

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 4 December 2023

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

#### **Decision**

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1. The complainant has made seven requests for information relating to subcontractors to the Asylum Accommodation and Support Contracts (AASC).
2. The Commissioner's decision is that the public authority is not entitled to rely on section 43 of FOIA to withhold the remaining information.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation.
  - Disclose the information it has relied on section 43 of FOIA to withhold.
4. The Home Office 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 30 March 2023 the complainant made a requested information of the following description:

"The Home Offices Asylum Accommodation and Support Contracts require accommodation providers to submit Excel spreadsheets containing details of all material and non-material sub-contractors and update these as when a sub-contractor is brought in or terminated.

Please provide:

All spreadsheets of subcontractors, and any updates, that have been provided to the Home Office by providers under the Asylum Accommodation and Support Contracts."

6. The complainant provided clarification in regards to their request stating the following:

"I am seeking any spreadsheets, or updates to these spreadsheets, that have submitted by providers since the contracts were awarded-up to the present date.

It appears the contracts were awarded on or around 8 January 2019."

7. On 13 April 2023 the Home Office responded refusing to provide the requested information under section 43(2) of the FOIA.
8. At internal review the Home Office upheld its original decision.

## Background

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9. As a background to the request, the Home Office explained that it has an obligation to provide accommodation and related services to asylum seekers who would otherwise be destitute. It stated that the current AASC was set up in 2019 and is provided by three suppliers: Serco Group plc, Mears Group plc and Clearsprings Ready Homes; across seven regional lots encompassing the entirety of the UK.

## Scope of the case

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10. The complainant contacted the Commissioner on 7 June 2023 to complain about the way their request for information had been handled.
11. The Commissioner considers that the scope of this complaint is to determine if section 43(2) is engaged for the Home Office to withhold the requested information.

## Reasons for decision

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### Section 43 – Commercial interests

12. Section 43(2) of the 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.
13. It is a qualified exemption, therefore in addition to demonstrating that disclosure would or would be likely to prejudice the commercial interests of the public authority or a third party, the public authority must demonstrate that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption
14. In order for 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 commercial interests;
  - 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 to those commercial interests; and
  - Thirdly, it is necessary to establish whether the alleged prejudice would, or would be likely, to occur.
15. The exemption provided by section 43 can be engaged on the basis that the alleged prejudice “would” occur, or the lower threshold: that the prejudice is only “likely to” occur. In its submission to the Commissioner, the Home Office explained that the release of the requested information “would be likely to” prejudice the commercial interests of both the providers and the Home Office.

16. Although applying the lower threshold of prejudice makes the exemption easier to engage, less weight is given to the value of maintaining the exemption when considering the public interest test.
17. Before contemplating the public interest test, it is necessary to consider first whether the exemption is actually engaged.
18. The withheld information consists of seven tables containing material subcontractors names, registered office address and company number, a very brief product/service description, a percentage of projected service charge over the contract term, a short description of the material role in delivery of the services and credit rating threshold.
19. In its submission to the Commissioner, the Home Office explained that it is currently considering Market Engagement in this area to support future procurement activity and if it were to release the withheld information, that would provide future competitors with information, not available to them by other means, about the current suppliers.
20. It argued that the release of the information requested would create an unfair advantage, resulting in prejudice to the Home Office's commercial interests by damaging commercial relationships with contractors and service providers.
21. It also argued that if suppliers are aware that the public authority is sharing sensitive information, then they would be less likely and willing to engage and contract with the Home Office. In turn, this would have the knock-on effect of reducing competition for the provision of contracts, consequently driving up the Home Office's operating cost. This would not provide good value for money for both the Home Office and taxpayer.
22. The Home Office explained to the Commissioner that release of the information requested would likely lead to providers being reticent to provide future sub-contractor detail and would be likely to have commercial consequences for the providers if their sub-contractors and relevant detail are made known to the public. It also claimed that release of the withheld information would be likely to result in the Home Office paying more for these services and would compromise ongoing procurement activity.
23. The Home Office advised that sharing details of sub-contractors gives a good link to the pricing paid by the supplier. If the information was released it would allow future competing suppliers to be aware of key information regarding an existing supplier which could be used to their

advantage when the contract comes up for Tender, thus harming their Commercial Interests.

24. The Home Office accepted that providers are "contractually required" to submit this information, it argued that this was "reliant on their willingness to do so within the confines of the contract". The Home Office argued that, if it shared commercially confidential information, the providers could "refuse to share in the future (even if they are commercially bound to do so)."
25. The Commissioner accepts that section 43 of the FOIA is designed to protect genuinely commercially sensitive information of either the public authority involved and/or third parties, on the basis that disclosure would or would be likely to hinder their abilities to compete fairly and competitively in the market place. However, for this to apply the arguments presented must relate to the information in question and how that information, if it were disclosed, would be likely to have the effects described.
26. The Commissioner has been provided with copies of the withheld information and is not convinced that disclosure of the type of information contained within it would provide future competitors with information that would create an unfair advantage.
27. The Commissioner is also not persuaded that disclosure would result in providers being less likely and willing to engage and contract with the Home Office. The Commissioner accepts that the providers will have contracts with confidentiality clauses but this alone is not enough to warrant the non-disclosure of information under the FOIA. The legislation has been in force for some time and private sector companies wishing to bid for public sector contracts should be aware of the legislation's requirements.
28. The Commissioner cannot accept the Home Office's argument that disclosure of the withheld information may result in providers not being willing to share such information in the future when it has also stated that "...providers are contractually required to submit this information..."
29. The Home Office has also claimed that disclosure would create unfair advantages but has not explained how this would be the case nor provided appropriate evidence demonstrating a causal link between disclosure of this particular information and harm to its own commercial interests or those of the providers. The Commissioner cannot make assumptions on the public authority's behalf.

30. The Home Office has failed to explain why merely naming the subcontractors would damage either its own interests, its contractor's interests or the interests of the subcontractors.
31. Even the figures that the withheld information contains which detail the overall share of the contract that each sub-contractor has been awarded are not obviously commercially sensitive.
32. Firstly, these figures are expressed as a percentage of the "anticipated" value of the AASC contract. Until the contract expires, the actual sum paid to the contractor has not been fixed and therefore both the percentage and the actual sum paid to the sub-contractor could vary. Therefore even if a rival were to combine the percentage figure quoted with the value of the overall contract, this may not be an accurate representation of what the subcontractor has been or ends up being paid.
33. Secondly, even if the Commissioner were to accept that the anticipated and final figures for the contract value were identical, this still does not allow a rival firm to derive the subcontractor payment with a reasonable degree of accuracy.
34. Most of the percentages appear to be rounded to the nearest whole number. That means that the actual percentage could be 0.5% higher or lower than quoted – and this could make a considerable difference.
35. For example, if a subcontractor has been awarded 8% of a £10 million contract, the actual price paid could be anywhere between £750,000 and £849,999. The point within that range where the actual price falls may make the difference between the contract being profitable and not. Even if a rival firm knows the range, it will not know where on that range, the subcontractor actually sits.
36. Finally, even if the Commissioner were persuaded that it was possible to derive an accurate figure from the percentage, he is still not persuaded that this would be of use to rivals – because the withheld information lacks specific details of what is being provided.
37. Simply knowing that a rival firm was paid £800,000 (if that, hypothetically, were the case) is of little use if you do not know what your rival was required to provide for that sum. If you do not know what services were provided, you cannot work out what the cost per unit was and hence you cannot work out what the profit margin per unit is.
38. The descriptions in the withheld information of the services being provided are highly generic. They do not indicate how many units were being provided or of what type, or when or where they were provided.

Without access to this information, a rival could not make any reliable estimate of profit margin.

39. As the Home Office has failed to demonstrate any causal link between those effects and the specific withheld information in this case, the Commissioner has decided that section 43 of the FOIA is not engaged. As he is satisfied that it is not engaged, there is no need to go on to consider the public interest test.

## Right of appeal

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40. 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](mailto:grc@justice.gov.uk)

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

41. 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.
42. 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 .....**

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