is also conscious that disclosure of the information which she has concluded is

not exempt from disclosure on the basis of section 43(2) would already provide a detailed insight into why the Lot was cancelled.

30. The Commissioner has therefore concluded that the public interest favours maintaining the exemption contained at section 43(2) of FOIA.

## **Other matters**

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31. The Commissioner wishes to note that she wrote to the Cabinet Office on 8 April 2019 and asked it to provide her with a copy of the withheld information and submissions to support the application of section 43(2) of FOIA. She asked for a response to this letter within 20 working days. Having failed to receive a response the Commissioner served an Information Notice on the Cabinet Office on 18 June 2019 under section 51 of FOIA which formally required it to provide her with a response to her previous letter within 30 calendar days, i.e. by 18 July 2019. The Cabinet Office's response was sent on 23 July 2019.
32. The Commissioner considers it regrettable that it took the Cabinet Office over three months to provide her with a response to her enquires, and in doing so also failed to comply in time with the Information Notice that was issued. (Such delays, it should be noted, follow the 118 days the Cabinet Office took to complete its public interest considerations). The Commissioner expects the Cabinet Office to provide her with timely responses to her enquiries and moreover that if she does issue an Information Notice under section 51 of FOIA that such a notice is complied with in time.

## Right of appeal

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33. 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@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)

34. 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.
35. 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 .....**

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