

Freedom of Information Act Environmental Information Regulations



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

Commercial detriment of third parties

The Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR) give rights of public access to information held by public authorities. This is part of a series of guidance notes produced to help public authorities understand their obligations and to promote good practice.

This guidance explains to public authorities that if they are seeking to rely upon the exemption at section 43 of the FOIA for disclosures that would, or would be likely to, prejudice commercial interests of third parties, then they need to explain how the commercial interests of the third party will be adversely affected.

Overview

- A public authority which believes that the commercial interests of a third party will, or are likely to, be prejudiced must explain why this is the case.
- It will not be enough for the public authority to simply speculate as to why the third party's commercial interests would, or would be likely to be prejudiced; the third party where possible must be asked for their opinions.
- If the third party does not put forward any concerns regarding any prejudice to its commercial interests then a public authority should not speculate on their behalf.
- If it is not possible to discuss the issue with the third party, it will be acceptable for the public authority to put forward arguments based on its prior knowledge of the third party's concerns.
- Whilst the view of the third party, where given, should always be taken into account the final decision whether to disclose the information or apply section 43 will always rest with the public authority.

What does section 43 say?

Section 43(2) explains that information will be exempt if its disclosure would, or would be likely to, prejudice the commercial interest of any person.

This exemption is qualified. Even if information falls within section 43, public authorities must then apply the public interest test set out in section 2(2)(b). The information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure.

Consulting the third party

If a public authority believes that by responding to a FOIA request it will prejudice the commercial interests of a third party, then it should when necessary (for example to determine whether or not an exemption applies) and wherever possible consult the third party for its view. The public authority must not speculate as to whether there is any commercial detriment and the reasons why without any evidence or input from the third party.

If the third party does not express any concerns regarding prejudice to its commercial interests, then the public authority should not put forward any arguments of its own. However, we acknowledge that there may occasionally be situations where the public authority cannot realistically obtain input from the third party, for example due to time constraints for responding to requests. In such situations, it will be acceptable for a public authority to put forward evidenced arguments based on its prior knowledge of the third party's concerns.

Example: In [Derry City Council v Information Commissioner \(EA/2006/0014;11 December 2006\)](#) Derry City Council claimed that section 43 applied because releasing the requested information would prejudice the commercial interests of both itself and a third party, Ryanair.

The Commissioner had considered arguments put forward by Derry City Council in support of its assertion that Ryanair's commercial interests would be prejudiced by the release of the requested information. However it was accepted at the Tribunal that these were the Council's own thoughts on the matter and were not representations made to the Council by Ryanair.

Consequently, the Tribunal did not take the commercial interests of Ryanair into account in reaching its decision commenting that "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."

Other considerations

Regulation 12(5)(e) of the EIR explains that the disclosure of environmental information will be excepted if it would adversely affect the confidentiality of any commercial or industrial information whose confidentiality is provided by law to protect a legitimate economic interest, unless the information relates to emissions, discharges and other releases.

Even though this exception is not exactly the same as the exemption within section 43, we believe that the approach taken in the Derry Tribunal decision is equally applicable to regulation 12(5)(e).

More information

For more general information on the section 43 exemption, see our guidance on: [Commercial interest: Awareness Guidance 5](#). There is also additional guidance available on the regulation 12(5) exceptions from the [Department for Environment, Food and Rural Affairs \(DEFRA\)](#).

This guidance will be reviewed from time to time in line with new decisions of the Information Commissioner, Tribunal and courts on freedom of information cases. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.

If you need any more information about this or any other aspect of freedom of information, please contact us.

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