

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 September 2021

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested the cost to the Home Office of chartering individual flights for the purposes of deporting and/or administratively removing people from the UK.
2. The Home Office refused to provide the requested information, citing section 43(2) (commercial interests) of FOIA.
3. The Commissioner's decision is that the Home Office failed to demonstrate why the exemption is engaged and is therefore not entitled to rely on the exemption.
4. The Commissioner requires the Home Office to take the following step to ensure compliance with the legislation:
 - disclose the requested information, as provided to the Commissioner during the course of her investigation, to the complainant.
5. The Home Office must take this step 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.

Request and response

6. On 10 June 2020, following an earlier request for information about chartered removal/deportation flights, the complainant wrote to the Home Office and requested information in the following terms:

"Many thanks for your response to request [reference redacted], which was received on 9 June 2020. Unfortunately, while the response was useful and much appreciated, it did not include all the information originally requested.

The original request was for:

- the date on which each chartered removal / deportation flight left the UK*
- the number of people on board each flight*
- the cost to the Home Office of chartering each flight*

The response received on 9 June 2020 to request [reference redacted] provided a full response to the first two questions, but not to the third.

As such, I would be very grateful if you could supply data as to the cost incurred by the Home Office for each flight that has left the UK after being chartered by the Home Office for the purposes of departing and/or administratively removing people from the UK, for the period between 01/01/2016 to 09/04/2020".

7. The request was made using the 'whatdotheyknow' website.
8. The Home Office responded on 22 June 2020. It confirmed that it held the requested information, but refused to provide it, citing section 43(2) (commercial interests) of FOIA as its basis for doing so.
9. The complainant requested an internal review on 23 June 2020.
10. The Home Office acknowledged the request for internal review on 25 June 2020. It told the complainant:

"This has been assigned to a caseworker and we will aim to send you a full response by 22/07/2020 which is twenty working days from the date we received your request".

Scope of the case

11. Following earlier correspondence, the complainant contacted the Commissioner on 18 December 2020 to complain about the way her request for information had been handled.
12. Given the history of this request for information, the Commissioner exercised her discretion to accept the complaint without the internal review having been carried out.

13. During the course of the Commissioner's investigation, the Home Office confirmed its application of section 43(2) (commercial interests) to the requested information.
14. Although not explicitly stated in its submission to her, the Commissioner accepts that the Home Office had previously disclosed information about deportation flights, including dates and destinations, in response to the complainant's previous request for information.
15. The analysis below considers the Home Office's application of section 43(2) to the requested information in this case. That information comprises the cost incurred by the Home Office of individual flights meeting the parameters specified in the request.

Reasons for decision

Section 43 commercial interests

16. 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).'

17. 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.
18. 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.

The complainant's view

19. The complainant argued that there is a clear precedent in favour of the disclosure of information of the kind being requested in this case. She referred to information supplied in response to a previous FOI request and to the Home Office publishing, monthly, its spending over £25,000. She told the Home Office:

"It should be noted that the information published there includes the amounts and dates of payments to contractors responsible for arranging travel for deportations and removals from the UK".

The Home Office's view

20. In its correspondence with the complainant, the Commissioner considers that the Home Office relied on the requested information being self-evidently exempt. It was not until during the Commissioner's investigation that it explained, in its submission to the Commissioner:

"We consider that disclosure of this information would prejudice the commercial interests of both the Home Office, as the charterer, and the airlines involved as the carriers".

21. With respect to prejudice to its own commercial interests, it told the Commissioner:

"Whilst we do not proactively publish information on charter destinations or numbers on board flights, we quite often have to release information on destinations or numbers in the responses to requests under the FOIA".

22. It went on to explain:

"Whilst the numbers on board any particular flight are unlikely to provide an insight into costs, knowing the date and destination would make it easy to track the carrier involved in operating the flight Such information, combined with the detailed information about costs flight by flight which would be disclosed if [we] were to accede to the present request, would provide insights into the pricing structures of the airlines operating these flights".

23. It argued that this would jeopardise the ability of the Home Office to procure charter flights in a competitive tender process.

24. It also told the Commissioner:

"In addition, there is a high risk that companies would be discouraged from bidding to provide this service if they knew that

information about them and the costs charged for their services were to be disclosed routinely under the FOIA”.

25. With respect to the commercial interests of third parties, the Home Office told the Commissioner:

“If carriers were to be discouraged from taking part in the bidding process, then this would by definition prejudice their commercial interests”.

26. The Home Office confirmed that it had consulted with the broker who acts on behalf of the carriers, who advised:

“Releasing the details of the Price for each single requirement along with the details of the flight undermines the integrity and the competitive nature of the procurement exercise”.

27. Addressing the complainant’s observation that the Home Office had previously publicised details, the Home Office told the Commissioner:

“The information disclosed in other responses covers a long time period and involves a group of flights. No real insight could be drawn from such overall figures for multiple flights that are likely to be operated by a number of multiple airlines, so the information could be disclosed without prejudice to commercial interests. In contrast, the present request is for the cost of specific flights, on specific days. It is the highly specific nature of the information requested here, compared to that in the previous requests to which [the complainant] refers, that gives rise to the commercial prejudice for both the Home Office and the airlines”.

The Commissioner’s view

28. The term ‘commercial interests’ is not defined in FOIA, however, the Commissioner has considered her guidance on the application of section 43¹. This states that:

“A commercial interest relates to a legal person’s ability to participate competitively in a commercial activity. The underlying

¹ <https://ico.org.uk/for-organisations/foi-guidance/section-43-commercial-interests/>

aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent”.

29. Her guidance to public authorities also explains:

“In order to apply section 43(2), you must be able to show that the disclosure of the information would, or would be likely to, prejudice or harm your commercial interests, or those of an individual, a company or any other legal entity. In conducting this test, you need to identify what the harm is and why it may occur as a result of disclosure”.

The applicable interests

30. With regard to first criterion, the Commissioner accepts that the potential prejudice described by the Home Office clearly relates to the interests which the exemption contained at section 43(2) is designed to protect.

Nature of the prejudice

31. 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(2). 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.

32. 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.

33. The Commissioner accepts that the Home Office provided her with evidence that reflects the concerns of the broker it consulted in relation to this request for information. She acknowledges that the Home Office explained that the broker acts on behalf of the carriers whose services the Home Office procures for charter operations.

34. The Commissioner considers that the prejudice test is not a weak test. Where there are concerns about the impact of disclosure on third party interests, the Commissioner considers that 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. Whilst the broker and the Home Office have stated that disclosure of the information undermines the integrity and competitive nature of the procurement exercise, and that the carriers may be discouraged from engaging in the bidding

process, neither has explained the causal link between the information requested and these potential prejudicial effects.

35. In this case, she does not consider that the Home Office has discharged this burden satisfactorily with respect to the third parties concerned.
36. The Commissioner has next considered the impact of disclosure on the Home Office's own commercial interests.
37. She considers it plausible that disclosure of the requested information in this case may impact on the future cost of flights and that this has the potential to harm the Home Office's own commercial interests.
38. She acknowledges that the Home Office argued that disclosure of the requested costs would jeopardise its ability to procure charter flights in a competitive tender process and that the Home Office position overall would be weakened when contracts were put out for re-tendering.
39. The Commissioner is also mindful, however, that the withheld information relates to flights that have been chartered over a number of years.
40. The Commissioner recognises that, in a commercial environment, the timing of a disclosure is of critical importance. She also accepts that it is not simply the case that the passage of time inevitably makes information less commercially sensitive. The extent to which its sensitivity is diminished depends on the nature of that information.
41. In this case, the Home Office has provided no evidence with regard to the status of any contracts with the airlines at the time of the request. Nor has it provided any information about the procurement process or explained whether it is likely to retender the contract(s) within a reasonable timeframe.
42. With respect to its own commercial interests, the Commissioner is not satisfied that the Home Office has shown that some causal relationship exists between the potential disclosure and the prejudice claimed and that the prejudice is, real, actual and of substance.
43. With regard to the third criterion, the Commissioner notes that, in its submission to her, the Home Office consistently refers to 'would' as opposed to 'would be likely to'. In other words it considers that the higher level of likelihood applies.
44. The Commissioner's guidance on section 43 of the FOIA states:

"would...prejudice" means that if you disclose the information, it is more probable than not that the harm you have identified would

occur (ie there is a more than 50% chance of disclosure causing the prejudice, although it is not absolutely certain that it would do so)".

45. In her guidance on the prejudice test², the Commissioner states:

"If an authority claims that prejudice would occur they need to establish that either

- the chain of events is so convincing that prejudice is clearly more likely than not to arise. This could be the case even if prejudice would occur on only one occasion or affect one person or situation; or*

- given the potential for prejudice to arise in certain circumstances, and the frequency with which such circumstances arise (ie the number of people, cases or situations in which the prejudice would occur) the likelihood of prejudice is more probable than not".*

46. In this case, the Commissioner is not satisfied that the Home Office has demonstrated that either of those limbs applies.

47. The Commissioner is not satisfied that the Home Office has evidenced a likelihood that disclosure would cause prejudice to the interest that the section 43 exemption protects. Consequently, as the exemption is not engaged on the basis of the prejudice test, she has not gone on to consider the balance of public interest.

Other matters

Timeliness of the internal review

48. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of FOIA. Rather, they are matters of good practice which are addressed in the code of practice (the code) issued under section 45 of FOIA which suggests that internal reviews should be responded to within 20 working days, and if complex it is best practice for any extension to be no longer than a further 20 working days.

² https://ico.org.uk/media/for-organisations/documents/1214/the_prejudice_test.pdf

49. In this case, despite the intervention of the Commissioner, the internal review that the complainant requested on 23 June 2020 was not completed in accordance with that timeframe.
50. The Commissioner expects the Home Office to ensure that the internal reviews it handles in the future adhere to the timescales set out in the code³.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Right of appeal

51. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

52. 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.
53. 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

**Laura Tomkinson
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