

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 May 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 section 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 section 43(2) and that in all the circumstances of the case the public interest favours maintaining the exemption. 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 18 May 2023:

"1. a) Does there exist any contract or agreement between the MoD/RN [Royal Navy] and the company now called WholeShip Limited (previously known as Whole Ship Consulting Limited) relating to the use of Predannack Airfield and nearby airspace?"

- b) Please provide a summary of the content of all such contracts and agreements.
 - c) Please send me full copies of all such contracts and agreements, including any additions and amendments.
2. a) Does the MoD/RN have a contract or agreement relating to the use of Predannack Airfield and nearby airspace with any other private company?
- b) Please provide the names of all such companies.
 - c) Please provide a summary of the content of all such contracts and agreements.
 - d) Please send me full copies of all such contracts and agreements, including any additions and amendments.
3. a) Does RNAS Culdrose have a policy relating to the use of Predannack Airfield and nearby airspace by private companies?
- b) If so, please send me a copy of the policy currently in force.
4. a) Has the MoD/RN issued any instructions or guidance since 1 Jan 2016 to RNAS Culdrose relating to the use of Predannack Airfield and nearby airspace by private companies?
- b) If so, please provide a copy of all such instructions and guidance."
5. The MOD contacted the complainant on 16 June 2023 and confirmed that it held information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of section 43(2) (commercial interests) of FOIA and it needed additional time to consider the balance of the public interest. The MOD issued a similar letter on 17 July 2023.
6. The MOD issued a substantive response to this request on 27 July 2023. The response explained that in relation to part 1a) of the request, an "Income Generation Contract" exists between the MOD/Royal Navy and WholeShip Limited relating to the use of Predannack Airfield. However, it explained that the information sought by parts 1b) and 1c) was exempt from disclosure on the basis of section 43(2) and that the public interest favoured maintaining the exemption. The MOD explained that it did not hold any information falling within the remaining parts of the request.
7. The complainant contacted the MOD on 9 August 2023 and asked it to conduct an internal review of the decision to withhold the information falling within the scope of parts 1b) and 1c) of the request.
8. The MOD informed him of the outcome of the internal review on 7 March 2024. The review explained that there was no summary in the contract and therefore the MOD should have informed the complainant that it did not hold any information in relation to part 1b) of the request. In

relation to part 1c) of the request the MOD provided the complainant with a redacted version of the contract, explaining that the redactions had been made on the basis sections 43(2) and 40(2) of FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 23 November 2023 in order to complain about the MOD's decision to withhold the information sought by parts 1b) and 1c) of his request, as well at that stage the MOD's failure to complete an internal review.
10. Following the completion of the internal review, the complainant confirmed that he wished to contest the MOD's decision to withhold parts of the contract on the basis of section 43(2) of FOIA. He 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.

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 MOD argued 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 competitive process and the MOD's ability to protect commercially sensitive information. In view of this, the MOD argued that release of the information withheld on the basis of section 43(2) could impact on MOD's relationships with its current and future industry partners which could jeopardise future projects and arrangements.
13. The MOD explained that this was because, providing details of the WholeShip's operating business model, as detailed in Schedule 1 of the contract, would result in the release of commercially sensitive information and would be likely to cause actual harm to the commercial interests of the company. The MOD argued that release of this

information could have a detrimental effect on WholeShip's ability to successfully participate and compete in future commercial activity.

14. In addition, the MOD argued that if the withheld information were released to the 'world at large' without the WholeShip's permission, it could damage the MOD's reputation and would undermine its working relationships with the company involved now and in the future.
15. Furthermore, the MOD argued that disclosure of such information could potentially allow companies to gain an unfair advantage and undermine its ability to secure best value for money in the future. The MOD argued that it should also be allowed to protect commercial information which relates to its Income Generation contracts which may hinder the its ability to obtain value for money in the use of the airfield in the future.

The complainant's position

16. The complainant noted that the MOD had advised him relation to a different request on the same topic, that there was no open and advertised competitive process for the awarding of this contract.¹ In view of this he argued that the MOD's basis of citing section 43, 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

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:
 - 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

¹ In response to the questions (MOD reference FOI2023/10070) "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)" the MOD advised the complainant 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."

- 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.
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 sensitive 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.

Public interest test

26. 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

27. The MOD acknowledged that there is a public interest in enhancing the accountability of government and informing public debate in areas

relating to matters of contractual processes. With regard to the information falling in the scope of this request it accepted that disclosure would increase understanding of the Government Income generated contracts process and the financial benefits to the MOD. Furthermore, the MOD acknowledged that release of the information would demonstrate its commitment to openness and transparency and provide an understanding of the decisions taken in relation to commercial matters in a fair and open market.

28. 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.
29. 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

30. 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 arguments

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).

Procedural matters

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

35. Section 1(1)(a) of FOIA requires a public authority to inform the complainant 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 complainant unless a valid refusal notice has been issued.
36. 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.
37. 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 contract outside of this time period.

Other matters

38. 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.² 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.³
39. In this case, as noted above, the MOD failed to meet these timescales as it took approximately seven 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.

² <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

³ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal>

Right of appeal

40. 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

41. 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.
42. 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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