



Ministry of
JUSTICE

Freedom of information guidance

Exemptions guidance

Section 43: Commercial interests

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Introduction

Section 43 exempts information, disclosure of which would be likely to prejudice the commercial interests of any person. It also includes a specific exemption for trade secrets. It protects not only the commercial interests of third parties but also the commercial interests of the public authority that holds the information.

In using this exemption, you should bear in mind that the commercial sensitivity (particularly the market sensitivity) of information will usually decrease with time.

This exemption is subject to the public interest test.

What information may be covered by this exemption?

Section 43(1) exempts information if it constitutes a **trade secret**. The FOI Act does not define a trade secret, nor is there a precise definition in English law. However it is generally agreed that¹:

- it must be information used in a trade or business
- it is information which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret
- the owner must limit the dissemination of the information, or at least, not encourage or permit widespread publication

Trade secrets are normally associated with such things as secret processes of manufacture, special formulae and so on. The expression carries with it the idea of something commercially valuable in its own right which is private to the owner. By contrast, information relating to a company's solvency, its ability to carry on business and its relationship with its holding company, although commercially sensitive, are not trade secrets. The exemption can apply to a public authority's own trade secrets and perhaps the more usual situation, the trade secrets of others' businesses.

¹ This derives from statements in *Lansing Linde Ltd. v Kerr* (1991) 1 WLR 251

If information meets the definition of being a trade secret, section 43(1) does not require a separate assessment of the prejudice that may be caused by disclosure (there is an element of potential prejudice in disclosure already inherent in the meaning of a trade secret).

However, before relying on section 43(1), you will need to be satisfied that the information does constitute a trade secret as defined above. In case of doubt about whether information constitutes a trade secret, legal advice may need to be sought. Where the trade secrets of other bodies, rather than an authority's own trade secrets, are concerned, it may be necessary to consult those other bodies, because it is their interests which will determine whether information does in fact constitute a trade secret.

Unless information clearly constitutes a trade secret, it may be appropriate to:

- cite section 43(2), which exempts information the disclosure of which would be likely to prejudice the commercial interests of any person, as well as section 43(1)
- cite section 43(2) in the alternative. That is, to claim that information falls within the scope of section 43(1), but if the Information Commissioner concludes that this is wrong, section 43(2) should be considered

Section 43(2) exempts information, disclosure of which would be likely to prejudice the **commercial interests** of any **person**. Section 43(2) is a prejudice-based exemption, so the test for exemption is whether or not the commercial interests referred to in the section would, or would be likely to, be prejudiced by disclosure.

'Commercial' can be taken to mean relating to an activity in the way of a business, trade or profession. Again, the exemption is expressly capable of applying not only to the commercial interests of outside organisations, but also to a public authority's own commercial interests. When it comes to considering a public authority's own interests, a range of circumstances may be relevant, including the authority's position in the market place both as a purchaser and as a supplier. However, the prejudice to the commercial interests of a public authority must be contrasted with prejudice to other interests such as the body's political or other non-commercial reputational interests, which are not protected by this exemption.

There is a distinction between commercial and financial interests:

- **a commercial interest** relates to a person's ability successfully to participate in a commercial activity
- **a financial interest** concerns the financial position of an individual or organisation.

Although the commercial and financial interests of a commercial entity may be extremely closely related - if it has a weak financial position, that will almost certainly

affect its ability to engage in commercial activity - that is not necessarily so in the case of a public authority. While there may be cases where prejudice to the financial interests of a department may affect its commercial interests, this will not always be the case. (For an explanation of how disclosure may prejudice financial interests see the guidance on **section 29 - the economy**).

The 'person' whose interests may be prejudiced could be any company, sole trader or private individual or the public authority itself. It could relate to more than one person (for example to the members of a partnership in that capacity) or, for example, to all businesses in a particular sector. Under section 81 of the Act, a government department counts as a person for these purposes. Section 43(2) also provides explicitly that the person in question can be the public authority holding the information.

When could releasing information cause prejudice to commercial interests?

General considerations relevant to the test of 'prejudice'

To decide whether or not disclosure could prejudice commercial interests, you need to identify:

- the interests themselves and how disclosure might prejudice them
- whose interests they are

A department's, or other body's, commercial interests might, for example, be prejudiced where a disclosure would be likely to:

- damage its business reputation or the confidence that customers, suppliers or investors may have in it
- have a detrimental impact on its commercial revenue or threaten its ability to obtain supplies or secure finance
- weaken its position in a competitive environment by revealing market-sensitive information or information of potential usefulness to its competitors

It is important to note, however, that a simple assertion by an individual or body that there would be prejudice to his or its interests is not sufficient.² The assertion must be

² See *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) (25 January 2006).

supported by reasoned argument, and where practicable by empirical evidence. In particular it is not sufficient for a body simply to mark a document commercial in confidence for the information in it to be exempt. It is important, in this and other contexts, to be alert to the differences between using this exemption to protect the interests of a third party and using it to defend a public authority's own interests. These differences are considered in further detail below.

Commercial sensitivity will often diminish over time - in some cases quite quickly. You should consider whether the prejudice applies at the time the request is received. For example release of information about a new product prior to public release could be damaging, but after release might not be.

Examples of information the disclosure of which may have a particular potential to damage commercial interests include:

- research and plans relating to a potential new product
- product manufacturing cost information
- product sales forecast information
- strategic business plans, including for example, plans to enter, develop or withdraw from a product or geographical market sector
- marketing plans, to promote a new or existing product
- information relating to the preparation of a competitive bid
- information about the financial and business viability of a company
- information provided to a public authority in respect of an application for a licence or as a requirement of a licence condition or under a regulatory regime

Prejudice to a third party's commercial interests

Departments are likely to hold a wide range of information the disclosure of which could come within the terms sections 43(1) and 43(2) by virtue of the effects of that disclosure on a third party. You should be particularly alert to this possibility where the information was itself originally obtained from the third party, although it may be a possibility in a range of other circumstances too.

Departments may obtain commercially sensitive information from third parties in a number of ways, for example:

- as a result of legal, regulatory, or licensing requirements (this may very well be subject to specific statutory requirements preventing or requiring release, and may therefore be more appropriately considered under sections 21 (information accessible by other means) and 44 (prohibitions on disclosure)³
- In the course of policy development - for example information obtained, usually voluntarily, to inform and influence the development of policy, or changes to law or regulation (here, potential overlap between section 43 and sections 35 (formulation of government policy) and 36 (prejudice to the effective conduct of public affairs) should be borne in mind⁴
- through providing support for business - for example information provided by a company or trade association to a public authority to obtain advice, help with a specific project, and/or financial assistance⁵
- through contracts, for example for products, services or research

Departments may also hold commercial information through having developed their own information about businesses, including assessments of product performance and financial viability. And they may hold commercial information on various products and services in their role as purchasers.

In situations where a third party has provided information, perhaps voluntarily, where the third party concerned is bidding for a contract, an important element of considering whether the disclosure of information would be likely to prejudice the commercial interests of a third party will be the terms on which the information was obtained by a public authority in the first place. Although the third party's expectations of commercial confidence cannot determine the question of prejudice, they will often provide important evidence as to the third party's perspective as to the likely effects of disclosure. Establishing that perspective at the outset of a transaction and, where appropriate, consultation at the time of disclosure are likely to be important steps in considering whether there is an empirical case for reliance on section 43. It must be stressed that

³ Examples include: information obtained using Part IV of the Genetically Modified Organisms (contained use) Regulations 2000, and EC Regulation 793/93 on the evaluation and control of risks of existing substances.

⁴ Often information in this category is provided without confidentiality being requested, for example in public consultations. However on occasion contributions are needed which will only be provided on a confidential basis. In these cases the authority may, in accordance with the guidance in the s.45 code of practice, accept a duty of confidence.

⁵ For example, a company may seek advice from a department about its plans for a particular overseas market, and for this purpose provide information about its future products and plans. Requests for financial assistance will often include sensitive information about the project and the financial position of the company. Also in this category are grants made to companies in line with a published policy, and support for trade fairs and events.

the prejudice to third party interests has to be assessed objectively and by the authority, but the third party's perspective should be taken into account in that process. Where a disclosure would be likely to prejudice the interests of a third party, it may be appropriate to consider an approach to that third party to try to establish its willingness or ability to waive or mitigate that prejudice.

Public authorities will not only receive commercially sensitive information as a result of entering into transactions but also as a result of regulatory or licensing requirements.⁶ In this context, the information obtained by the public authority is highly likely to be confidential. Where a public authority has statutory powers of compulsion, that is, if it can legally oblige people to provide information for certain purposes, a statutory duty of confidentiality will usually arise in relation to that information. Where this is the case the exemption under section 41 of the Freedom of Information Act (information provided in confidence) will also need to be considered. Further, where information is required to be provided, a statutory bar on disclosure may also protect it so that section 44 (prohibitions on disclosure) would apply.⁷

Prejudice to commercial relations with a third party

Information may come within the terms of section 43(2) because of the likelihood of prejudice to the commercial interests of both the authority and a third party, where the relationship between them is itself in the commercial interests of one or both parties and where disclosure could damage that relationship and hence those interests.

This is again most likely to be the case where commercially sensitive information has been supplied to the authority by the third party - for example in one of the ways described above - although that will not always or necessarily be the case.

In this context, there is likely to be considerable overlap with the applicability of section 41 (information provided in confidence). Where information has been supplied by a third party in circumstances giving rise to a legal duty of confidence, and disclosure would breach that duty, there is a clear potential for the application of section 41. Where section 41 applies, then it should always be considered before section 43. Section 41 is

⁶ For example under the Export Control Act 2002 there are two main orders giving the Secretary of State the power to grant licences. The Trade in Goods (Control) Order 2003 (SI 2003/2765) and the Export of Goods, Transfer of Technology and Provision of technical assistance (Control) Order 2003 (SI 2003/2764). An applicant for an export licence has to submit sufficient information to allow the Secretary of State to determine whether or not to grant an export licence. This information will include details of the goods to be exported or technology to be transferred as well as details of the final recipient. The Secretary of State (via the Export Control Organisation) will be in receipt of a significant amount of information, which is commercially sensitive. (Strictly speaking there is no statutory provision requiring this information to be provided but if it is not it is unlikely that a licence will be issued).

⁷ For example there are restrictions on the disclosure of information (except in specified circumstances) in Part 9 of the Enterprise Act and section 24 of the Animals (Scientific Procedures) Act 1986.

an absolute exemption, and failure to withhold information where it applies has a potential to expose an authority to legal action.

Even where a disclosure would not technically fall within the terms of section 41, it is possible for a disclosure of information to prejudice the commercial interests inherent in the maintenance of good commercial relations between an authority and a third party. A number of important points must be understood in this context:

- The connection between prejudice to the relationship and prejudice to one or other party's, or both parties', commercial interests must be real and demonstrable.
- A third party's objection to a specific disclosure is one, but only one, aspect of the overall relationship between the authority and the third party.
- Where the relationship is expressed in contractual terms, the fact that a disclosure would amount to a breach of contract may be a relevant consideration on the question of commercial prejudice, but cannot be considered separately from the commercial interests in the contract terms themselves. Departments and agencies are strongly advised not to accept confidentiality clauses in procurement contracts that conflict with their obligations under the Freedom of Information Act. Under the terms of the Freedom of Information Act the decision as to whether to withhold or disclose the information is ultimately a matter for the public body, regardless of whether the information was originally supplied by a third party and the fact that a disclosure would be in breach of contract cannot be determinative of the legal obligations under the Act (as there is no absolute exemption provided for this). However, it is not in the public interest for public authorities to break contracts. Where disclosures are likely to come within the terms of section 43 because of the commercially prejudicial effect of disclosure, establishing that likelihood at the outset may assist with the process of drafting a suitable contract and applying the exemption at the point where information is subsequently requested.

Further guidance on confidentiality and contracts is contained in the Part V of the section 45 Code of Practice and has been provided by the Government Procurement Service (formerly Buying Solutions and the Office of Government Commerce) see '**FOI (civil procurement) policy and guidance**' at: www.ogc.gov.uk

The public interest balance, considered below, will have to take into account not only the nature and extent of the prejudice to the relationship but the context and quality of the relationship itself. The public interest in promoting that relationship needs to be considered in its own right.

Prejudice to a public authority's own commercial interests

Certain departments and agencies may find that they hold a particularly large amount of information disclosure of which is likely to prejudice their own commercial interests because they are themselves engaged in commercial supply activities either as a prime or subsidiary activity. Examples might include the Export Credit Guarantee Department, Meteorological Office, Ordnance Survey, and the Environment Agency.

More generally all departments have commercial interests as purchasers, for example of property, IT, office supplies, catering and cleaning services.

Section 43 makes provision for the protection of authorities' commercial interests in either capacity.

Some cases require special consideration:

Procurement

The position of public authorities in a procurement role is one in which they are likely to have strong and specific commercial interests. It is also one in which the commercial interests of third parties are likely to have to be considered. Annex A considers some particular issues which may arise. Annex B considers the Gateway Review Process for acquisition programmes or procurement projects.

Public authorities' commercial interests in the disclosure or publication of information

The Freedom of Information Act obligations on public authorities to give or disclose information on request apply to information that is subject to copyright (as explained in the guidance on the application of section 44). But the commercial effects of disclosure on the copyright holder - including cases where copyright is held by the public authority itself - may nevertheless be considered in relation to the exemption under section 43. Authorities' commercial interests in the publication of information need to be considered also within the context of sections 21 (information accessible by other means) which is an absolute exemption, and 22 (information intended for future publication) of the Freedom of Information Act and reference should be made to the relevant guidance on those provisions.

Neither confirm nor deny

Section 43(3) provides an exemption from the duty to confirm or deny whether or not the department holds information which could prejudice **commercial interests** where acknowledging this could in itself be prejudicial.

Section 3(3) provides no exemption from the duty to inform an applicant whether it holds information that constitutes a **trade secret** – unless to do so would prejudice the commercial interests of any person.

Public interest test

Section 43 is subject to the public interest test set out in section 2 of the Act. In determining the public interest in individual cases, you will need to evaluate in the first place the value of the trade secret, or the nature of the prejudice (including its likelihood and magnitude). The sensitivity of commercial information, and the corresponding prejudice that may be caused to commercial interests, will often decrease over time.

Section 43 may protect the commercial interests of either a third party or the authority itself. At a very general level, there is a public interest in protecting the commercial interests of both the private sector (which plays an important role in the general health of the economy) and the public sector (whose commercially-related functions need in any event to be exercised in the wider context of the public interest).

Generally speaking there is a public interest in the disclosure of commercial information in order to ensure that:

- there is transparency in the accountability of public funds
- there is proper scrutiny of government actions in carrying out licensing functions in accordance with published policy
- public money is being used effectively, and that departments are getting value for money when purchasing goods and services
- departments' commercial activities, including the procurement process, are conducted in an open and honest way
- business can respond better to government opportunities

Factors that might weigh in favour of the public interest in withholding information in this area include:

- where disclosure would make it less likely that companies or individuals would provide the department with commercially sensitive information in the future and consequently undermine the ability of the department/agency to fulfil its role
- where disclosure would be likely to prejudice the commercial interests of the department by affecting adversely its bargaining position during contractual negotiations which would result in the less effective use of public money
- where disclosure would, as a consequence, make it more difficult for individuals to be able to conduct commercial transactions or have other dealings with public bodies which are not a typical commercial transaction - for example where an organisation obtains a grant or financial assistance from a public authority - without fear of suffering commercially as a result. It would not, for example, be in the public interest to disclose information about a particular commercial body if that information was not common knowledge and would be likely to be used by competitors in a particular market to gain a competitive advantage

As noted at page 5 above, commercial interests could be prejudiced in many circumstances and the degree of prejudice, and the consequent balance of the public interest in disclosure will often be time sensitive.

Duration of the exemption

This exemption does not apply to information contained in records more than 30 years old.

Other relevant exemptions

- **Section 21** (information accessible by other means): there may be relevant legal, regulatory, or licensing requirements governing the disclosure of commercially sensitive information making the information accessible to the applicant by other means.
- **Section 26** (defence): this is likely to be particularly relevant in matters involving defence procurement.

- **Section 27** (international relations): this exemption could also be relevant in matters involving defence, or other kinds of overseas procurement activities.
- **Section 29** (the economy): this exemption could be relevant if the disclosure would be likely to prejudice the financial interests of a department or agency, or the economic interest of the UK
- **Section 33** (audit function): this exemption could be relevant if disclosure would be likely to prejudice audit functions.
- **Section 35** (formulation of government policy): this exemption could be relevant if commercially sensitive information is obtained in the course of policy development, or **section 36** could be relevant if disclosure would prejudice the effective conduct of public affairs.
- **Section 41** (information provided in confidence): as discussed above, potentially commercially sensitive information held by a public authority may often be held on explicit or implicit terms which make it subject to a duty of confidence. This may particularly be the case with procurement information. If it is established that public release of the information would constitute an actionable breach of confidence, then the section 41 exemption will apply. This is an absolute exemption and does not require the public interest test as defined in section 2 to be applied. However, the public interest component of the common law duty of confidence may need to be considered. It is important to note that the use of terms such as 'commercial in confidence' or 'commercially confidential' do not of themselves establish that any exemption applies. The practical effect is to act solely as a warning that an exemption might apply.
- **Section 44** (statutory prohibitions on disclosure): this section provides an absolute exemption where disclosure is prohibited under other legislation or by EU law. This may be particularly relevant in regulatory and procurement contexts.

Annex A: Procurement-related information

Procurement - related information is likely to be the subject of a significant number of Freedom of Information requests. A substantial amount of procurement-related information is likely to be commercially sensitive at some stage and care will be needed to assess the effect of disclosure on departments and third parties. Equally, as the majority of this information will, by its nature, have been supplied by a third party, the terms on which it was supplied will also have an important bearing on the assessment of whether or not the information should be disclosed.

Types of procurement information

There will be a public interest in favour of disclosure of commercial information generated in the relation to procurement, for the reasons cited in paragraph 36.

However, there will also be examples where the application of section 43 should be considered, these include:

- **Information relating to general/preliminary procurement activities:** e.g. market sounding information; information relating to programme, project and procurement strategies; and contextual information about the authority, its business objectives and plans
- **Information relating to supplier selection:** e.g. qualification information for potential bidders; information about requirements including specifications; details of the qualification process; and details of qualified bidders
- **Information relating to contract negotiation and award:** e.g. bids; papers about capabilities of bidders, evaluations of bids, negotiating briefs and recommendations; the contract; information about successful bid and bidder, and information about other bids and bidders
- **Information relating to contract performance and post-contract activities:** e.g. information about implementation; information about performance; information about contract amendments with supporting papers; and information may be provided and reviewed by third parties (e.g. consultants/auditors)
- **Any requirements for disclosure under public procurement legislation:** the Public Contracts Regulations 2006 impose requirements to publish certain information and to refrain from disclosing other information. If there appears to be any conflict between a public authority's obligations under these Regulations and under the Freedom of Information Act, legal advice should be sought

Likely public interest considerations: lessons from overseas

Experience of the enforcement of access to information legislation in Ireland is instructive here, although care should be taken not simply to read across from the Irish experience, as the Freedom of Information regime is similar but not identical. The picture in Ireland tends to support the view that the public interest in the disclosure of procurement related information is not sufficiently strong to override the harm that may be done to commercial interests before the award of the contract. However, the public interest in making available information after the award of the contract - such as the total tender price and evaluation details of the successful tenderer, along with information about the fee rates and other details necessary to understand the nature of the services contracted - was found to be much stronger.

Each individual case will, of course, need to be considered on its merits. In more difficult cases there is likely to be a complex mix of conflicting factors that will have to be weighed in deciding where the balance of the public interest lies. It is therefore vital that where a decision is taken to withhold information there are clear reasons for refusing to disclose information which are capable of standing up to scrutiny by the Information Commissioner and ultimately the courts. The balance of the public interest will need to be determined on a case by case basis and may, in difficult cases, require legal advice.

For further guidance on handling requests for procurement information see the working assumption on procurement and the Government Procurement Service, (formerly Buying Solutions and Office of Government Commerce) '**FOI (civil procurement) policy and guidance**' at: www.ogc.gov.uk

Annex B: Gateway Reviews

What is a Gateway Review?

Major acquisition programmes and procurement projects in civil central government are subject to Gateway Reviews. These are carried out at key decision points and look ahead to provide assurance to the programme's/ project's Senior Responsible Owner (SRO) that the programmes/projects can progress successfully to the next stage. Gateway Reviews are undertaken by a team of experienced people, independent of the programme/project team.

There are five Gateway Reviews during the lifecycle of a project, three before contract award and two looking at service implementation and confirmation of the operational benefits.

Gateway Review 0 is a programme-only review that is repeated throughout the programme's life; it can be applied to policy implementation, business change or other types of delivery programme involving acquisition. It sets the programme review in the wider policy or corporate context.

- Gateway Review 0 – Strategic assessment
- Gateway Review 1 – Business justification
- Gateway Review 2 – Procurement strategy
- Gateway Review 3 – Investment decision
- [Gateway Review 4 – Readiness for service]
- [Gateway Review 5 – Benefits realisation]

The material contained in Gateway reviews can be wide-ranging depending on the project / programme that is being reviewed. Most procurement projects will engage section 43 issues, however it may be that other exemptions will also apply to information contained in a Gateway review. For further guidance on handling requests for information related to Gateway Reviews, please see the **Gateway Review working assumption**.

One of the factors authorities will consider in respect of a request for disclosure of Gateway information is where a programme or project is in its lifecycle bearing in mind that:

- **up to and including contract award** (Gateway Reviews 0-3), given the sensitivities around, for example, evaluation of tenders, departments should regard all Gateway information, which is not, properly, already in the public domain, as information that would, or would be likely to, prejudice the commercial interests of any person if it was disclosed. Authorities will then need to consider the balance of public interest in respect of disclosure of that information
- **post contract award**, authorities should take account of the fact that the sensitivity of Gateway information is certain to change over time and may well diminish. If there are contractual disputes post-contract award, for example, the sensitivity of Gateway information may increase again