

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 August 2023

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information relating to the performance of Crown Commercial Services (CCS) energy procurement activities. The Cabinet Office (CO) refused to disclose the information citing section 43(2) (Commercial interests) of FOIA to do so.
2. The Commissioner's decision is that the withheld information engages section 43(2), and the balance of the public interest lies in maintaining the exemption.
3. The Commissioner does not require any further steps as a result of this decision.

Background

4. The Crown Commercial Service (CCS) – is an executive agency of the Cabinet Office, and its suppliers engage in commercial arrangements.
5. CCS is an active participant in the competitive market for supplying energy to public sector customers. The normal process for participants in this market is to not publicly share the information requested due to its commercial sensitivity.

Request and response

6. On 3 January 2024, the complainant requested information in the following terms:

"This Freedom of Information Request relates to the performance of Crown Commercial Services energy procurement activities.

Up until 2020 CCS regularly published the performance of its various energy procurement trading strategies. However, to the best of our knowledge this information has not been in the public domain since that time. We believe that it is in the public interest that this information is made available to allow for a transparent analysis of performance versus other procurement options. In particular, we would request the data detailed below from 2020 to 2023:

- Fully delivered mark prices achieved by L6, L12, V6 and V30 CCS trading strategy baskets
- Current traded mark prices and hedge volumes on all actively trading strategy baskets.

We look for to your co-operation in this matter."

7. CO responded on 31 January 2024. It refused the request, stating:

"I consider information concerning energy procurement trading strategies and mark prices to be exempt from disclosure in accordance with the exemption at Section 43(2) (prejudice to commercial interests) of the FOIA."

8. The complainant requested an internal review on 15 February 2024. CO provided the review outcome on 20 March 2024. It upheld its reliance on section 43(2) to withhold the information in scope of the request.

Scope of the case

9. The complainant contacted the Commissioner on 10 April 2024 to complain about the way their request for information had been handled. They argued that: "The precedent has already been set in that the information has previously been openly available in the past, but there has now been a change to restrict this information." And there is a need to demonstrate disclosure "has the potential to prejudice someone's commercial interests."
10. The complainant has said: "Greater transparency should help obtain best value for money from tendering exercises and being transparent

and open is therefore beneficial to both parties in the interests of fair competition and a level playing field.”

11. The Commissioner needs to consider if the information being withheld under section 43(2) is being withheld correctly.

Reasons for decision

Section 43(2) – commercial interests

12. Section 43(2) states that information may be withheld if its disclosure would, or would be likely to, prejudice the commercial interests of any legal person (including the public authority holding the information).
13. In order to engage section 43(2), it's not sufficient to argue that because information is commercially sensitive, its disclosure would, or would be likely to, prejudice commercial interests. There must be a causal link between disclosure and the prejudice envisaged.
14. In this case CO is concerned that CCS's commercial interests would be likely to be prejudiced if the requested information were used by a competitor to draw custom away from CCS. CO argues: "there is a likelihood of prejudice to the suppliers of energy to CCS for the purposes of the commercial agreements with its customers. The disclosure of the requested information would, in turn, reveal the prices being offered by those suppliers, who are also competitors in the broader energy market. The revelation of their prices would also enable those to be undercut or used as leverage to the detriment of their market position. The disclosure of the information requested may increase the costs in servicing the CCS portfolio."
15. CO further argued:

“CCS's energy suppliers consider the rates they offer CCS to be of utmost commercial sensitivity, and they require strong assurances (including contractual) that they will be treated as such and not disclosed.

If CCS cannot assure suppliers that their commercially sensitive information will not be disclosed, it could lead to a number of damaging outcomes, such as existing suppliers seeking to terminate contracts, potential future suppliers deciding not to bid, or potential future suppliers bidding at increased prices to cover the risk of their information being disclosed (i.e. adding a 'risk premium'). We would be able to substantiate the view from a supplier that they would consider that their commercial interests would be likely to be prejudiced by disclosure.”

16. The Commissioner has considered each of CO's arguments, bearing in mind that for the causal link referred to in paragraph 14, 15 to exist, the prejudice claimed must at least be possible, i.e. there are circumstances in which it could arise.
17. The Commissioner has considered the information that is being withheld. Having done so, he's satisfied that a causal link exists and that the prejudice described would be likely to occur in this case.
18. The Commissioner accepts CO's, arguments that the withheld information is commercially sensitive in an extremely competitive market where the slightest advantage can make a huge difference. The Commissioner accepts that disclosure could lead to the replication of approaches and techniques, especially in consultations which would be likely to affect CCS's ability to operate in a commercially competitive field – therefore the exemption is engaged.
19. Section 43(2) is a qualified exemption; the Commissioner will now go on to consider where the balance of the public interest lies.

Public interest test

Arguments in favour of maintaining the exemption

20. The Commissioner has accepted that disclosure would be likely to prejudice the commercial interests of CCS and the third parties involved, on the basis that competitors and consultancies could benefit from the information being placed into the public domain.
21. In its response to the requester, it was stated that: "Preserving relationships of trust and confidence and the free flow of information between the Crown Commercial Service and suppliers is paramount. The disclosure of the requested information may jeopardise this relationship, which is fundamentally important in maintaining the most effective delivery of public services." And "The release of information concerning strategy and prices with suppliers could have a direct impact on the ability of suppliers to compete on a level playing field in current and future commercial activities."
22. To add context, it was also explained that: "both the suppliers and CCS would potentially experience detriment from the disclosure of the requested information. This could result in a strain of those relationships where either party would be less inclined to continue them. We consider that this would not be in the interests of the public, which benefits from CCS being able to purchase energy on behalf of customer organisations at the best possible price. We consider that there is a strong public interest in publicly funded customers being able to purchase energy at

the best price available and an obvious public interest in those same customers purchasing it for more than it otherwise would.

However, releasing this information does not achieve this due to how the energy market operates in practice. Once a customer has committed to a delivery period with any provider, they should be unable to take a lower offer for that delivery period without paying a mark to market payment which would roughly equal to the potential gain being offered.

As a self funding executive agency, any outcome that impacts CCS's ability to operate on a level playing field with other providers would not be in the public interest given that the purpose of CCS being an active participant in the energy market is to provide public sector customers with energy that is affordable.

We are therefore satisfied that the public interest is strongly in favour of withholding the requested information from disclosure."

Arguments in favour of disclosure

23. There is always a public interest in public authorities being transparent about their work and opening up their decisions for scrutiny.
24. CO acknowledges that the public have an expectation that public bodies will always seek to obtain value for money and spend money responsibly. Furthermore, the public also expect openness and transparency from public bodies. Disclosure of the information concerned could provide this assurance.
25. At the time of raising their complaint with the Commissioner the complainant said: "What the Cabinet failed to consider is the most important fact that disclosure would enable potential clients of CCS to assess whether CCS are offering the best deal on the market, which would come under the reasoning of promoting competition in procurement via transparency as there is a clear public interest in encouraging competition amongst private companies for public sector contracts. Greater transparency should help obtain best value for money from tendering exercises and being transparent and open is therefore beneficial to both parties in the interests of fair competition and a level playing field." And "Whilst the information does reflect CCS performance, more critically it allows Trusts to make the best-informed decision on how to procure energy to get best value for money out of taxpayers money."

Balance of the public interest

26. CO has explained that although the public interest in transparency is justifiably strong, this should not come at the detriment of the public

interest in protecting the public purse and those third parties involved in the supply of energy to the markets, and therefore, the balance is swayed toward withholding the information in scope of the request.

The Commissioners conclusion

27. In this instance, the Commissioner has determined from the arguments presented to him that the balance of the public interest lies in maintaining the exemption.

Right of appeal

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

Website: 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.

Deirdre Collins
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF