

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 April 2016

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information from the Ministry of Justice (MoJ) relating to batteries available in prisons. The MoJ confirmed it held the requested information, but refused to provide some of it citing section 43(2) (commercial interests) of the FOIA.
2. The Commissioner's decision is that the exemption as set out in section 43(2) is not engaged.
3. The Commissioner requires the MoJ to take the following steps to ensure compliance with the legislation:
 - disclose the withheld information as requested in parts (1) and (2) of the request.
4. The MoJ must take these steps 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.

Background

5. By way of background to his request, the complainant told the Commissioner:

"DHL sell Duracell "D" size batteries to prisoners at a cost of £1.75 for each battery. ... [The batteries] are taken from a multi-pack and sold individually...."

Request and response

6. On 27 April 2015, the complainant wrote to the MoJ and requested information in the following terms:

*"1. At what price are the multi-pack Duracell D batteries bought by DHL?
2. What is the profit on each battery?
3. How does the practice described above comply with health and safety requirements?
4. Is DHL engaged in such a practice with the full knowledge of NOMS?"*

7. The MoJ responded on 5 June 2015 confirming that it holds the requested information. It provided the information requested in points 3 and 4 of the request, but refused to provide the remainder. It cited section 43(2) of the FOIA (commercial interests) as its basis for doing so.

8. Requesting a review of its response to parts (1) and (2) of the request, the complainant told the MoJ:

"I do not believe your response to be appropriate not least because DHL has no competitor and therefore disclosing the price paid by DHL and thus the profit made could have no conceivable impact on the trading activities of DHL".

9. Following an internal review the MoJ wrote to the complainant on 6 September 2015 maintaining that position. It clarified that it considers disclosure in this case may prejudice both its own commercial activities and those of the company in question.

Scope of the case

10. The complainant contacted the Commissioner on 20 October 2015 to complain about the way parts (1) and (2) of his request for information had been handled. He disputes that disclosure of the requested price and profit information would prejudice the commercial interests of any person.
11. The analysis below considers the MoJ's application of section 43(2) to the information requested at parts 1 and 2 of the request.

Reasons for decision

Section 43 commercial interests

12. Section 43(2) sets out an exemption from the right to know if release of the information is likely to prejudice the commercial interests of any person, including those of the public authority, holding the information.

13. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his guidance¹ on the application of section 43. This states that:

"...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."

14. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers that three criteria must be met.

- First, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather, there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority.

¹ https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

Applicable interests

15. When identifying the applicable interests, the Commissioner must consider whether the prejudice claimed is to the interest stated in the exemption which, in the case of section 43(2), is commercial interests.
16. The MoJ told the complainant that the exemption is capable of applying not only to the commercial interests of outside organisations, but also to a public authority's own commercial interests. In this case it considers that the exemption applies because:

"the release of such information could have an adverse impact on the company in question and may prejudice the commercial activities and interests of both the MoJ and the company".

17. The Commissioner is satisfied that, in the context of the request in this case, the information relates to a commercial interest.
18. He is also satisfied that the negotiation of purchase prices – and related buying power - represents a commercial activity conducted in a competitive environment.

Nature of the prejudice

19. The Commissioner's view is that the use of the term 'prejudice' is important to consider in the context of the exemption at section 43. It implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way.
20. Secondly, there must be what the Tribunal in the case of *Christopher Martin Hogan and Oxford City Council v the Information Commissioner* (EA/2005/0026 and 0030) called a 'causal link' between the disclosure and the prejudice claimed. The authority must be able to show how the disclosure of the specific information requested would, or would be likely to, lead to the prejudice.

Nature of the prejudice – third party supplier

21. In relation to the third party supplier's commercial interests, the MoJ told the complainant:

"If the MoJ released commercially sensitive buying data, or profit amounts which is essentially the same thing, which belong to the company, this could put them at a commercial disadvantage if competitors knew their negotiated purchase prices, and related buying power".

22. The Commissioner recognises that companies compete by offering something different from their rivals. He accepts that that difference may be the price at which goods or services can be delivered.
23. When claiming that disclosure would prejudice the commercial interests of a third party, the Commissioner expects a public authority to consult the third party for its view. In this case, there is no evidence that the MoJ has consulted with the relevant third party either at the time of the request or during his investigation.

Nature of the prejudice – the MoJ

24. In relation to its own commercial interests, the MoJ said that its business reputation could potentially be damaged as a result of disclosure, and the resulting loss of business could weaken its ability to compete in a competitive environment.

Is the exemption engaged?

25. The Commissioner considers that the prejudice test is not a weak test: an evidential burden rests with public authorities to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, real, actual and of substance. In the Commissioner's view, if a public authority is unable to discharge this burden satisfactorily the exemption is not engaged.

Is the exemption engaged – the MoJ?

26. In determining whether or not the effect of disclosure in this case would be detrimental or damaging in some way to the commercial interests of the MoJ itself, the Commissioner has considered the nature and likelihood of harm that would be caused.
27. The Commissioner acknowledges that, in its submissions, the MoJ explained how the prison retail contract works. The Commissioner can see some potential link between disclosure of the information and prejudice to the commercial interests of the MoJ. However, he finds that its arguments, for example that disclosure may prejudice the market's confidence in bidding for future business with the MoJ, have not been convincingly explained in terms of a causal link between disclosure of the information and prejudice to commercial interests to the extent that there is an identifiable, real and significant risk.
28. As the MoJ has not provided the required level of detail or evidence to support its statement that disclosure would cause prejudice to its own commercial interests, the Commissioner is unable to conclude that the exemption is engaged.

Is the exemption engaged – third party supplier?

29. The MoJ did not provide any evidence that it had consulted with DHL in order to establish whether they had any objection to their information being disclosed.
30. The Commissioner considers it important that, in claiming the section 43 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.
31. In assessing whether there is a real and significant risk, the Commissioner considers that third party companies engaging with public authorities must expect a more robust approach to the issue of commercial sensitivity than would apply in the private commercial environment. His view is that, following the implementation of the FOIA, companies providing services to public authorities can reasonably expect that core information related to the services they provide, including some commercial information, will be subject to a high level of public scrutiny.
32. In this case, the MoJ told the Commissioner that disclosure would be damaging to the third party supplier. However, in the absence of evidence that that statement reflects the supplier's view, the Commissioner cannot accept that there is a causal link between the disclosure of the withheld information and the likely prejudice to third party supplier commercial interests.
33. The Commissioner therefore does not consider it has been sufficiently demonstrated there would be any prejudice to the commercial interests of the third party supplier in this case.

Conclusion

In light of the above, the Commissioner has concluded that the MoJ failed to demonstrate that the exemption is engaged. As he does not consider that the exemption is engaged, the Commissioner has not gone on to consider the public interest arguments.

Right of appeal

34. 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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. 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.
36. 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

Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF