

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 19 July 2011

Public Authority: The Cabinet Office
Address: Admiralty Arch
North Entrance
The Mall
London

Summary

The complainant requested information from the Cabinet Office about the make and model of two products highlighted in a published review of Government spending. The Cabinet Office confirmed it held the requested information but refused to provide it on the basis that it was exempt from disclosure by virtue of section 43(2) (commercial interests) of the Freedom of Information Act 2000. The Commissioner has investigated and his decision is that section 43(2) did not apply. The Cabinet Office is therefore required to disclose the requested information. The Commissioner also concluded that the Cabinet Office breached procedural requirements of the Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. Sir Philip Green was asked by the Prime Minister in mid-August 2010 to carry out an efficiency review of Government spending, focusing on commodity procurement, property and major contracts. The "*Efficiency Review by Sir Philip Green Key Findings and Recommendations*" report was published in October 2010.

The Request

3. The complainant wrote to the Cabinet Office on 12 October 2010:

"We are requesting the following information, in regards to Sir Philip Green's Review, published by the Cabinet Office on 12 October 2010.

- *On p13 of the report, Sir Philip draws comparisons between the price of two different printer cartridges, priced at £86 and £398 respectively. Could you please specify the exact make/model of the two printer cartridges concerned.*
- *On p14 of the report, Sir Philip draws comparisons between the price of two different laptops, priced at £353 and £2,000 respectively. Could you please specify the exact make/model of the two laptops concerned".*

4. The Cabinet Office responded on 5 November 2010, confirming that it held information within the scope of the request but refusing to disclose it, citing section 43(2) (commercial interests) of the Act.

5. The Cabinet Office upheld its decision in internal review correspondence sent to the complainant on 26 November 2010. It also confirmed, in response to a question from the complainant, that the procurement examples used by Sir Philip *"were either like for like comparisons or were items supplied by a single supplier"*.

The Investigation

Scope of the case

6. The complainant contacted the Commissioner on 29 November 2010 to complain about the way his request for information had been handled.

7. The Commissioner considers the scope of his investigation to be whether the Cabinet Office was correct to withhold the requested information, namely the make and model of the specified products.

Chronology

8. The Commissioner wrote to the Cabinet Office on 22 February 2011 asking for further explanation of its reasons for citing section 43 in relation to the request, including its reasons for concluding that the public interest in maintaining the exemption outweighs the public interest in disclosure of the information requested.
9. After a lengthy delay, and only after the Commissioner had written to the Cabinet Office warning that unless he received a response by 16 May 2011 he would proceed to issue an Information Notice in accordance with his powers under section 51 of the Act, the Cabinet Office finally responded on 16 May 2011.

Analysis

Exemptions

Section 43 Commercial interests

10. Section 43(2) of the Act provides:

"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)".

11. In order to apply the exemption it is necessary to consider whether the release of such information would prejudice someone's commercial interests. Then, if appropriate, it will be necessary to apply the public interest test.

The applicable interests

12. In correspondence with the Commissioner, the Cabinet Office argued that disclosure in this case would prejudice both its own commercial interests and those of one of its suppliers.

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

13. The term 'commercial interests' is not defined in the Act. However the Commissioner has considered his *Awareness Guidance* on the application of section 43. This comments 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 correspondence with the complainant, the Cabinet Office argued that disclosure of the printer cartridge and laptop information:

"would undermine current negotiations with our supplier to standardise all units onto a single specification and price".

15. It also told him that releasing the information *"would make the supplier identifiable and could undermine negotiations"*.
16. With respect to third party commercial interests, the Cabinet Office told the Commissioner that, by providing its rivals with commercially sensitive information about its pricing and products, disclosure would put the third party supplier *"at a serious commercial disadvantage"*.
17. The Commissioner accepts that public authorities such as the Cabinet Office are major purchasers of goods and services and, as a result, will hold a wide range of information relating to the procurement process. He is therefore satisfied that the withheld information relates to applicable commercial interests and therefore arguments about prejudice to such interests can potentially fall within the scope of the exemption contained in section 43(2).

Nature of the prejudice

18. 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.
19. With respect to the prejudice to its own commercial interests, the Cabinet Office argued that disclosure would damage relations between itself and a major contractor *"by weakening the trust which is essential for such a relationship to work effectively"*.
20. It also argued that disclosure of the requested information at the time of the request would reduce the incentive for bidders to submit their best price for the contract. In this respect, the Commissioner understands that the request was made at a time when the Cabinet Office was in negotiations with its major contractors regarding its then current contracts.
21. With respect to third party commercial interests, the Cabinet Office argued that, by putting its supplier at a serious commercial disadvantage, disclosure would be damaging to the supplier.
22. The Commissioner is satisfied that, with respect to detriment to the principle of competition, there are commercial interests that are capable

of being prejudiced. He has therefore gone on to consider whether the disclosure of the information in question in this case would cause such a prejudice.

Likelihood of prejudice

23. The Cabinet Office told the Commissioner that it considered disclosure of the withheld information "*would prejudice*" the commercial interests of one of its suppliers and "*would prejudice*" the commercial interests of the Cabinet Office itself.
24. Taking into account the Tribunal's comments in *Hogan* (EA/2005/2006 and EA/2005/0030), the Commissioner's view is that there is an evidential burden on the public authority to be able to demonstrate that:
 - the nature of the prejudice claimed can be linked back to the disclosure of the information in question; and
 - the likelihood of the prejudice occurring meets the test for the level of likelihood claimed.

Evidence of prejudice – the Cabinet Office

25. The Commissioner has first considered the arguments put forward by the Cabinet Office as to why it considers its own commercial interests would be prejudiced.
26. The Cabinet Office argued that not only would disclosure damage relations with a major supplier, but that other suppliers would notice the precedent:

"making it more difficult in the future to obtain suppliers willing to provide good and services".

27. It also argued that disclosure would reduce the incentive for bidders to submit their best price for the contract. In other words:

"the Cabinet Office would have paid more than necessary as a result".

28. When considering the representations provided by the Cabinet Office, the Commissioner has taken into account the fact that pricing information about the products, namely the minimum and maximum price paid by the Government, is already in the public domain as a result of having been published in the report. He has also taken into account the competitive nature of the IT market for hardware such as laptops and printer cartridges, as well as the speed with which such products enter and leave the market: factors which he considers to be of relevance in this case.

29. In the Commissioner's view, the arguments put forward by the Cabinet Office have not been explained convincingly in terms of establishing a plausible link between disclosure of the requested information and commercial prejudice to its own interests.
30. In the Commissioner's view, the prospect of disclosure of such information would not easily dissuade companies from bidding for lucrative government contracts. He considers that contracts to supply products of this nature are usually profitable for successful bidders, and it is therefore unlikely that suppliers would willingly exclude themselves from providing goods and services because of the provisions of the Act.
31. It follows that the Commissioner is not satisfied that the Cabinet Office has demonstrated in this case that disclosure **would** prejudice its own commercial interests.
32. However, the section 43(2) prejudice test is not restricted to 'would prejudice'. It provides an alternative limb of 'would be likely to prejudice'.
33. Clearly, this second limb of the test places a lesser evidential burden on the public authority to discharge and the Commissioner has therefore gone on to consider whether, in this case, the lower threshold is met.
34. Where the issue is that disclosure is only likely to give rise to the relevant prejudice then, in accordance with the Tribunal's decision in the case of *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005), "*the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk*".
35. As the Cabinet Office has not put forward discrete arguments specifically in relation to the test of 'would be likely to prejudice' the Commissioner has considered its arguments in relation to the 'would prejudice' test (described above) when determining whether or not the lower prejudice threshold is met.
36. Having considered the arguments against the lower threshold, the Commissioner is not satisfied that the Cabinet Office has demonstrated a real and significant risk of prejudice to its commercial interests through the disclosure of the information in question. He therefore does not find that the exemption in section 43(2) is engaged with respect to the commercial interests of the Cabinet Office.

Evidence of prejudice – the supplier

37. The Commissioner has next considered the arguments put forward by the Cabinet Office as to why it considers that the commercial interests of another person would be prejudiced.
38. Importantly, when considering prejudice to a third party's commercial interests, the Commissioner's view is that 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, and the relevant arguments are those made by the third party itself. This approach has been confirmed by the Information Tribunal in the case of *Derry City Council v ICO* (EA/2006/0014).
39. The Commissioner specifically brought this to the attention of the Cabinet Office during his investigation. Having given due consideration to the Cabinet Office's arguments in relation to the 'would prejudice' test in this case, the Commissioner does not find them compelling. In particular, he notes the absence of any evidence in relation to third party concerns regarding disclosure.
40. It follows that the Commissioner is not satisfied that the Cabinet Office has demonstrated in this case that disclosure **would** prejudice the commercial interests of its supplier. He has next gone on to consider whether disclosure would be likely to prejudice the commercial interests of the supplier.
41. As the Cabinet Office has not put forward discrete arguments specifically in relation to the test of 'would be likely to prejudice' the Commissioner has considered its arguments in relation to the 'would prejudice' test (described above) when determining whether or not the lower prejudice threshold is met.
42. In assessing whether there was a real and significant risk, the Commissioner considers that those contracting 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 Act, companies contracting with public authorities can reasonably expect that their commercial dealings will be subject to a higher level of public scrutiny.
43. Having considered the arguments against the lower threshold, the Commissioner's view is that the Cabinet Office has not demonstrated a real and significant risk of prejudice to the commercial interests of its supplier through the disclosure of the information in question.

44. As the Cabinet Office has not provided the required level of detail, or provided evidence to support its statement that disclosure would be likely to cause prejudice, the Commissioner is unable to conclude that the exemption is engaged with respect to the supplier.

Procedural Requirements

45. Section 1(1) of the Act provides a general right of access to information and states that, subject to the application of an exemption:

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

46. Section 10(1) of the Act requires that a public authority complies with the requirements of section 1(1) promptly and in any event within 20 working days.
47. In the circumstances of this case, as the Commissioner has concluded that the information is not exempt from disclosure, the Cabinet Office should have disclosed this to the complainant within 20 working days of his request. The Cabinet Office's failure to do this constitutes a breach of section 1(1)(b) and 10(1) of the Act.

The Decision

48. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.
- it breached section 1(1)(b) by not providing the complainant with the requested information by the time of the completion of the internal review; and
 - it breached section 10(1) by not providing the complainant with the requested information within 20 working days of the request.

Steps Required

49. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- disclose the requested information to the complainant.

50. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

51. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

52. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

53. 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.

54. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 19th day of July 2011

Signed

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

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (iii) section 41, and
 - (iv) section 44"

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Commercial interests

Section 43(1) provides that –

“Information is exempt information if it constitutes a trade secret.”

Section 43(2) provides that –

“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).”