

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

### **Decision notice**

**Date:** 3 April 2024

**Public Authority:** National Highways  
**Address:** National Traffic Operations Centre  
3 Ridgeway  
Quinton Business Park  
Birmingham  
B32 1AF

### **Decision (including any steps ordered)**

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1. The complainant requested information used by National Highways (NH) to make a decision to pull Costain from the Northern Trans-Pennine upgrade project A66.
2. The Commissioner's decision is that section 43(2) of FOIA – commercial interests is engaged, however, the balance of the public interest favours disclosing the information in this case.
3. He further finds that the majority of the withheld information is not in scope of the request as it relates to which of the remaining providers should undertake particular work.
4. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation:
  - To disclose pages 1 and 2 of the withheld information.
5. The public authority must take this step 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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6. The complainant made the following information request to NH on 9 June 2023:

"In relation to the recent Construction Enquirer article published on 8 June 2023, which reported: "National Highways has pulled Costain from the quartet of contractors mobilising to deliver the £1.3bn A66 Northern Trans-Pennine upgrade project" can you please provide the decision paper/s (or similar) which were used by National Highways to make this decision to pull Costain from the A66."

7. NH's final position was that the relevant information it holds is exempt from disclosure under section 43(2) of FOIA.

## Reasons for decision

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8. The Commissioner's reasoning focusses on whether NH is entitled to withhold the information the complainant has requested under section 43(2) of FOIA.

## Section 43 – commercial interests

9. Section 43(2) of 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.
10. NH considered that releasing the requested information would cause commercial harm to itself due to its need to protect the public purse, and also to Costain. Therefore, the decision to apply the exemption in Section 43(2) for prejudice to commercial interests to withhold the documents in their entirety was made.
11. The Commissioner is satisfied first that the harm NH envisages relates to commercial interests principally those of the provider.
12. In its submission to him, NH has explained that disclosure would impact the contractor's commercial interests and standing in the market, potentially impacting its ability to win new work with other client bodies. Its contracts contain a mutual confidentiality clause which NH would be in breach of from disclosure. The Commissioner has not considered this argument when coming to his decision as it is not relevant to the exemption claimed.
13. Disclosure could also lead to those who tender for work being less willing to work with NH in the future. This would be likely to prejudice

NH's commercial interests and ability to attract competitive tenders in future.

14. The Commissioner therefore accepts that a causal link exists between disclosure and commercial prejudice.
15. Finally, the Commissioner accepts NH's position that the envisioned prejudice would be likely to happen i.e. it is more than a remote, hypothetical possibility. The Commissioner's decision is therefore that the exemption at section 43(2) is engaged, and he will go on to consider the associated public interest test.
16. In their request for an internal review the complainant has said that: "In your response, you have not set out what documents actually exist (eg. title of the document, date, author/role), which surely cannot be commercially confidential. Given this is a £1.3bn project, the decision to pull Costain (as reported by Construction News) must have been the subject of much discussion in National Highways. I can appreciate that some of the text of the relevant documents may be commercially confidential, but I think it is highly unlikely that 100% of the content of all relevant documents is confidential."
17. During the Commissioner's investigation, NH made a partial disclosure of information it felt was relevant but did not engage the exemption at section 43. However, it maintained section 43 was applicable to the majority of information held.
18. The complainant emphasised that: "In terms of how the public interest test has been used to refuse 100% of my request, the taxpayer has a right to understand how National Highways has made this decision, especially given that (reported in Construction News: Costain's exit from A66 scheme may cause cost hikes | Construction News) 'pulling Costain' may result in the A66 project costing the taxpayer a lot more money. I can understand that supplier names and prices may be confidential but National Highways needs to be able to demonstrate (through the accountability that the FOI regime brings) that it is sensibly spending taxpayers money."
19. As well as the complainant's specific public interest arguments for the information's disclosure above, there is a general public interest in public authorities being open and transparent.
20. Each request has to be considered on its own merits on a case-by-case basis. In the Commissioner's view, there is also a public interest in the cost-effective delivery of infrastructure both locally and nationally. There is, also a wider public interest in their being a choice of providers

working in this specialist marketplace and in those organisations being able to compete for work fairly.

21. It was argued that disclosure would distort competition in the market, which would not be in the public interest. If the commercial performance of one of the suppliers 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.
22. NH explained this within its public interest test to the complainant.
23. The public interest in transparency is partially met through the information that NH provides publicly on its website and its accountability to budgets derived from the tender process and funded by the public purse.

### **Balance of the public interest**

24. The Commissioner has carefully considered the balance of the public interest in this case.
25. He has made his decision due to the substantial amount of public money involved. The public purse is not a bottomless pit and particularly at the moment, with the state of the economy and demands on public services, it is crucial that value for money is obtained.
26. Furthermore, the Commissioner is not persuaded that such big players in this industry would be deterred from competing for other major contracts.
27. After reviewing all the information available to him<sup>1</sup> the Commissioner has determined that the public interest favours disclosing the requested information as detailed in paragraph 4.

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<sup>1</sup> Highways Magazine - National Highways retreats in the face of safety upgrade cost  
Highways Magazine - Costain drops out of 'unique' A66 collaboration  
Construction News 10/8/23 Costain was the largest recipient of National Highways spending in each of the last two financial years, Construction News can reveal. The contractor and consultant was paid £522.4m by the government-owned roads body in 2022/23, £129.74m more than its nearest rival

## **Right of appeal**

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28. 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)

29. 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.
30. 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**

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