

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 June 2024

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) seeking information about a contract between it and WholeShip Limited relating to the use of Predannack Airfield. The MOD disclosed some information within the scope of the request but withheld the remainder on the basis of sections 40(2) (personal data) and 43(2) (commercial interests) of FOIA.
2. The Commissioner's decision is that the remaining withheld information is exempt from disclosure on the basis of either section 43(2) and that in all the circumstances of the case the public interest favours maintaining that exemption, or is exempt on the basis of section 40(2) of FOIA. However, the MOD breached section 10(1) of FOIA by failing to disclose the information it did not consider to be exempt within 20 working days of the request.
3. The Commissioner does not require further steps.

Request and response

4. The complainant submitted the following request to the MOD on 9 August 2023:

- "1. In relation to the Income Generation Contract between the MOD/RN and Wholeship Limited relating to the use of Predannack Airfield, please state the following:
- a) was the contract subject to a competitive process?
 - b) if so, where and when was the opportunity advertised? (please supply the URL)
 - c) how much total income has the contract generated for the MOD/RN since it started?
 - d) what sums were remitted on what dates to the MOD/RN arising from this contract?
2. Please send me copies of all emails and other communications since 1 August 2021 between Commodore Nick Walker and WholeShip (including when previously known as Whole Ship Consulting)"
5. The MOD responded on 5 September 2023. In response to parts 1a and 1b of the request, it explained that Income Generation/Sales Contracts do not need to be advertised for competition and are not subject to the same regulations as Sourcing/Procurement who are required to advertise. The MOD confirmed that it held information falling within the scope of parts 1c, 1d and 2 of the request but it considered this to be exempt from disclosure on the basis of section 43(2) of FOIA, and that section 40(2) also applied to parts of this information.
6. The complainant contacted the MOD on 10 September 2023 and asked it to conduct an internal review and explained that he was challenging the application of both exemptions.
7. The MOD informed the complainant of the outcome of the internal review on 21 May 2024. The review found that the information sought by parts 1c and 1d was exempt from disclosure on the basis of section 43(2) of FOIA. With regard to the correspondence sought by part 2 of the request, the MOD provided the complainant with a redacted version of this but explained that parts of it remained exempt on the basis of section 43(2), namely a 'slide pack' attached to an email, and parts of the correspondence also remained exempt on the basis of section 40(2) of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 12 December 2023 in order to complain about the MOD's decision to withhold the information

sought by parts 1c, 1d and 2 of his request, as well at that stage, the MOD's failure to complete an internal review.

9. Despite the outcome of the internal review, the Commissioner understands that the complainant wishes to contest the decision to withhold the remaining withheld information. The complainant also remained unhappy with the length of time it took the MOD to complete the internal review, and as a result, its delays in disclosing the some of the information to him.
10. In considering the application of section 43(2) in this case the Commissioner has taken into account his findings in another recent case where the complainant also sought information regarding this specific contract.¹ In that case the complainant sought a copy of the contract between the MOD and WholeShip. The MOD provided the complainant with a redacted copy of that contract but withheld financial information contained within it, as well as details of WholeShip's operating business model, on the basis of section 43(2) of FOIA. The Commissioner found that this exemption applied to such information and furthermore that the public interest favoured maintaining the exemption.

Reasons for decision

Section 43 – commercial interests

11. Section 43(2) of FOIA states:

'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).'

The MOD's position

12. The information which the MOD sought to withhold on the basis of this exemption consists of information on the commercial activities of WholeShip Ltd and the MOD's contractual financial information.
13. In support of this application in its refusal notice the MOD explained that the use of competition is at the heart of Government procurement and the effectiveness of this strategy depends largely on the integrity of the

¹ IC-272459-H6H5

<https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4029740/ic-272459-h6h5.pdf>

competitive process and the MOD's ability to protect commercially sensitive information. As such, it is considered that release of the information withheld on the basis of section 43(2) could impact on its relationships with its current and future industry partners and jeopardise future projects and arrangements. Furthermore, the MOD argued that disclosure of such information could potentially allow companies to gain an unfair advantage which would prejudice the negotiating process with its contractors and prevent the MOD from securing best value for money.

14. In support of its application of this exemption in the internal review, the MOD argued that disclosing the information contained within the slide pack brief detailing updates on the aims and objectives of the Predannack Autonomy Test and Evaluation Centre, would provide invaluable information to potential competitors of WholeShip, by disclosing their business model and ways of working, all of which could be used against them when competing for similar contracts and strands of work in the future.
15. Furthermore the MOD argued that disclosing details of the income generated would potentially allow companies or groups to gain an unfair advantage in negotiating in the future for similar contracts which could prejudice future negotiations between the MOD and its contractors and prevent it from securing best value for money.
16. As a result the MOD concluded that disclosure of this information would be likely to prejudice the commercial interests of both it and WholeShip.

The complainant's position

17. The complainant noted that the MOD had advised him in response to this request that there was no open and advertised competitive process for the awarding of this contract. In view of this he argued that the MOD's basis of citing section 43(2), which was based on the notion of competition, is not relevant since this was not a competitive procedure. As a result the complainant argued that there was no reason to suppose that releasing information about this non-competitive matter would have any implications for completely distinct and properly competitive commercial arrangements that the MOD is involved in.

The Commissioner's position

18. 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. The anticipated prejudice must be more likely than not.
19. With regard to whether the above criteria are met, the Commissioner adopts the rationale and findings of his previous decision notice which also considered financial information concerning the same contract and details of WholeShip's operations. This is on the basis that the information withheld information in this case, ie financial information about the contract and WholeShip's business model is materially the same as that withheld in the previous case. The relevant paragraphs of that notice are 18 to 25, which for ease of reference the Commissioner has reproduced below:

"18. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the MOD relates to the interests which the exemption contained at section 43(2) is designed to protect.

19. With regard to the second criterion, the Commissioner acknowledges the complainant's point that the contract in question was not subject to open competition. However, in his view this does not undermine the potential validity of the MOD's section 43 arguments.

20. The Commissioner understands the MOD's position to be that harm to a party's commercial interests could occur for the following broad reasons a) disclosure could harm WholeShip's commercial interests as it contains information which is commercially sensitivity to the company b) in such a context disclosure would harm the MOD's relations with the company, and in turn harm the MOD's reputation as a trusted commercial partner c) disclosure would the MOD's ability to secure best value for money for this airfield in the future.

21. The Commissioner accepts that the withheld information, which details the specific nature use of the airfield under the terms of the

contract by WholeShip and the costs of doing so, is information which could be reasonably considered to be commercially sensitive to the company in question. It reveals the amount they have committed to pay the MOD and some indication of their operating procedures. The Commissioner also accepts that such information could undermine the company's ability to successfully participate and compete in future commercial activity, be it in securing contracts offering its services to potential clients at Predannack Airfield and/or competing with other businesses offering similar UAV testing facilities. The fact that the contract in question was not subject to open competition, does not in the Commissioner's opinion, undermine these arguments.

22. Similarly, in respect of b), the Commissioner does not consider that how the contract was agreed – via open competition or otherwise – undermines the logic of the MOD's argument; disclosure would still result in information a third party considers to be commercially sensitive being released and in turn this could still potentially impact on the MOD's reputation.

23. Finally, in terms of c), should the MOD wish to agree terms with other parties for the future use of the airfield, in the Commissioner's view the fact this contract was not subject to open competition does not remove the risk of prejudice occurring in this way. Any other company entering into a contract with the MOD for the use of the airfield – be that via open competition or otherwise – could use the withheld information as an insight into the terms upon which the MOD had previously agreed with the company in question.

24. The Commissioner therefore accepts that there is a causal link between disclosure of the information and prejudice occurring to both the company's and MOD's commercial interests and the second criterion is met.

25. In respect of the third criterion, the Commissioner is prepared to accept that there is more than a hypothetical likelihood of such prejudice occurring. In respect of WholeShip, disclosure of the information would provide a clear indication of its business model, including prices and agreed terms for use of the airfield which could be of use to its competitors. In respect of the MOD's interests the Commissioner accepts that disclosure of the information would provide other companies with which it may agree uses of the airfield with in the future an indication of its negotiating position. The Commissioner considers that such a scenario presents more than a hypothetical risk to the MOD's commercial interests. The third of limb of this criterion is therefore met and the information in question is exempt from disclosure on the basis of section 43(2) of FOIA."

20. The Commissioner is therefore satisfied that disclosure of the information which the MOD has withheld in this case is exempt from disclosure on the basis of section 43(2) of FOIA.

Public interest test

21. Section 43 is a qualified exemption and in line with the requirements of section 2 of FOIA the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption cited outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

22. The MOD recognised there is a public interest in furthering the understanding of the collaborative arrangements between the Royal Navy and Wholeship. It also recognised that there is a public interest in the financial information in scope of the request that would provide further detail on MOD's commercial activities.
23. The complainant argued that in his view full disclosure of the requested information was required for the sake of transparency and accountability in promoting public understanding, public scrutiny, value for money, the best use of public resources, and fair competition. He emphasised that these are extremely important considerations, and the MOD arguments for maintaining the exemption were not sufficient to undermine them.
24. In addition the complainant argued that such issues attracted particular weight in the circumstances of this case. This was because the contract in question did not arise from an openly advertised and competitive process. In his view contracts which are agreed without a competitive process should be subject to greater public scrutiny, since there is a much greater risk that they do not truly serve the public interest. The complainant argued that the existence of a proper and regulated competitive procedure can help to ensure that public finances are being maximised, and to reassure the public that this is the case. Without the safeguards that arise from fair and proper competition, the complainant argued that it is essential to maximise public transparency and full scrutiny. Furthermore, he argued that the absence of such a process means there is an even stronger case for information to be disclosed, so that the public are better able to see the full situation for themselves and assess on an informed basis whether decisions have been taken properly and with a view to getting the best for government resources.

Public interest arguments in favour of maintaining the exemption

25. The MOD argued that there was public interest in a level playing field in terms of competition. In its view third parties that enter into contracts with public authorities should not be placed at a commercial disadvantage as a result of doing so. Similarly, it was in the public interest for the MOD to be able to secure best value for money when negotiating contracts.

Balance of the public interest test

26. The Commissioner has considered the above arguments along with the content of the withheld information. However, given the similarity of the information in this case to the previous case, and for the reasons set out in the previous case the Commissioner also considers the public interest to favour withholding the information in this case. This rationale is set out at paragraphs 31 to 34 of the previous notice, which for ease of reference the Commissioner has reproduced below:

"31. The Commissioner agrees with the MOD that there is clear public interest in ensuring that its commercial interests are not harmed and that it is able to secure best value for public money. Furthermore, in the Commissioner's opinion there is very strong public interest in ensuring fairness of competition and in his view it would be firmly against the public interest if WholeShip's commercial interests were harmed on the basis that it has entered into a contract with the MOD.

32. Nevertheless, the Commissioner recognises that there is strong public interest in ensuring that the MOD is transparent and accountable for commercial decisions that it has taken. In the circumstances of this case the Commissioner has some sympathy with the complainant's argument that as the contract in question was not subject to open competition this arguably increases the public interest in disclosure in order to allow further scrutiny of the MOD's arrangements with WholeShip.

33. However, the Commissioner would observe that the logical conclusion of such a position would appear to be that any contract which was agreed without open competition should be fully disclosed, regardless as to the genuine and real commercial prejudice that could be caused by such a disclosure to third parties and/or the public authorities. The Commissioner is not persuaded that this is a position which could be said to be in the public interest. Furthermore, in the circumstances of this case the Commissioner considers that the public interest in disclosure is met, to some degree, via the partial disclosure of contract the MOD has now made in this case.

34. In conclusion, and taking into account the above considerations, the Commissioner has concluded that the public interest favours maintaining section 43(2)."

Section 40(2) – personal data

27. The information which the MOD withheld on the basis of section 40(2) of FOIA included the names and contact details of junior MOD staff, contact details of senior MOD staff, and contact details of a director of WholeShip. As part of the Commissioner's investigation of previous linked case (ie IC-272459-H6H5) the complainant accepted such redactions and therefore these are not considered in this decision notice. In addition in this case, section 40(2) has also been applied to a very limited amount of further information which the Commissioner considers could be described as personal opinions/views of an individual and some biographical/personal information about an individual. The Commissioner has therefore considered whether such information is exempt from disclosure on the basis of section 40(2).
28. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
29. In this case the relevant condition is contained in section 40(3A)(a)². This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
30. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
31. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

32. Section 3(2) of the DPA defines personal data as:
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² As amended by Schedule 19 Paragraph 58(3) DPA.

"any information relating to an identified or identifiable living individual".

33. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
34. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
35. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
36. In the circumstances of this case, having considered the withheld information in question, the Commissioner is satisfied that the information relates to identifiable individuals. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
37. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
38. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

39. Article 5(1)(a) of the UK GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

40. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
41. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

42. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.

43. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"³.

44. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

45. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

³ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

Legitimate interests

46. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
47. As indicated above in his considerations of section 43(2), the Commissioner accepts that there is a legitimate interest in the disclosure of information about the MOD's agreements and arrangements with its commercial partners.

Is disclosure necessary?

48. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
49. However, despite the legitimate interest identified above, in the Commissioner's opinion disclosure of the limited personal data that has been withheld would not add materially to the public's understanding of this particular commercial arrangement. The Commissioner has therefore concluded that disclosure of this information is not necessary.
50. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
51. The Commissioner has therefore decided that the MOD was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Procedural matters

Section 1: general right of access Section 10(1): time for compliance

52. Section 1(1)(a) of FOIA requires a public authority to inform the requester in writing whether or not recorded information is held that is relevant to the request. Section 1(1)(b) requires that if the requested information is held by the public authority it must be disclosed to the requester unless a valid refusal notice has been issued.
53. Section 10(1) requires that the public authority comply with section 1 promptly, and in any event no later than 20 working days after the date of receipt of the request.
54. In this case the Commissioner has concluded that the MOD breached section 10(1) of FOIA as it provided the complainant with the redacted version of the emails outside of this time period.

Other matters

55. FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe.⁴ The Commissioner expects that most internal reviews should be completed within 20 working days, and even for more complicated requests, reviews should be completed within a total of 40 working days.⁵
56. In this case, as noted above, the MOD failed to meet these timescales as it took approximately eight months to complete the internal review, a review which was only completed during the course of the Commissioner's investigation of this complaint. The Commissioner acknowledges the understandable frustration such a delay has caused to the complainant, particularly as the outcome of the internal review resulted in the disclosure of information falling within the scope of the request.

⁴ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

⁵ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal>

Right of appeal

57. 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

58. 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.
59. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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