

Commercial interests (section 43)

Freedom of Information Act

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Introduction

1. The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities.
2. An overview of the main provisions of FOIA can be found in the [Guide to freedom of information](#).
3. This is part of a series of guidance, which goes into more detail than the guide, to help public authorities to fully understand their obligations and promote good practice.
4. This guidance explains to public authorities how to apply section 43, the exemption for commercial interests.

Overview

- Section 43(1) provides an exemption under FOIA for information which is a trade secret.
- Section 43(2) exempts information whose disclosure would, or would be likely to, prejudice the commercial interests of any person (an individual, a company, the public authority itself or any other legal entity).
- A public authority may refuse to confirm or deny that it holds information where such confirmation or denial in itself would (or would be likely to) prejudice those commercial interests.
- The section 43 exemptions are qualified exemptions, subject to the public interest test.

What FOIA says

5. Section 43 states:

43. - (1) Information is exempt information if it constitutes a trade secret.

(2) 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).

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).

Section 43(1) - Trade secrets

6. The term "trade secret" is not defined in FOIA. The concept of a trade secret has developed through common law and has a fairly wide meaning. It is information which is not simply confidential but confers a competitive advantage to the owner and therefore requires more protection.
7. A trade secret is information which has not been widely disseminated and is not generally known. It is information which a rival could not easily recreate or discover themselves. In this context, disclosure of the information should also be liable to cause real (or significant) harm to the owner or be advantageous to any rivals. It is information which therefore should be accorded a high level of secrecy.
8. A trade secret can be thought of as the property of an organisation and clauses in employment contracts will often prevent an ex-employee from disclosing a trade secret.
9. A trade secret may be a technical secret or a business secret.

A technical secret might be:

- an invention;
- a manufacturing process;
- engineering and design drawings; or
- a craft/recipe (common in food, pharmaceutical and cosmetic industries);

A business secret might be:

- costs information, such as how much money an organisation spends on product development;
- pricing information, such as how much a company plans to charge for a product it sells;
- supplier lists and contact details; or
- plans for the development of new products / the discontinuance of old products.

10. However just because information falls into one of the above categories does not necessarily mean it will be a trade secret. A business secret in particular is less likely than a technical secret to be considered as a trade secret.

Example

The First-tier Tribunal discussed the definition of a trade secret in the case of the [Department for Work and Pensions v IC EA/2010/0073, \(20 September 2010\)](#). It quoted from previous court and Tribunal decisions which had reviewed the nature of a trade secret.

The Tribunal therefore noted that a trade secret was information, which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret. This assumed that the information was used in a trade or business and that the owner had either limited the dissemination of the information or at least not encouraged or permitted widespread publication.

The Tribunal also noted that the concept of a 'trade secret' was one that related to a particular kind and quality of information. As regards kind, it considered this suggested "something technical, unique and achieved with a degree of difficulty and investment". As regards quality, the Tribunal indicated that the term 'trade secret' suggested the "highest level of secrecy".

11. Section 43(1) is a class based exemption which means that if information is a trade secret, there is no consideration of harm or prejudice. It is however subject to the public interest test.
12. There is no exclusion from the duty to confirm or deny whether information is held just because it is a trade secret. However a public authority can refuse to confirm or deny that it holds a trade secret under the related section 43(3) exemption, where to do so would or would be likely to prejudice its or another party's commercial interests.

Section 43(2) – Prejudice to commercial interests

13. There are many circumstances in which a public authority might hold information with the potential to prejudice commercial interests. The range of activities below indicates where this is most likely, although there may be other situations where commercial information is held.
 - **Procurement** – many public authorities will be involved in the purchase of goods and services and will hold a wide range of information relating to this procurement process. This can include: information provided during a tendering process about both successful and unsuccessful tenders; details of a contract with a successful company; future procurement plans; and performance information about a contractor.
 - **Regulation** – public authorities who undertake regulatory activity may hold commercially sensitive information received in the course of their investigations or related to their functions, for example the issuing of licences.
 - **Own commercial interests** – some public authorities, such as publicly owned companies, are allowed to engage in commercial activities and many generate their own income. Any information held about these activities 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, if a public authority is developing a policy aimed at promoting a particular industry, then it may request information from companies within that sector.

- **Policy implementation** – a public authority may undertake commercial activity in order to pursue its own policies. For example, in order to encourage economic development, a public authority may award grants to businesses. It may therefore hold information relating to its assessment of any proposals submitted to it.
 - **Private finance initiative/public private partnerships** – public authorities often work with private sector partners, who may help to finance projects and deliver identified services. In such circumstances, the public authority is likely to hold a significant amount of information about the funding of the partnership, as well as more general information relating to the partner’s private business.
14. Such commercial information may be held by a public authority in the exercise of its functions, however it does not automatically follow that this information is exempt from disclosure under section 43(2).
 15. In order for such information to be exempt, the public authority must show that because it is commercially sensitive, disclosure would be, or would be likely to be, prejudicial to the commercial activities of a person (an individual, a company, the public authority itself or any other legal entity). It is then necessary to apply the public interest test.

The prejudice test

16. In order to apply section 43(2), the public authority must satisfy itself that disclosure of the information would, or would be likely to, prejudice or harm the commercial interests of any person (this can include the public authority holding it). This is known as the prejudice test.
17. The term “would...prejudice” means that prejudice is more probable than not to occur (ie a more than a 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so).
18. “Would be likely to prejudice” is a lower threshold. This means that there must be more than a hypothetical or remote possibility of prejudice occurring. There must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%.

19. The public authority must decide the likelihood of prejudice arising on the facts of each case.
20. Establishing the appropriate level of likelihood is also important because it has an effect on the balance of the public interest test.
21. Detailed discussion of the prejudice test can be found in the ICO's guidance [The prejudice test](#).

What is a commercial interest?

22. A commercial interest relates to a person's ability to participate competitively in a commercial activity. The underlying aim may be to make a profit however it could also be to cover costs or to simply remain solvent.

Example

In the case of [University of Central Lancashire \(UCLAN\) v IC and Professor Colquhoun EA/2009/0034, \(8 December 2009\)](#), the Tribunal found that the selling of courses by UCLAN was a commercial activity which enabled it to remain solvent.

The Tribunal considered that a body which depends on student fees to remain solvent has a commercial interest in maintaining the assets upon which the recruitment of students depends. These assets were the teaching materials UCLAN had produced for its degree courses.

The Tribunal accepted that UCLAN was operating within a competitive environment where other institutions of higher education were also seeking to sell similar products (undergraduate degree courses) to potential students.

The Tribunal therefore concluded that UCLAN's interests in its teaching materials produced for its degree courses were commercial interests.

23. Although most commercial activity will directly relate to the purchase and sale of goods, the above example also illustrates that the information requested may be indirectly linked. In UCLAN's case, the commercial activity was identified as the provision of academic courses in a competitive environment. The requested information (the teaching materials) had an indirect link to the commercial activity.

24. In the UCLAN decision, the Tribunal decided that the identified financial interests of the University were also commercial in nature. However this will not always be the case, and there is an important distinction to be made between commercial and financial interests. Public authorities will have financial interests in the information that they hold but these will not always be covered by the commercial interest exemption. For example, details of how a council sets Council Tax rates is information that relates to the council's financial interests, but does not relate to any of the council's commercial activities.
25. However, if the council issues a tender for a third party to calculate and decide on Council Tax rates, then information about that commercial tender will potentially relate to the council's commercial interests.

Third party interests

26. A public authority can withhold information that has been provided to it by a third party on the basis of prejudice to the commercial interests of that party. However, to do so it must follow the same steps and arguments that it would for its own information.
27. When a public authority wants to withhold information on the basis that to disclose the information would or would be likely to prejudice the commercial interests of a third party, it must have evidence that this does in fact represent the concerns of that third party. It is not sufficient for the public authority to speculate on the prejudice which may be caused to the third party by the disclosure.

Example

In the case of [Derry City Council v Information Commissioner EA/2006/0014, \(11 December 2006\)](#), Derry City Council operated Derry City Airport and had an agreement with Ryanair who ran a scheduled service. The complainant requested details about that agreement.

The Council withheld the requested information. It applied section 43 and argued that disclosure would prejudice the commercial interests both of itself and of Ryanair.

In submitting its arguments to the Commissioner, and then to the Tribunal, the Council did not ask Ryanair for its views concerning the identified prejudice, but provided its own.

As these were the views of the Council and not of Ryanair, the Tribunal discounted them and therefore did not consider them when reaching its decision. In doing so, the Tribunal pointed out:

"Although, therefore, we can imagine that an airline might well have good reasons to fear that the disclosure of its commercial contracts might prejudice its commercial interests, we are not prepared to speculate whether those fears may have any justification in relation to the specific facts of this case. In the absence of any evidence on the point, therefore, we are unable to conclude that Ryanair's commercial interests would be likely to be prejudiced".

Example

The Derry approach has also been followed by a different Tribunal in the case of [Keene v the Information Commissioner & the Central Office of Information EA/2008/0097, \(14 September 2009\)](#). In this case the Central Office of Information (COI) argued that it would prejudice the commercial interests of the companies who submitted bids in a tendering exercise (to secure a reprographics contact) if the COI's evaluation of those bids were disclosed. The Tribunal countered that:

"....none of the businesses which submitted tenders are parties to this appeal, and there is no evidence before us from any of them as to whether they would suffer any prejudice, much less as to what prejudice they would suffer".

The Tribunal therefore discounted this argument.

28. Despite the above, there will be situations where a public authority cannot seek the views of a third party, for example due to time constraints for responding to requests. In such circumstances, the public authority may present arguments regarding the likelihood of prejudice based on its prior knowledge of the third party's concerns. In doing so, a public authority will need to provide evidence that its arguments genuinely reflect the concerns of the third party involved.
29. If it is established that a third party does not itself have any arguments or concerns about prejudice to its commercial interests, then the public authority should not present speculative arguments on behalf of that third party.

Procurement process

30. Information about the procurement of goods and services by a public authority is usually considered to be commercially sensitive. This can include information provided during a tendering process and also details of a contract or transaction with a third party.
31. A public authority might for example argue that disclosing information about its financial transaction with one third party would prejudice its commercial interests in subsequent negotiations with another third party. In considering how likely it is that the commercial interests of the public authority might be prejudiced in such circumstances, both the nature of the information and the degree of similarity between the transactions should be taken into account.
32. If the degree of similarity is not great, then it is less likely that disclosure of the information will prejudice the related commercial interest.

Example

In the case of [John Connor Press Associates Limited v The Information Commissioner EA/2005/0005, \(25 January 2006\)](#), the Tribunal ruled that the disclosure of financial information about the commissioning of artwork by the National Maritime Museum (NMM) from a named artist would not be likely to prejudice the commercial interests of the museum.

The NMM had refused to disclose the information on the grounds that to do so would be likely to prejudice its bargaining position during contractual negotiations with other artists. The artwork was to be part of a “New Visions” contemporary art programme and NMM explained that the financial information could be released once it had completed its negotiations with the next artist in the series.

The Tribunal accepted that “the commercial interests of a public authority might be prejudiced if certain information in relation to one transaction were to become available to a counterparty in negotiations on a subsequent transaction”.

However, it explained that whether or not prejudice was likely “would depend on the nature of the information and the degree of similarity between the two transactions”.

In this case, the likelihood of prejudice was not judged to be sufficient because of the nature of the information relating to the negotiations already disclosed, and because the types of work created by the named artist and the next artist in the series were so different that it was considered they could not be treated as comparable.

33. Furthermore, it is not sufficient for a public authority to simply argue that disclosing details of a contract would prejudice the commercial position of an organisation, should that contract come up for retendering. It must also demonstrate that the contract is likely to be retendered.

Example

In the case of [Cranfield University v the Information Commissioner EA/2011/0146, \(5 March 2012\)](#), the complainant made two requests to Cranfield University for information which included the pricing of its Academic Provider Contract with the Ministry of Defence (MoD).

The University argued that if the contract to provide courses for the MoD came up for retendering, the disclosure of the disputed information would prejudice its commercial position.

It argued that the information would allow competitors to work out its pricing mechanism.

The Tribunal accepted that the information was potentially commercially sensitive, but only if the contract was retendered. It therefore went on to consider whether this was likely. It considered the various scenarios in which retendering could theoretically arise and found that it was unlikely. This was mainly due to the specific terms of the contract which reflected the flexibility of the arrangement between the University and the MoD.

Having found that it was unlikely the contract would be retendered, the Tribunal concluded that the information was not commercially sensitive.

34. It is also important for a public authority to consider each clause within a contract, rather than view the contract as a whole. Arguments about the burden this may create are not relevant under section 43.

Example

In the case of [Channel 4 v IC EA/2010/0134, \(22 February 2011\)](#) the requester asked Channel 4 for correspondence, minutes of meetings and the agreement with Sky TV about E4 Channel. Channel 4 refused the request and applied section 43 to some of the withheld information.

The Commissioner decided that, apart from specific identified exempt information, Channel 4 should disclose the contents of nine documents. One of these documents was the digital distribution agreement relating to the distribution of the E4 channel by Sky.

Channel 4 argued that the entire contents of the digital distribution agreement were exempt from disclosure. In particular it argued there was no need to go through a detailed analysis of the contract, extracting any clauses which could be disclosed and justifying the commercial prejudice likely to be caused by the disclosure of each clause. Channel 4 argued that such an exercise was disproportionate and could not be insisted on by the Commissioner.

The Tribunal did not accept Channel 4's arguments that the whole digital distribution agreement was exempt from disclosure and the whole contract document should be treated as one piece of 'information'. The Tribunal explained:

"there is a clear distinction between a document and the information in it" and that "a document may well contain many pieces of information some of which must be disclosed under the Act and others which need not be disclosed".

The Tribunal therefore rejected Channel 4's argument that it was disproportionate to consider each clause of the document separately. It held that "the route by which the Commissioner reaches his decision on a complaint under section 50 is a matter for his discretion and is not a matter for this Tribunal" and that "the fact that a public authority may be involved in time, expense and trouble as part of the appeal process under the Act is unremarkable and is the inevitable consequence of the system which Parliament has instituted".

Other commercially sensitive information

35. Often public authorities who are regulators will hold commercially sensitive information which has been provided to them by a third party. If the public authority needs to consider the prejudice test, it should ask the third party for its view about the level of harm and the impact any possible disclosure would have.

Impact of other legislation and guidance

36. Other legislation and guidance can impact on the disclosure of commercially sensitive information and, where relevant, public authorities must take this into account when considering what they can and should disclose.
37. For example, if information can be accessed by the general public under other legislation, then this may affect the likelihood of any prejudice arising from a disclosure under FOIA. (See also the ICO's guidance [Information in the public domain](#)).
38. The [Local government transparency code](#) requires local authorities to publish the details of the purchase of any item of expenditure that exceeds £500.

39. The ICO's [Definition document for principal local authorities](#) provides guidance about publication schemes to local authorities. It recommends that a principal local authority should make financial information about projected and actual income and expenditure, procurement, contracts and financial audit available for at least the current and previous two financial years. This should include details of expenditure over £500, including costs, supplier and transaction information (monthly).
40. A principal local authority should therefore routinely make available financial information in enough detail to allow the public to see where money is being spent, where a council or department is, or has been, planning to spend it and the difference between the two. It should publish financial information at least annually and, where practical, it should provide half yearly or quarterly financial reports. These should include revenue budgets and budgets for capital expenditure.
41. Such information is unlikely to be considered prejudicial to the local authority's commercial interests and is therefore unlikely to be exempt under section 43.
42. Public authorities should also consider the ICO's guidance [Intellectual property rights and disclosures under the Freedom of Information Act](#).

The public interest test

43. Section 43 is a qualified exemption. This means that a public authority has to consider the public interest if the exemption is engaged because of prejudice to commercial interests, or because the information is a trade secret. It has to decide whether the balance of the public interest in maintaining the exemption outweighs that of disclosing the information. For further information, please refer to the ICO's guidance [The public interest test](#).
44. Although there is a strong public interest in openness, this does not necessarily override all other arguments. The following two sections illustrate the particular arguments that a public authority should consider when balancing the public interest with respect to this exemption. The examples are not exhaustive but they are indicative of the type of public interest arguments that can be relevant.

Arguments in favour of disclosure

45. Openness and transparency – Public authorities should bear in mind the strong case for openness and transparency in their affairs when balancing public interest arguments.

Example

This is demonstrated in the case of [Hugh Mills v Information Commissioner EA/2013/0263, \(2 May 2014\)](#).

The complainant requested documentation from the Western Health & Social Care Trust about a tender process between the Trust and domiciliary care providers. He specifically requested documents on how the advertised maximum hourly price was reached by the Trust.

The Tribunal found that disclosure would be likely to prejudice the Trusts' commercial interests and went on to consider the public interest balance. It outlined the following factors in favour of disclosure:

- It would inform the public of the activities carried out on their behalf, allowing for more user involvement and collaborative decision making.
- It would enable the public to better scrutinise the public monies spent.
- It would ensure the tender process was open and transparent.
- It would show that the calculation of the ceiling rate followed a transparent and fair process.
- It would help to ensure clarity around fairness, equity, value for money and quality of care in the overall tender process.
- Disclosure of the disputed information to potential bidders would lead to better value for money for the Trust.

The Tribunal considered the factors in favour of maintaining the exemption and concluded these factors "should be given

less weight than those in favour of disclosure particularly because no individual confidential information of existing suppliers is being requested. Also we find that the public interest in the quality of care that can be provided at the maximum rate per hour is of great weight. We therefore find that public interest balance favours disclosure”.

Transparency and openness were therefore key to this decision.

46. Accountability for the spending of public money – disclosure of commercial information can make public authorities more accountable for how they spend public money. This argument is applicable to both purchasing of goods or services and awarding grants to private sector companies. If people have a better understanding of how public money is spent, this may give them more confidence in the integrity of the public authority and in its ability to effectively allocate public funds. Alternatively it may enable them to make more informed challenges to the spending of public money by public authorities.

Example

This is demonstrated in the case of [Michael Abbott v Information Commissioner and the Department for Business Innovation and Skills EA/2015/0189, \(23 September 2016\)](#).

The complainant requested a copy of the contract between the Department for Business, Innovation and Skills (DBIS) and the consortium delivering the Manufacturing Advisory Service (MAS) programme which provided advice and support for manufacturing businesses. DBIS withheld some of the requested information under section 43(2).

The Tribunal found that section 43(2) was engaged due to the commercial interests of the consortium who delivered the scheme. It then went on to consider the public interest.

The Tribunal took into account the strong public interest in transparency about government contracting, concerns about overbilling in certain government contracts, the historic inadequacy of government monitoring of contracts, and flaws

in government procurement as set out in the National Audit Office (NAO) report on transforming government contract management. In particular the Tribunal noted that the NAO report identified that there was a need to improve transparency over government contracting.

The Tribunal noted that whilst the contract document had been largely published, it did not include a clear expression of service levels, monitoring information or performance. The Tribunal considered that DBIS should disclose further information so it could be held to account. This should ensure value for money in future bids.

The Tribunal went on to consider the public interest in non-disclosure however it found that the public interest favoured the disclosure of some additional information.

Transparency and openness were therefore again notable factors in supporting the public interest arguments for disclosure, but also in this case, the need to ensure value for money and to hold the public authority to account were important considerations.

47. Promoting competition in procurement via transparency – there is a public interest in encouraging competition for public sector contracts. Greater transparency about the tendering process and the negotiation of public sector contracts may encourage companies to take part in the process and help them improve their bids. This will increase competition and therefore help public authorities to get value for money. Transparency of tender information is therefore beneficial to the whole process and should not deter contractors from making bids for public authority contracts, particularly as the value of these contracts also provides a clear incentive to tender for the work.
48. Protection of the public – if a public authority is a regulator, it may hold commercially sensitive information about the quality of a product or the practices of an organisation. There are strong public interest arguments in allowing access to information which will help protect the public from unsafe products or dubious practices. This would potentially override any considerations of prejudice to the commercial interests of a company.

Arguments in favour of maintaining the exemption

49. Competition – there is a public interest in allowing public authorities to withhold information which if disclosed, would reduce its ability to negotiate or compete in a commercial environment.

Example

In the case of [Willem Visser v Information Commissioner EA/2011/0188, \(1 March 2012\)](#) the complainant requested a copy of the approved business plan of the London Borough of Southwark Council with a third party company which delivered leisure services on its behalf. Part of the plan was withheld under section 43(2).

The Commissioner's decision was that the Council was correct to apply section 43(2) and that the public interest supported maintaining the exemption in this instance.

The Tribunal agreed. It found that even though the company in question was not-for-profit it operated in a competitive market.

It noted that prejudicing the commercial interests of one player in the market would distort competition in that market, which in itself would not be in the public interest.

As the Tribunal pointed out, in terms of the public interest test, there is therefore a public interest in protecting the commercial interests of individual companies and ensuring they are able to compete fairly:

“If the commercial secrets of one of the players 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”.

50. Reputational damage/loss of customer confidence – disclosure of information may cause unwarranted reputational damage to a public authority or another organisation whose information it holds, which may in turn damage its commercial interests through loss of trade.

51. Ability to generate income – it is part of the role and duties of many public authorities to generate income. However it is not always in the public interest to place information which explains how that income is generated into the public domain. This could inform potential competitors and may lessen any competitive advantage held by the public authority. This may have a significant impact upon the ability of the public authority to operate in the relevant marketplace.

Example

The case of [Council of the Borough and County of the Town of Poole v IC EA/2016/0074, \(13 September 2016\)](#) was the first Tribunal case to consider a public authority's commercial interests in relation to services it provided on a commercial basis, in order to maximise its income.

A request was made to the Council for information about the payroll and pension services it provided to schools. The Council applied section 43(2) to information detailing how much it charged schools for these services. It explained that it had to compete for the contract with other private sector contractors and other local authorities.

In reviewing the application of the public interest test, the Tribunal noted that most of the Council's competitors were from the private sector. It also accepted the Council's evidence that whilst in the short term, disclosure might lead to a decrease of costs, in the long term disclosure of price information would lead to an increase in costs.

The Tribunal therefore found that information detailing how much the Council charged schools for payroll and pension services was commercially sensitive and that the public interest favoured maintaining the exemption.

In coming to its conclusion, the Tribunal noted that most section 43(2) cases which come before it arise from circumstances in which the public authorities are the commissioners of services. It noted that the "strikingly different aspect" to this appeal was that the Council was acting here in the competitive market for the provision of services to others. The commercial interests identified were therefore those of the Council itself, acting in a competitive market with the purpose of maximising its income.

Transparency and accountability were not therefore the main factors in this appeal, but rather the “urgent need to maintain income to the Council in the highly pressurised financial circumstances that currently face local government”.

52. Impact on other negotiations – revealing information such as a pricing mechanism can, for example, be detrimental to a public authority’s negotiations on other contracts and procurements. If an organisation knows how a public authority costs an item or service for example, then it can exploit this for profit or other gain.

Neither confirm nor deny

53. Section 43(3) FOIA enables a public authority to neither confirm nor deny whether or not it holds the requested information, where to do so either would, or would be likely to, prejudice the commercial interests of the public authority or a third party.
54. However a public authority must also be able to show that the public interest favours neither confirming nor denying whether it holds the requested information. For a more detailed discussion, please see our guidance [‘When to refuse to confirm or deny information is held’](#).
55. There is no exclusion from the duty to confirm or deny whether information is held just because that information is a trade secret.

Practical issues for public authorities

Consulting with third parties

56. Where the disclosure of requested information may potentially prejudice a third party’s commercial interests, a public authority should consult with the relevant third party about such disclosure at the time of the request. This is in accordance with the section 45 code of practice.
57. It is important that public authorities identify the relevant information and consult with any affected third party as soon as possible. They are required to respond to FOIA requests

within 20 working days and will need to consider the matter and, if necessary, formulate their arguments within this timeframe.

58. It is therefore good practice for a public authority at the time a contract is agreed to make a third party aware that any information it provides (either as part of an ongoing relationship or specifically with respect to any agreed contracts) will be subject to FOIA. This will mean that expectations are managed at the outset.

Confidentiality clauses

59. The third party may ask the public authority to accept a confidentiality clause in a procurement contract in order to prevent the future disclosure of information. Such clauses may identify the information considered by the two parties to be confidential and therefore not to be made public. They can be useful in identifying prejudice to a third party's commercial interests and also in providing a framework for redress in the event of an unauthorised disclosure.
60. However a confidentiality clause should not be used as a substitute for consultation (as long as this is possible) following any information request and does not necessarily mean that section 43 will apply.
61. Public authorities should also be wary of circumstances where an organisation attempts to impose a blanket confidentiality clause on all the information contained in a contract. In the event of a complaint to the Commissioner, the whole contract would be reviewed and, where information was not considered to be commercially sensitive, a confidentiality clause would not prevent its disclosure. Public authorities must realise they cannot contract out of their FOIA statutory obligations.

Timing

62. In a commercial environment, the timing of a disclosure will be of critical importance. The public authority must apply an exemption based on the circumstances that exist at the time the request is made. However information submitted during a tendering process is more likely to be commercially sensitive while the tendering process is ongoing, compared to once the contract has been awarded. Circumstances change and with the passage of time, information which has once been refused may be eligible for release at a later date.

63. However it is not simply the case that due to the passage of time, information will become less commercially sensitive. The extent to which the sensitivity of information is diminished by age depends on the nature of that information.

Example

This is demonstrated in the case of [Willem Visser v Information Commissioner EA/2011/0188, \(1 March 2012\)](#).

In this case the Appellant argued that the information was not commercially sensitive because it dated from 2007/08.

The Tribunal noted firstly that the assessment had to be made as at the time of the request in 2009, and at that point the information was only two years old.

However the Tribunal also argued that the information which was particularly sensitive in this case was the company's approach to apportioning resources, and to reveal the details of this approach would have been as damaging commercially in 2009 (or even in 2012) as in 2007.

Therefore in this case the requested information had not lost its sensitivity due to the passage of time.

Outsourcing

64. Often public authorities will outsource work or functions to third parties and this can involve information that may be commercially sensitive. The ICO has produced guidance on this subject [Outsourcing and freedom of information](#).

Other exemptions

Section 29 FOIA

65. This exemption is designed to protect information about the economy of the United Kingdom, where to disclose such information, would or would be likely, to prejudice the economic or financial interests of the United Kingdom or any part of it.

66. There will be situations where a public authority holds information which falls under both section 43 and section 29 FOIA. For example, a central government department may hold sensitive information which if disclosed, it considers would, or would be likely to, prejudice its commercial interests and the economic or financial interests of the UK economy.

Example

In the case of [Derry City Council v Information Commissioner EA/2006/0014, \(11 December 2006\)](#), the Tribunal considered whether section 29(1)(a) FOIA was applicable to the requested information (as well as section 43 and section 41 FOIA).

The Tribunal accepted that Derry City Council would have been likely to suffer prejudice to its commercial interests had the information been disclosed. It also accepted that prejudice to the Council's commercial interests was likely to have an impact on the region's economic interests and as such it considered that section 29(1)(a) was applicable.

67. For further information, please see the ICO's guidance [The economy \(section 29\)](#)

Section 41 FOIA

68. There is an obvious connection between information that is commercially sensitive and information that is considered confidential, for example, trade secrets may fall into both categories. Section 41 FOIA is an absolute exemption which allows information to be withheld where its disclosure would cause an actionable breach of confidence.
69. When applying section 41, a public authority needs to be able to show that the relevant information has the necessary quality of confidence and that any breach of confidence would be actionable. For further information, please see the ICO's guidance [Information provided in confidence \(section 41\)](#).
70. When considering whether section 43 is applicable to a request, it is therefore advisable to consider whether section 41 is relevant. In particular, the above guidance also discusses the status of information within contracts with respect to section 41.

More information

71. If you need further information on the public interest test, other FOIA exemptions, or EIR exceptions, additional guidance is available on our website guidance pages.
72. This guidance has been developed drawing on ICO experience. Because of this it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.
73. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
74. If you need any more information about this or any other aspect of freedom of information, please [contact us](#), or visit our website at www.ico.org.uk.