



Information Commissioner's Office
Promoting public access to official information
and protecting your personal information

Freedom of Information Act Awareness Guidance No. 5

Commercial Interests

The right under the Freedom of Information Act to request official information held by public bodies (known as the right to know) came into force on 1st January 2005. The aim of this guidance is to help the staff of public bodies involved in handling requests for information, and members of the public seeking information from public authorities.

The guidance will be developed over time in the light of practical experience.

A) WHAT DOES THE ACT SAY?

Section 43 of the Act sets out an exemption from the right to know if:

- the information requested is a trade secret, or
- release of the information is likely to prejudice the commercial interests of any person. (A person may be an individual, a company, the public authority itself or any other legal entity.)

Where the information requested constitutes a trade secret, there is no need to consider the harm its release may cause. The fact that the information is a trade secret is reason enough to withhold the information (subject to the public interest test). Information which does not constitute a trade secret can only be withheld under this exemption if the public authority is satisfied that to release the information would damage someone's commercial interests. This is referred to as the prejudice test. Section 43 does not apply beyond 30 years, the point at which information becomes a "historical record".

a) The Duty to Confirm or Deny

The Act provides that in responding to a request for information a public authority is obliged to inform the applicant whether it holds the information (known as "the duty to confirm or deny"), and if so to communicate it to them. In relation to trade secrets, section 43 does not remove the obligation to inform an applicant whether it holds the information that constitutes the trade secret.

By contrast, where the information requested is likely to prejudice commercial interests, section 43 not only provides an exemption from the obligation to communicate the information to the applicant, but can also provide an exemption from the requirement to inform the applicant whether the information is held. However a public authority can only refuse to confirm or deny whether it holds such information where this in itself would prejudice commercial interests.

b) The Public Interest Test

Section 43 is a qualified exemption. That is, it is subject to the public interest test which is set out in section 2 of the Act. Where a public authority is satisfied that the information requested is a trade secret or that its release would prejudice someone's commercial interests, it can only refuse to provide the information if it is satisfied that the public interest in withholding the information outweighs the public interest in disclosing it. The bias is in favour of disclosure and there will be occasions where information is released even though it is a trade secret or is likely to prejudice someone's commercial interest.

The public interest test is dealt with in more detail in Section E below and in [Awareness Guidance No 3](#). Generally speaking, the public interest is served where access to the information would;

- further the understanding of, and participation in the debate of issues of the day;
- facilitate the accountability and transparency of public authorities for decisions taken by them;
- facilitate accountability and transparency in the spending of public money;
- allow individuals to understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions;
- bring to light information affecting public safety.

In considering the public interest it may also be helpful to bear in mind that certain considerations will not be relevant. For instance, if information is complex or incomplete and therefore potentially misleading these factors should not, in themselves be used to justify non-disclosure. Information should be disclosed if the only likely harm would be embarrassment to the authority, although if disclosure might discourage openness in expressing opinions, then that might be a reason for withholding it. It may also be necessary to disregard previous requests: the fact that the public interest may not favour disclosure today does not mean that it would not do so given changed circumstances in the future.

B) TRADE SECRETS

a) General

The term “trade secret” is not defined in the Act. Perhaps the most important thing to grasp is that the term can have a fairly wide meaning. It covers not only secret formulae or recipes, but can also extend to such matters as names of customers and the goods they buy, or a company’s pricing structure, if these are not generally known and are the source of a trading advantage. Many of the cases considered by the courts have concerned an employer’s ability to prevent the use of information about his business being used by an ex-employee.

The trade secret exemption within section 43 is a class exemption which means that if information is a trade secret it is exempt, whether or not harm results from its disclosure.

In one respect, the Act treats trade secrets differently in that it appears to envisage circumstances where a public authority, whether or not it decides to disclose, must always confirm or deny that it holds the information. This contrasts with the requirement of a public authority to confirm or deny whether it holds information whose disclosure would cause prejudice under section 43 (2), unless disclosure of that fact in itself would cause such prejudice. However, in most circumstances, this proviso will also apply to trade secrets because disclosure of a trade secret is likely to prejudice commercial interests.

b) Determining what is a trade secret

In attempting to decide whether information is in fact a trade secret, it may be helpful to ask a number of questions including:

1. Is the information used for the purpose of trade?

Information may be commercially sensitive without being the sort of secret which gives a company a competitive edge over its rivals. For instance a public authority may hold information about the state of repair of a manufacturer’s equipment. While information about the design of the equipment may constitute a trade secret, information about its state of repair would not (even though it may be commercially sensitive) since it is not information which is used to help generate profits.

2. Is it obvious from the nature of the information or, if not, has the owner made it clear that he or she considers releasing the information would cause them harm or be advantageous to their rivals?

In considering cases involving former employees, the courts have often found that the question of whether or not the employee knew that disputed information was a trade secret was important.

3. Is the information already known?

It may be a statutory requirement for the information to be published in some form (Land Registry, Companies House, European procurement regulations etc). The information may already be common knowledge in the business community. If the information is known beyond a narrow circle, it is unlikely to constitute a trade secret.

4. How easy would it be for competitors to discover or reproduce the information for themselves?

Generally the less skill, effort, or innovation that was required to generate the information in the first place, the less likely the information is to constitute a trade secret. By the same token, the easier it would be for a competitor to recreate or discover that information through his own efforts, the less likely it is to be a trade secret.

As we explain in Section F of this guidance, unauthorised disclosures of trade secrets, just as with other breaches of confidentiality, may result in legal action being taken against public authorities. While the Act strongly encourages openness it does not encourage unlawful acts and, if in doubt, authorities and FOI officers should seek legal advice.

C) COMMERCIAL INTERESTS

a) General

Trade secrets are one example of commercial interests. The concept is, however, far wider. A commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services.

The underlying motive for these transactions is likely to be profit, but this is not necessarily the case, for instance where a charge for goods or the provision of a service is made simply to cover costs.

While the essential feature of commerce is trading, the information which falls within the exemption may relate only indirectly to the activity of buying and selling. For instance, it is the duty of an employer proposing to make over 100 employees redundant within 90 days to inform the Department for Business, Enterprise and Regulatory Reform. While this information does not relate directly to a commercial activity, it is easy to see how its disclosure would be likely to undermine a trading position.

There is a distinction to be drawn between commercial interests and financial interests. While there will be many cases where prejudice to the financial interests of a public authority may affect its commercial interests, this is not necessarily the case.

b) Types of Information that may affect Commercial Interests

Public authorities possess commercial information in numerous circumstances. This list is only indicative and there may be other situations in which a public authority holds such information.

- **Procurement** – public authorities are major purchasers of goods and services and will hold a wide range of information relating to the procurement process. This could be future procurement plans, information provided during a tendering process, including information contained in unsuccessful bids right through to the details of the contract with the successful company. There may also be details of how a contractor has performed under a contract. Further consideration of the issues around procurement information is provided later.
- **Public authority's purchasing position** – a public authority will hold information about its own position as a purchaser in a commercial environment.
- **Regulation** – public authorities may be supplied with information in order to perform their regulatory functions e.g. the issuing of licences. Alternatively they may obtain commercial information whilst investigating potential breaches of regulations that they are responsible for.
- **Public authority's own commercial activities** – some public authorities, for instance publicly owned companies, are permitted to engage in commercial activities. Any information held in relation to these will potentially fall within the scope of the exemption.
- **Policy development** – during the formulation or evaluation of policy a public authority may seek information of a commercial nature. For example in developing a policy aimed at promoting a particular industry a public authority may solicit information from companies in that sector.
- **Policy Implementation** – e.g. policy of encouraging economic development via awarding grants, public authority will hold information in relation to the assessment of the business proposals when awarding those grants.
- **Private Finance Initiative/Public Private Partnerships** – the involvement of private sector partners in the financing and delivering of public sector projects and services has become a common feature of public life. In this context public authorities are likely to hold a good deal of information both related to the particular project in which a private partner is involved and more generally to the private partner's business.

It is important to note that the list above only refers to how a public authority, in the exercise of its functions, may come to hold information relating to commercial activities. It does not imply that all such information would be exempt. In order to apply the exemption it is necessary to consider whether

the release of such information would prejudice someone's commercial interests. It will then be necessary to apply the public interest test.

D) THE TEST OF PREJUDICE

When deciding whether the release of information would, or would be likely to, harm someone's commercial interests it will be necessary to consider fully all the circumstances in question. For example whether the price of goods is commercially sensitive will depend on a number of factors. Releasing information on the price of goods purchased from a catalogue that was freely available to all would not prejudice the supplier's commercial interests. The price submitted by a contractor is likely to be commercially sensitive during the tendering process, but less likely to be so once the contract has been awarded. It could be misleading to present an indicative list of the sorts of information likely to prejudice someone's commercial interest. Instead we suggest some of the questions that should be considered in order to determine the impact that releasing the information would have:

a) Does the information relate to, or could it impact on a commercial activity?

As mentioned above there is a distinction between commercial interests and financial interests. Commercial information relates to the activity of buying or selling goods and services. Some information may have a very direct relationship with commercial activity e.g. the price at which goods are offered for sale. Other information may have a less direct link to a commercial transaction, for example, information that a company is considering relocating may have repercussions for labour relations which the company would wish to manage properly in order to minimise disruption to production.

b) Is that commercial activity conducted in a competitive environment?

The level of competition within an industry will affect whether the release of information will harm someone's commercial interests. Where a company enjoys a monopoly over the provision of the goods or services in question it is less likely that releasing the information will have a prejudicial impact on that company. Alternatively some public authorities may be the sole purchasers of specialist equipment, for example military hardware or medical supplies. In such situations the commercial interests of the company could be more dependent on the procurement plans of the public authority in question rather than the effect of releasing commercial information.

c) Would there be damage to reputation or business confidence?

There may be circumstances where the release of information held by a public authority could damage a company's reputation or the confidence that customers, suppliers or investors may have in a company. It may be that releasing such information has a significant impact on revenue or threatens its ability to obtain supplies or secure finance. In these circumstances the commercial interest exemption may be engaged. However it should be noted

that there is no exemption for embarrassment, only where there is a real risk of such harm being caused could the exemption be engaged.

d) Whose commercial interests are affected?

In many cases it will be clear whose commercial interests are likely to be prejudiced by a disclosure of information. However, in other circumstances more thought may be required to identify the stakeholders. Could the release of information operate to the disadvantage of the public authority? For instance, by disclosing the budget set aside for a purchase, would this encourage suppliers to raise their prices? Could the information prejudice the bargaining position of the public authority? Will the information impact on the commercial interests of a contractor's suppliers or investors?

e) Is the information commercially sensitive?

Companies compete by offering something different from their rivals. That difference will often be the price at which the goods or services can be delivered, but that difference may also relate to quality or specification. Information which identifies how a company has developed that unique element is more likely to be commercially sensitive. For example where a company competes on price, it may be that the final price charged is readily available, however information disclosing how the company is able to offer the product at that price may not be. That is, information revealing profit margins is more likely to be commercially sensitive. This argument can extend to working practices etc. that allow a quality of service to be more efficiently delivered.

f) What is the likelihood of the prejudice being caused?

Deciding whether or not a particular disclosure would be likely to cause prejudice will often require the exercise of judgement. It will be necessary to judge, in other words, what may be the nature of the harm that would be caused and, also, the likelihood of that harm. While the "prejudice" that may be caused by disclosure may not be substantial, nor should it be completely trivial. As for likelihood, while prejudice need not be certain, there must be a significant risk rather than a remote possibility of prejudice.

The prejudice test is mentioned in more detail in **Awareness Guidance No. 20 (link)**

E) THE PUBLIC INTEREST

Whether the information requested forms a trade secret or relates to another type of commercial interest, a public authority considering the section 43 exemption must consider whether there is an overriding public interest in providing the information. In practice this is likely to involve weighing the prejudice caused by possible disclosure against the likely benefit to the wider public.

a) General public interest factors

The factors discussed here are not the only ones that should be considered. However, they illustrate the sort of approach that public authorities should take. Although there is a strong public interest in openness, this does not necessarily override all other considerations.

1. Accountability for the spending of public money

Clearly there is a public interest in the scrutiny of how public money is spent. This will be equally true whether a public authority is purchasing goods or services or responsible for awarding grants to private sector companies. Transparency of decisions on how public funds are spent will also generate confidence in the integrity of the procedures involved.

Where a public authority is purchasing goods or services there is a public interest in ensuring it gets value for money. This is particularly relevant at a time when there is a public debate around the increasing role private companies have in delivering public services.

2. Protection of the public

In the course of its role as a regulator, a public authority may hold information on the quality of products or on the conduct of private companies. There would be strong public interest arguments in allowing access to information which would help protect the public from unsafe products or dubious practices, even though this might involve revealing information that is likely to harm the commercial interests of a company.

3. Circumstances under which the public authority obtained the information

Where a public authority obtained information using statutory powers, the disclosure of that information is unlikely to prevent the obtaining of similar information in the future. (Before making a disclosure, however, authorities should also consider whether they are prevented from doing so by the legislation used to obtain the information or by a duty of confidence.) Where there has been no obligation to provide information, for instance in the course of research being conducted by the authority, the general presumption in favour of disclosure would have to be carefully weighed against the risk of discouraging private companies from participating in research in the future.

4. Competition issues

There is a public interest in ensuring that companies are able to compete fairly. There is also a public interest in ensuring that there is competition for public sector contracts. In considering the release of information, authorities should therefore take these issues into account, including any reputational damage that disclosure might cause.

Policies on industrial regeneration, for example, may be implemented through a scheme offering assistance to private companies. The authority sponsoring

the scheme may carry out a check on a company's standing before making a grant to it. Companies may be discouraged from participating in the scheme if they felt it could result in the disclosure of information relating to their general business. In this example, although the public interest would not be served by reducing the participation in the scheme, there is also a public interest in understanding the circumstances in which public money is provided to private companies.

Public authorities should be wary of accepting arguments that the potential for commercial information to be released would reduce the number of companies willing to do business with the public sector, leading to reduced competition and increased costs. In practice, many companies may be prepared to accept greater public access to information about their business as a cost of doing business with the public sector. And the overall value of public sector contracts is a great incentive to tender for them.

Increasing access to information about the tendering process may in fact encourage more potential suppliers to enter the market. A better understanding of the process, the award criteria, knowledge of how successful bids have been put together, could also lead to improved bids being submitted in the future. This will lead to more competition and so decrease costs to the public authority. Indeed where a contract comes up for renewal, limiting this kind of information may well favour the current contractor and reduce competition.

b) Timing

Very often, in a commercial environment, the timing of the disclosure will be of critical importance. The application of any exemption has to be considered in the circumstances that exist at the time the request is made. Circumstances will change over time. Information submitted during a tendering process is more likely to be commercially sensitive whilst the tendering process is ongoing compared to once the contract has been awarded. Information refused at one point in time does not mean that the information can be permanently withheld. Market conditions will change and some information, such as those relating to costs, may very quickly become out of date.

F) OVERLAP BETWEEN COMMERCIAL INTEREST AND CONFIDENTIALITY

Many of the exemptions in the Act overlap with others. For instance, disclosure of information held by one of the armed forces about a defence contract may cause prejudice to national security (s.24), defence (s.26), international relations (s.27) as well as to commercial interests.

Very often the commercial interests exemption will overlap with that relating to information provided in confidence. (Awareness Guidance No 2 discusses confidentiality in greater detail.) Where there is a legally recognised duty of confidence for information provided in commercial dealings, damages for breach of confidence are likely to be assessed on the basis of commercial loss.

Given the financial risk to the authority of breaches of confidence, it may be doubly important to seek legal advice if in doubt.

G) PRACTICAL ISSUES

a) Consultation

In order to determine whether the disclosure of information would prejudice a commercial interest, a public authority should, in accordance with the Secretary of State's Code of Practice, consult with the parties likely to be affected by any disclosure. Time is, however, likely to be limited since the public authority must decide whether the exemption applies within 20 working days. A failure to respond by those being consulted does not remove the obligation to respond within that time limit. It will be helpful therefore to have discussions with suppliers and contractors as to the types of information whose disclosure they would consider would harm their commercial interests. It may also be helpful to agree the circumstances under which the public authority will consult in the event of requests in the future.

It is important to note that in claiming the exemption on the basis of prejudice to the commercial interests of a third party, the public authority must have evidence that this does in fact represent or reflect the view of the third party. The public authority cannot speculate in this respect; the prejudice must be based on evidence provided by the third party, whether during the time for compliance with a specific request or as a result of prior consultation. This approach has been confirmed by the Information Tribunal.¹

Although public authorities should consider the views of the affected party, it is the responsibility of the public authority to decide whether or not the exemption applies. The public authority can only withhold information if is satisfied that any arguments for withholding the information are justified.

b) Review of Contracts/Confidentiality Clauses

As noted above, there will often be an overlap between section 43 and section 41 which provides that information is exempt where its release could lead to a public authority being taken to court for a breach of confidence. During the procurement process public authorities may be asked by contractors to accept confidentiality clauses which attempt to prevent the disclosure of information. In many cases such clauses may be perfectly proper and serve to make clear that information which the supplier considers should not be made public and that which can be freely disclosed. Clauses may also be helpful in providing a framework for redress in the event of an unauthorised disclosure.

There is, however, a risk that blanket clauses may restrict the disclosure of all information, including that which could be disclosed without any prejudice to the commercial interests of the supplier. Authorities must recognise that they cannot contract out of their statutory obligations under the FOIA. On the other hand, if the issue is properly addressed as contracts are negotiated,

¹ Derry City Council v Information Commissioner (EA/2006/0014; 11 December 2006)

confidentiality clauses may prove of real assistance in identifying prejudice to a third party's commercial interests. This should not be a substitute for consultation, where this is possible, following the receipt of a request for information.

This approach to confidentiality clauses should also include a review of existing contracts and discussion with suppliers and contractors on the circumstances under which information might be released in response to a request for information.

Public authorities should also be aware of the Secretary of State's Code of Practice under section 45 of the Act. This sets out the standards public authorities are expected to meet in order to comply with their obligations under Part 1 of the Act. It is available from the Ministry of Justice's website. The code discusses public sector contracts and consultation with third parties in more detail.

c) Environmental Information Regulations

The Environmental Information Regulations 2004 also came into force in January 2005. Where an application is made for environmental information, the request should be considered under the Regulations rather than the FOI Act.

The regulations provide an exception from the right of access for information where its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest. Although broadly similar to the commercial interests exemption in the Freedom of Information Act, it does not exactly mirror section 43. For instance:

- The exception in the Regulations does not apply to commercial information concerning emissions, discharges and other releases.
- The Regulations also include an exception which allows information volunteered to a public authority to be withheld if its release would adversely affect the interests of the provider
- Any enactment or rule of law preventing the disclosure of information does not apply

The definition of environmental information is wide and all public authorities should familiarise themselves with the differences between the Regulations and the Act.

Further advice

If you need any further information about this or any other aspect of Freedom of Information or Environmental Information please contact us:

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