

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 January 2013

Public Authority: Ministry of Justice

Address: Data Access and Compliance Unit
10th floor, Post Point 10.34
102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information about proprietary financial models used in pilot Payment By Results (PBR) schemes at HM prisons at Doncaster and Peterborough during the bidding process for other relevant contracts.
2. The Commissioner's decision is that MOJ acted correctly in refusing the request since the section 43(2) commercial interests exemption is engaged and, at the date of the information request (and still at the date of the internal review), the balance of the public interest favoured maintaining the exemption.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. MOJ set up two prison pilot schemes (the pilots) to research the delivery of rehabilitation services to certain cohorts of prisoners at HMP Doncaster and HMP Peterborough. The first of these pilots, to research payment by results (PBR) financial models, was launched at HMP Peterborough in September 2010; MOJ says that it will be another four years until this pilot is completed. The Doncaster pilot began in October 2011 with a scheduled four-year life span; one element of it was the replacement of multiple targets with a single outcome based PBR performance target of reducing reoffending by former prisoners

following release. Both pilots contain, MOJ says, unique proprietary concepts and financial models. MOJ announced in July 2011 that it would launch a set of other planned pilot schemes during 2012; these would all be related to the (HMP Doncaster and HMP Peterborough) pilots and give bidders the opportunity to include innovative ideas, including PBR schemes. MOJ says it expects to award the relevant contracts during the early part of 2013.

5. MOJ told the Information Commissioner on 17 September 2012 that it has placed most of the terms of the Doncaster pilot in the public domain, however, the schedule to the contract containing the PBR financial model had been excluded from the information that was published for reasons of commercial confidence. The non-confidential terms of the contract for the Peterborough pilot have not yet been published although MOJ says that it does intend to publish a redacted version shortly as part of its scheme to publish redacted versions of all previously awarded prison contracts.
6. On 27 March 2012, the complainant wrote to MOJ and requested information in the following terms:

Re HMP Peterborough:

What is the value of the agreed amount which will be paid [to the contractor, contractor A] per court appearance leading to conviction avoided?

Re HMP Doncaster:

1 How much will HMP Doncaster [the contractor, contractor B] lose if they fail to meet their target?

2 How much will they receive for each additional percentage point reduction in proportion of offenders reoffending?

7. On 24 April 2012 MOJ responded and refused to provide the requested information citing the commercial interests exemption in section 43(2) FOIA as its basis for doing so. Additionally, in the case of the Doncaster pilot, MOJ also relied initially on the section 21 FOIA exemption but subsequently withdrew from it.
8. On 27 April 2012, the complainant asked MOJ to review its decisions. She did not dispute MOJ's application of the section 43(2) FOIA exemption but did set out why she believed that there were grounds, in the public interest, to support disclosure of the requested information.
9. On 28 May 2012, following internal review, MOJ responded maintaining the section 43(2) FOIA exemption and saying that the public interest arguments favoured non-disclosure.

Scope of the case

10. On 6 June 2012 the complainant contacted the Commissioner to complain about the way her request for information had been handled. She did not dispute the application by MOJ of the section 43(2) FOIA exemption but did dispute MOJ's decision that the balance of the public interest favoured maintaining the exemption.
11. The Commissioner considered the application of the section 43(2) FOIA exemption to both parts of the request, noting that its application was not disputed by either party. He then proceeded to consider the balance of the public interest.

Reasons for decision

12. Section 43(2) of FOIA states 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).'

13. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner believes 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 – i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner believes 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 to discharge.

14. In relation to the commercial interests of third parties, the Commissioner does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, the Commissioner expects that arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns.
15. In this matter, MOJ told the Information Commissioner on 27 July 2012 that disclosure would damage the relevant commercial interests which were the commercial interests of both contractors and, by extension, of MOJ itself by revealing market sensitive information which was of potential value to other contractors. Accordingly, with regard to the three limb test for engaging a prejudice based exemption set out at paragraph 13, the Commissioner is satisfied that, in relation to the arguments identified by MOJ, the first limb is met. The nature of the harm envisaged, the prejudice to the commercial interests of MOJ itself and its contractors, clearly relates to the interests which section 43(2) is designed to protect.
16. MOJ explained that, at the time of the information request on 27 March 2012, it had been running an extended tendering exercise to contract out relevant aspects of the operations of some other prisons. This means that the withheld information was then relevant to a live bidding process for comparable future contracts and was not simply a matter of historical fact. MOJ confirmed that the commercial interests of both itself and the contractors would, or would be likely to, be prejudiced by disclosure of the relevant information which both it and the contractors regard as commercially sensitive. MOJ confirmed to the Commissioner that it had contacted the contractors, specifically in the context of this information request, to enquire about the prejudice they might or might not suffer from disclosure. The contractors had confirmed their perceptions regarding the current commercial sensitivity of the withheld information and the prejudice that would arise from its disclosure.
17. MOJ stressed to the Commissioner the innovative nature of the PBR aspects of each of the two pilot contracts the details of which, MOJ confirmed, were unique to each contract and contractor. MOJ added that disclosure would be likely to prejudice its bargaining position during the connected contractual negotiations for other pilots that might include PBR financial modelling.
18. Timing is an important issue in this matter and information that is commercially sensitive during a tendering process may no longer be sensitive once relevant contracts have been signed. The Commissioner saw that relevant contract bidding processes were in progress at the time of the 27 March 2012 information request. With regard to the

second limb of the test, the Commissioner is satisfied that there is a causal link between disclosure of the requested information and the particular prejudice identified. Furthermore, the Commissioner is satisfied that the nature of the prejudicial effects is one that can correctly be described as being real, actual or of substance.

19. The Information Commissioner therefore decided that disclosure would result in real and substantial prejudice to the commercial interests of MOJ itself and of both contractors during the current contracting round. He therefore concluded that the section 43(2) FOIA exemption was engaged and had been correctly relied upon.

Public interest test

20. Section 43(2) is a qualified exemption and therefore the Commissioner must consider the public interest test contained at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. If the public interest arguments are equally weighted, the information must be disclosed; to that extent the legislation effectively contains an assumption in favour of disclosure.

Public interest arguments for disclosing the redacted information

21. The Information Commissioner has seen that disclosure would provide:
- increased evidence of accountability and transparency in the application of public funds;
 - insight into an innovative use of public funds and of how successful it is being;
 - evidence that the relevant interventions are delivering value for money – or evidence to suggest that they may not be - depending on the outcomes;
 - information to enable the furtherance of public debate and understanding of the application of PBR methods as used within the context of HM prisons and prisoners;
 - evidence as to how far the public may or may not be beginning to be protected from reoffending by the use of PBR methods;
 - insights to the likely profit potential which could tempt more bidders to enter the market if the profitability looked attractive enough.
22. The Information Commissioner has seen that the main public interest factors for maintaining the exemption are:

- the unique and innovative nature of the contractual information being sought regarding the contractors' specially developed intellectual property in the form of proprietary financial models;
 - at the date of the information request, there were current, related tendering exercises in place and disclosure of the requested information would have interfered with the tendering process;
 - disclosing sensitive information against the express wishes of the contractors would undermine public confidence and trust in MOJ and make it less likely that contractors would trust or provide MOJ so readily with sensitive information in future;
 - an adverse effect on MOJ's bargaining position during negotiations would be likely to occur;
 - disclosure would discourage innovation by contractors by opening their intellectual property to others at a sensitive time in the bidding process;
 - there would be a strong likelihood of damage to competition in the market for the current round of contracting.
23. The Information Commissioner has seen that there are substantial issues supporting both sides of the public interest balancing test argument. He decided, on balance, that information about the profitability of unique and innovative proprietary financial model formulae, coupled with the timing of the relevant tendering exercises, are decisive considerations and that the balance of the public interest favoured maintaining the exemption at the March 2012 date of the information request and still continued to favour it at the date of MOJ's May 2012 review of its initial decision.
24. The Information Commissioner's decision is that the section 43(2) commercial interests exemption is engaged and that, at the date of the information request (and still at the date of the internal review), the balance of the public interest favours maintaining the exemption.

Right of appeal

25. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

26. 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.
27. 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

Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF