

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 24 August 2016

**Public Authority:** Ministry of Defence  
**Address:** Main Building  
Whitehall  
London  
SW1A 2HB

#### Decision (including any steps ordered)

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1. The complainant submitted a request to the Ministry of Defence (MOD) seeking the cost of living allowance paid to staff overseas. The MOD withheld the requested information on the basis of section 43(2) (commercial interests) and section 41(1) (information provided in confidence) of FOIA. The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of section 43(2) of FOIA and that in all the circumstances of the case the public interest favours maintaining the exemption.

#### Request and response

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2. The complainant submitted the following request to the MOD on 18 March 2016:  
  
*'I note that the Cost of living additions (COLA) rates for civilian personnel overseas publication was archived on 1 Sep 15 and is no longer current. Therefore, I would like to be provided with a copy of the latest Cost of living additions (COLA) rates for MOD civilian personnel in Germany, details of how it is applied e.g. by wage bands, grade etc, the period of review, when it was last reviewed and when it is planned to be reviewed next.'*
3. The MOD responded on 19 April 2016. The response explained that the COLA rates were being withheld, albeit that the response did not cite an exemption within FOIA. The response did however provide some information on when the rates were reviewed.

4. The complainant contacted the MOD on 19 April 2016 and asked for an internal review of this response. He also submitted an additional request which read: *'Were the rates (not calculations) requested available to the public at anytime during the current ECA contract e.g those published in Sep 15 as detailed in my original request'.<sup>1</sup>*
5. The MOD responded to this additional request on 18 May 2016 and confirmed that *'the rates requested [ie the current rates effective from March 2016] were not releasable outside this Department. This remains the case'*.
6. The MOD informed the complainant of the outcome of the internal review on 24 May 2016. The review concluded that the requested rates were exempt from disclosure on the basis of sections 43(2) and 41(1) of FOIA and referred to the MOD's previous responses to a linked request, and the Commissioner's decision notice in respect of that linked request, namely FS50604092 which was issued on 14 March 2016.<sup>2</sup> In this previous case, the complainant had requested the methodology used by ECA to calculate the COLA rates which were the focus this current request. The Commissioner's decision notice concluded that the requested methodology was exempt from disclosure on the basis of section 43(2) of FOIA.

## Scope of the case

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7. The complainant contacted the Commissioner on 4 June 2016 to complain about the way his request for information had been handled. He disputed the MOD's decision to withhold the COLA rates that he had requested.

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<sup>1</sup> The MOD contracts the company ECA International to provide it with information about appropriate costs of living allowances for staff working overseas.<sup>2</sup>  
<https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1623761/fs50604095.pdf>

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## Reasons for decision

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### Section 43 – commercial interests

8. Section 43(2) 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).'*

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

- Firstly, 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; and
- 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 to discharge.

10. 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.

The MOD's position

11. The MOD argued that disclosure of the withheld information would be likely to prejudice both ECA's commercial interests and those of the MOD (and more broadly HM Government's).
12. In respect of ECA's interests, the MOD explained that ECA had been consulted about the request and firmly argued that disclosure of the withheld information would be against its commercial interests. (The Commissioner was provided with a copy of this correspondence).
13. In the previous decision notice, ECA argued that disclosure of the information in that case would allow competitors to determine what cost factors should be taken into account and what individual weight should be applied to each cost factor to formulate a reliable, realistic and reasonable level of allowance to compensate individuals for the additional costs of living overseas in specific locations. Consequently, disclosure of the requested information in that case would allow ECA's competitors to replicate its methodology for calculating the COLA rates. The MOD agreed with this assessment and was satisfied that the exemption was engaged at the lower threshold as disclosure of the withheld information would be likely to reduce ECA's competitive advantage.
14. In the circumstances of this case, the MOD argued that disclosure of the withheld information, would to some extent, reveal the methodology used by ECA in calculating the COLA rates. Therefore the arguments set out in the preceding paragraph were equally relevant to this case.
15. Furthermore, ECA emphasised that the COLA rates themselves formed part of its commercial capital as this information was only available to subscribers of its 'International Information Service' on the payment of the appropriate subscription fee. Disclosure of the withheld information would therefore provide organisations with access to information that previously would only have been available to ECA's paying clients.
16. In terms of the MOD's commercial interests, the MOD referred to the position it adopted in the earlier decision notice. Namely that disclosure of the withheld information would be likely to lead to a breach of the MOD's contract with ECA. Again, the Commissioner was provided with a copy of the relevant contract condition which specified that all written information supplied by ECA to the MOD remained ECA's copyright and must be kept confidential. The MOD argued that disclosure of the withheld information, without ECA's consent, could lead to ECA discontinuing its business with government and the MOD being forced to look for another supplier who may not offer the service at a cheaper price. The MOD emphasised that there are currently few companies that

can offer a service which meets the government's specific requirements in terms of what data are used to assess the cost of living overseas.

### The complainant's position

17. The complainant disputed the MOD's suggestion that disclosing the COLA rates for MOD civilian personnel in Germany would reveal details of ECA's methodology. Furthermore, he emphasised that as noted in his original request, COLA rates had previously been available to the public.<sup>3</sup>

### The Commissioner's position

18. With regard to the three limb test referred to at paragraph 9, the Commissioner is satisfied that the first limb is met given that the nature of prejudice envisaged to both the ECA and the MOD/government's interests are clearly ones that fall within the scope of the exemption provided by section 43(2).
19. With regard to the second limb, the Commissioner accepts that there is clearly some causal link between disclosure of the withheld information and harm occurring to ECA's commercial interests. The Commissioner agrees that disclosure of the requested information would provide some insight into the methodology used by ECA to calculate COLA rates. Although such an insight is arguably quite a limited one, the Commissioner accepts that ECA's competitors could still use the withheld information in this case to develop some understanding how ECA calculates COLA rates. As the Commissioner explained in the previous decision notice, she accepts that it is logical to argue that disclosure of a company's particular methodology, which underpins how it delivers part of its services, is likely to provide its competitors with an advantage. Furthermore, the Commissioner is satisfied that the resultant prejudice which is alleged in relation to ECA is real and of substance. Furthermore, the Commissioner is also persuaded that ECA's commercial interests would be likely to be harmed given that disclosure of the information would provide direct access to information that ECA charges its subscribers for.
20. Similarly, and again, in line with her finding in the previous notice, in terms of the MOD/government's commercial interests the Commissioner accepts that it is not – in theory - illogical to suggest that if ECA's commercial interests were harmed then it may consider withdrawing its

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<sup>3</sup> The Commissioner understands that these rates date from February 2014.

services to government departments. In such a scenario the Commissioner accepts that there could be a negative impact on the government's commercial interests in terms of re-tendering for an alternative supplier and potentially only securing one that delivers similar services at a higher cost.

21. With regard to the third limb, in terms of ECA's commercial interests the Commissioner is satisfied that the third limb is met. She has reached this conclusion given that prejudice to ECA could arise from either its competitors gaining some insight into its methodology or because disclosure of the information would provide direct access to information which ECA currently charges its clients for.
22. With regard to the MOD/government's commercial interests, as the Commissioner explained in the previous notice, she is usually somewhat sceptical about the line of argument that suggests that private sector companies will no longer offer their services to public authorities if information is disclosed under FOIA against their wishes. There is after all an inherent commercial benefit to such companies entering into contracts with the public sector and part of doing business with the public sector involves accepting that such clients are subject to FOIA. However, in the circumstances of this case the Commissioner is persuaded that disclosure would be likely to affect the government's commercial interests for the reasons the MOD put forward. The Commissioner has reached this conclusion given the clear and firm manner in which ECA has explained that it would consider disclosure to constitute a breach of contract, the clear way in which ECA has explained how its own commercial interests would be likely to be directly harmed by such a disclosure, and because ECA has a range of other private sector companies who use its services; in other words it is not necessarily dependent upon the public sector clients.
23. In reaching this decision the Commissioner understands that, as the complainant has indicated, an earlier version of the COLA rates for civilian staff dating from February 2014 was available to the public. However, the MOD has explained that such information had been inadvertently placed into the public domain and had been withdrawn once the error was identified as such a disclosure was a breach of ECA's commercial confidentiality. Furthermore, the MOD explained to the Commissioner that the current rates in the scope of this request, ie those dating from March 2016, have never been put in the public domain. In light of these circumstances, the Commissioner is satisfied that the publication of the previous COLA rates does not undermine her findings in respect of section 43(2) in this case.
24. Finally, the Commissioner recognises that previous and current MOD civilian COLA rates are routinely made available internally to MOD staff.

However, in the Commissioner's view such a situation does not mean that the requested information could be said to be in the public domain. Rather, in her view information is in the public domain if it is realistically accessible to a member of the general public at the time of the request. Consequently, the availability of such information to MOD staff does not, in the Commissioner's opinion, undermine her findings as set out above.

25. For the reasons set out above the Commissioner is satisfied that the exemption contained at section 43(2) is engaged.

#### **Public interest test<sup>4</sup>**

26. Section 43(2) is a qualified exemption. 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 in relation to the information that she accepts is exempt from disclosure outweighs the public interest in disclosing the information.

#### *Public interest arguments in favour of maintaining the exemption*

27. The MOD argued that in the circumstances of this case there was a clear public interest in ensuring that the commercial interests of both ECA and the government were not harmed.

#### *Public interest arguments in favour of disclosing the withheld information*

28. The MOD acknowledged that there was a public interest in disclosure of the information which would provide greater transparency into public funds. Release of this information would increase taxpayers' and claimants' understanding of COLA rates.
29. The complainant argued that disclosure of the withheld information was necessary so that it was possible to compare the amount the MOD paid service personnel as a contribution to the additional costs of living in Germany in comparison to what the MOD (and other government department) employees received. The complainant argued that such a comparison would allow an assessment of whether there was parity and fairness between the manner in which such allowances were paid.

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<sup>4</sup> The public interest analysis mirrors that set out in the previous decision notice, however for completeness the Commissioner has replicated the analysis in full in this notice.

*Balance of the public interest arguments*

30. The Commissioner clearly accepts that not only is there a broad interest in the public understanding how public money is spent, but more specifically, individuals in receipt of such allowances are entitled to know that they are being paid a fair and reasonable allowance. The Commissioner therefore acknowledges that there is a public interest in the disclosure of information in order to facilitate the comparison that the complainant wishes to undertake and such a line of argument should not be dismissed likely.
31. However, the Commissioner believes that there is an inherent public interest in ensuring fairness of competition; in that respect she agrees with the MOD that it is against the public interest for the commercial interests of a third party to be undermined simply because they have entered into a contract with a government department. Furthermore, the Commissioner accepts that it would be clearly against the public interest if the commercial interests of the MOD/government would be harmed. Consequently, given the cumulative public interest in protecting the interests of both ECA and the MOD/government, the Commissioner has concluded that the public interest narrowly favours maintaining the exemption.
32. In light of her findings, the Commissioner has not considered the MOD's reliance on section 41(1) of FOIA.



## Right of appeal

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33. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

34. 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.
35. 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** .....

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
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