

Freedom of Information Act Awareness Guidance No 5

Commercial Interests

The right under the Freedom of Information Act to request official information held by public bodies (known as the **right to know**) came into force on 1st January 2005. The Awareness Guidance series is published by the Information Commissioner to assist public authorities and, in particular, staff who may not have access to specialist advice in thinking about some of the issues. The aim is to introduce some of the key concepts in the act and to suggest the approaches that may be taken when handling requests for information. Particularly for central government departments (but also for other larger public authorities) more detailed advice on the scope and approach to be taken to the exemption relating to commercial interests will be available from the Department for Constitutional Affairs which is committed to preparing advice on the key exemptions for Whitehall Departments.

A) What does the act say?

Section 43 of the Act sets out an exemption from the right to know if:

- the information requested is a trade secret, or
- release of the information is likely to prejudice the commercial interests of any person. (A person may be an individual, a company, the public authority itself or any other legal entity.)

Where the information requested constitutes a trade secret, there is no need to consider the harm its release may cause. The very fact that the information is a trade secret is reason enough to withhold the information (subject to the public interest test). Information which does not constitute a trade secret can only be withheld under this exemption if the public authority is satisfied that to release the information would damage someone's commercial interests. This is referred to as the prejudice test.

Section 43 does not apply beyond 30 years, the point at which information becomes a "historical record".

The Duty to Confirm or Deny

The "right to know" really refers to two rights. The Act provides that in responding to a request for information a public authority is obliged to inform the applicant whether it holds the information (known as "the duty to confirm or deny"), and if so to communicate it to them. In relation to trade secrets, section 43 does **not** remove the

obligation to inform an applicant whether it holds the information that constitutes the trade secret.

By contrast, where the information requested is likely to prejudice commercial interests other than trade secrets, section 43 not only provides an exemption from the obligation to communicate the information to the applicant but can also provide an exemption from the requirement to inform the applicant whether the information is held. However a public authority can only refuse to confirm or deny whether it holds such information where this in itself would prejudice commercial interests.

The Public Interest Test

This is a qualified exemption. That is, it is subject to the public interest test which is set out in section 2 of the Act. Even where a public authority is satisfied that the information requested is a trade secret or that its release would prejudice someone's commercial interests it can only refuse to provide the information if it believes the public interest in withholding the information outweighs the public interest in disclosing it. Clearly the bias is in favour of disclosure and there will be occasions where information is released even though it is a trade secret or is likely to prejudice someone's commercial interest.

The public interest test is dealt with in more detail in Section E below and in Awareness Guidance No 3 on The Public Interest Test. Generally speaking, the public interest is served where access to the information would;

- further the understanding of, and participation in the debate of issues of the day;
- facilitate the accountability and transparency of public authorities for decisions taken by them;
- facilitate accountability and transparency in the spending of public money;
- allow individuals to understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions;
- bring to light information affecting public safety.

In considering the public interest it may also be helpful to bear in mind that certain considerations will not be relevant. For instance, if information is complex or incomplete and therefore potentially misleading these factors should not, in themselves be used to justify non-disclosure. Information should be disclosed if the only likely harm would be embarrassment to the authority although if disclosure might discourage openness in expressing opinions, then that might be a reason for withholding it. It may also be necessary to disregard previous requests: the fact that the public interest may not favour disclosure today does not mean that it would not do so given changed circumstances in the future.

B) Trade Secrets

General

Disclosure of a trade secret would, by definition, prejudice a commercial interest. In one respect, however, the Act treats trade secrets differently than other information whose disclosure might harm a commercial interest in that whether or not it is decided to disclose, the public authority must always confirm or deny that it holds the information.

The term “trade secret” is not defined in the Act although it is one which is not difficult to understand. Perhaps the most important thing to grasp is that the term can have a fairly wide meaning. Many people often think of a trade secret to be secret formulae or recipes. While such information is certainly likely to be included in the term, it may also extend to names of customers and the goods they buy or a company’s pricing structure if these are neither generally known and the source of a company’s “competitive edge”. Many of the cases considered by the courts have concerned an employer’s ability to prevent the use of information about his business being used by an ex-employee.

In attempting to decide whether information is in fact a trade secret, it may be helpful to ask a number of questions including:

1. Is the information used for the purpose of trade? Information may be commercially sensitive without being the sort of secret which gives a company a “competitive edge” over its rivals. For instance a public authority may hold information about the state of repair of a manufacturer’s equipment. While information about the design of the equipment may constitute a trade secret, information about its state of repair would not (even though it may be commercially sensitive) since it is not information which is used to help generate profits.
2. Is it obvious from the nature of the information or, if not, has the owner made it clear that he or she considers releasing the information would cause them harm or be advantageous to their rivals? In considering cases involving former employees, the courts have often found that the question of whether or not the employee knew that disputed information was a trade secret was important.
3. Is the information already known? It may be a statutory requirement for the information to be published in some form (land registry, company house, European Procurement regulations etc). The information may already be common knowledge in the business community. If the information is known beyond a narrow circle, it is unlikely to constitute a trade secret.

4. How easy would it be for competitors to discover or reproduce the information for themselves? Generally the less skill, effort, or innovation that was required to generate the information in the first place, the less likely the information is to constitute a trade secret. By the same token, the easier it would be for a competitor to recreate or discover that information through his own efforts, the less likely it is to be a trade secret.

As we explain in Section F of this guidance, unauthorised disclosures of trade secrets, just as with other breaches of confidentiality, may result in legal action being taken against public authorities. While the Act strongly encourages openness it does not encourage recklessness and, if in doubt, authorities and FOI officers may wish to seek legal advice.

C) Commercial interests

General

Trade secrets are one example of commercial interests. The concept is, however, far wider. A commercial interest relates to a person's ability to successfully participate in a commercial activity, i.e. the purchase and sale of goods or services.

The underlying motive for these transactions is likely to be profit, although this is not necessarily the case, for instance where a charge for goods or the provision of a service is made simply to cover costs.

While the essential feature of commerce is trading, the information which falls within the exemption may relate only indirectly to the activity of buying and selling. For instance it is the duty of an employer proposing to make over 100 employees redundant within 90 days to inform the DTI. While this information does not relate directly to a commercial activity, it is easy to see how its disclosure would be likely to undermine a trading position (by making prospective customers less willing to place orders or a bank less likely to extend credit).

There is an important distinction to be drawn between commercial interests and financial interests. While there will be many cases where prejudice to the financial interests of a public authority may affect its commercial interests, this is not necessarily the case. For example, information as to how the level at which Council Tax is set will be information which affects the financial interests of the council, that information does not relate to its commercial activity. Similarly, information concerning central government funding of a local initiative would not be considered commercial information even though there may be competition for the award of grants. There may be grounds under the Act for refusing requests for information as to future levels of Council Tax or central government funding for local initiatives. However the exemption relating to commercial interests is not one of these.

Types of Information that may affect Commercial Interests

It may be helpful to consider some of the reasons why a public authority possesses commercial information. This list is only indicative and there may be other circumstances in which a public authority holds such information.

- **Procurement** – public authorities are major purchasers of goods and services and will hold a wide range of information relating to the procurement process. This could be future procurement plans, information provided during a tendering process, including information contained in unsuccessful bids right through to the details of the contract with the successful company. There may also be details of how a contractor has performed under a contract. Further discussion of the issues around procurement information is provided later when considering implementation issues.
- **Regulation** – public authorities may be supplied with information in order to perform their regulatory functions e.g. the issuing of licences. Alternatively they may obtain commercial information whilst investigating potential breaches of regulations that they are responsible for.
- **Public authority's own commercial activities** – some public authorities, for instance publicly owned companies, are permitted to engage in commercial activities. Any information held in relation to these will potentially fall within the scope of the exemption.
- **Policy development** – during the formulation or evaluation of policy a public authority may seek information of a commercial nature. For example in developing a policy aimed at promoting a particular industry a public authority may solicit information from companies in that sector.
- **Policy Implementation** – e.g. policy of encouraging economic development via awarding grants, public authority will hold information in relation to the assessment of the business proposals when awarding those grants.
- **Private Finance Initiative/Public Private Partnerships** – the involvement of private sector partners in the financing and delivering of public sector projects and services has become a common feature of public life. In this context public authorities are likely to hold a good deal of information both related to the particular project in which a private partner is involved and more generally to the private partner's business.

It is important to note that the list above only refers to **how** a public authority, in the exercise of its functions, may come to hold information relating to business. It does not imply that all such information would be exempt. In order to apply the exemption it is necessary to consider whether the release of such information would **prejudice** someone's commercial interests, i.e. it is necessary to apply the test of prejudice. It will then be necessary to apply the public interest test.

D) The Test of Prejudice

When deciding whether the release of information would, or would be likely to, harm someone's commercial interests it will be necessary to properly consider all the circumstances in question. For example whether the price of goods is commercially sensitive will depend on a number of factors. Releasing information on the price of goods purchased from a catalogue that was freely available to all would not be prejudice the supplier's commercial interests. The price submitted by a contractor is likely to be commercially sensitive during the tendering process but less likely to be so, once the contract has been awarded. In light of this it could be misleading to try and present an indicative list of the sorts of information likely to prejudice someone's commercial interest. A preferred approach is to suggest some of the questions that should be considered in order to determine the impact that releasing the information would have.

1. Does the information relate to, or could it impact on a commercial activity?

As discussed above there is a distinction between commercial interests and financial interests. Commercial information relates to the activity of buying or selling goods and services.

Some information may have a very direct relationship with commercial activity e.g. the price at which goods are offered for sale. Other information may have a less direct link to a commercial transaction, for example, information that a company is considering relocating may have repercussions for labour relations which the company would wish to manage properly in order to minimise disruption to production.

2. Is that commercial activity conducted in a competitive environment?

The level of competition within an industry will effect whether the release of information will harm someone's commercial interests. Where a company enjoys a monopoly over the provision of the goods or services in question it is less likely that releasing the information will have a prejudicial impact on that company.

Alternatively some public authorities may be the sole purchasers of specialist equipment for example military hardware or medical supplies. In such situations the commercial interests of the company could be more dependent on the procurement plans of the public authority in question rather than the effect of releasing commercial information.

3. Would there be damage to reputation or business confidence?

There may be circumstances where the release of information held by a public authority could damage a company's reputation or the confidence that customers, suppliers or investors may have in a company. It may be that releasing such information has a significant impact on revenue or threatens its ability to obtain supplies or secure finance. In these circumstances the commercial interest exemption may be engaged. However it should be noted that there is no exemption for embarrassment, only where there is a real risk of such harm being caused could the exemption be engaged.

4. Whose commercial interests are affected?

In many cases it will be clear whose commercial interests may be prejudiced by a disclosure of information however in other circumstances more thought may be required to identify the stakeholders. Could the release of information operate to the disadvantage of the public authority, for instance by disclosing the budget set aside for a purchase, would this encourage suppliers to raise their prices? Could the information prejudice the bargaining position of the public authority? Will the information impact on the commercial interests of a contractor's suppliers or investors.

5. Is the information commercially sensitive?

Companies compete by offering something different from their rivals. That difference will often be the price at which the goods or services can be delivered but that difference may also relate to quality or specification. Information which identifies how a company has developed that unique element is more likely to be commercially sensitive. For example where a company competes on price, it may be that the final price charged is readily available, however information disclosing how the company is able to offer the product at that price may not be. That is information revealing profit margins is more likely to be commercially sensitive. This argument can extend to working practices etc that allow a quality of service to be more efficiently delivered.

6) What is the likelihood of the prejudice being caused?

Deciding whether or not a particular disclosure would be likely to cause prejudice will often require the exercise of judgement. It will be necessary to judge, in other words, what may be the nature of the harm that would be caused and, also, the likelihood of that harm.

While the "prejudice" that may be caused by disclosure may not be substantial, nor should it be completely trivial. As for likelihood, while prejudice need not be certain, there must be a significant risk rather than a remote possibility of prejudice.

E) The Public Interest

Whether the information requested forms a trade secret or relates to another type of commercial interest, a public authority considering relying upon the section 43 exemption must consider whether there is, in fact an overriding public interest in providing the information. In practice this is likely to involve weighing the prejudice caused by possible disclosure against the likely benefit to the applicant and the wider public.

a) General public interest factors

The factors discussed here are not the only ones that should be considered. However, they illustrate the sort of approach that public authorities should take. Although there is a strong public interest in openness, this does not necessarily override all other considerations.

1. Accountability for the spending of public money

Clearly there is a public interest in allowing scrutiny of how public money is spent. This will be equally true whether a public authority is purchasing goods or services or responsible for awarding grants to private sector companies. Transparency of decisions on how public funds are spent will also generate confidence in the integrity of the procedures involved.

Where a public authority is purchasing goods or services there is a public interest and in ensuring they get value for money. This is particularly true at a time when there is a public debate around the increasing role private companies have in delivering public services.

2. Protection of the public

In the course of its role as a regulator, a public authority may hold information on the quality of products or on the conduct of private companies. There would be strong public interest arguments in allowing access to information which would help protect the public from unsafe products or unscrupulous practices even though this might involve revealing a trade secret or other information whose disclosure might harm the commercial interests of a company.

3. Circumstances under which the public authority obtained the information

Where a public authority obtained information using statutory powers, the disclosure of that information may not prejudice the obtaining of similar information in the future. (Before making a disclosure, however, authorities should also consider whether they are prevented from doing so by the legislation used to obtain the information or by a duty of confidence.)

On other occasions, the information may have been volunteered to the authority, for instance in the course of research being conducted by the authority. The general presumption in favour of disclosure would have to be carefully weighed against the risk of discouraging private companies from participating in research in the future.

4. Competition issues

There is a public interest in ensuring that companies are able to compete fairly. There is also a public interest in ensuring that there is competition for public sector contracts. In considering the release of information, authorities should therefore take these issues into account, including any reputational damage that disclosure might cause.

Policies on say industrial regeneration, may be implemented through a scheme offering assistance to private companies. Before making a grant to a company a “health check” may be carried out by the authority sponsoring the scheme. Companies may be discouraged from participating in the scheme if they felt it could result in the disclosure of information relating to their general business. In this example, although the public interest would not be served by reducing the participation in the scheme, there is also a public interest in understanding the circumstances in which public money is provided to private companies.

Public authorities should be wary of accepting arguments that the potential for commercial information to be released would reduce the number of companies willing to do business with the public sector, leading to reduced competition and increased costs. In practice, many companies may be prepared to accept greater public access to information about their business as a cost of doing business with the public sector.

Increasing access to information about the tendering process may in fact encourage more potential suppliers to enter the market. A better understanding of the process, the award criteria, knowledge of how successful bids have been put together, could also lead to improved bids being submitted in the future. This will lead to more competition and so decrease costs to the public authority. Indeed where a contract comes up for renewal limiting this kind of information is likely to favour the current contractor and so may be anticompetitive.

b) Timing

Very often, in a commercial environment, the timing of the disclosure will be of critical importance. The application of any exemption has to be considered in the circumstances that exist at the time the request is made. Circumstances may change over time. Take the example of information submitted during a tendering process. That information is more likely to be commercially sensitive whilst the tendering process is ongoing compared to once the contract has been awarded. Simply because a request was refused at one point in time does not mean that the information can be permanently withheld. Market conditions will change and for example information relating to costs may very quickly become out of date.

F) Overlap between Commercial Interest and Confidentiality

Many of the exemptions in the Act overlap with others. For instance, disclosure of information held by one of the armed forces about a defence contract may cause prejudice to national security (s.24), defence (s.26), international relations (s.27) as well as to commercial interests.

Very often, as in this example, the commercial interests exemption will overlap with that relating to information provided in confidence. ([Awareness Guidance No 2](#) discusses confidentiality in greater detail.) In practice, an indication of whether or not the disclosure of information would in fact cause prejudice to the commercial interests of a third party may be answered by considering the likelihood of the third party being able to successfully take action in the courts for breach of confidence. If the action is successful, the court is likely to award damages in proportion to the commercial loss suffered as a result of disclosure.

Given the financial risk to the authority of breaches of confidence, it may be doubly important for FOI officers to seek legal advice if in doubt.

G) Implementation Issues.

a) Consultation

In order to determine whether the disclosure of information would prejudice a commercial interest, a public authority may wish to consult with the parties likely to be affected by any disclosure. Time is, however, likely to be limited since the public authority must decide whether the exemption applies within 20 working days. A failure by those being consulted to respond does not remove the obligation to respond within that time limit. It may be helpful therefore to have some discussions now with major suppliers and contractors as to the types of information whose disclosure they would consider might harm their commercial interests. It may also be helpful to agree the circumstances under which the public authority will consult in the event of requests in the future.

(Although public authorities may wish to consider the views of the affected party, it is the responsibility of the public authority to decide whether or not the exemption applies. The public authority can only withhold information if it is satisfied that any arguments for withholding the information are justified.)

b) Review of Contracts/Confidentiality Clauses

As noted above, there will often be an overlap between section 43 and section 41 which provides that information is exempt where its release could lead to a public authority being taken to court for a breach of confidence.

During the procurement process public authorities may be asked by contractors to accept confidentiality clauses which attempt to prevent the disclosure of information. In many cases such clauses may be perfectly proper and serve to make clear that information which the supplier considers should not be made public and that which can be freely disclosed. Clauses may also be helpful in providing a framework for redress in the event of an unauthorised disclosure.

There is, however a risk, that blanket clauses are proposed which purport to restrict the disclosure of all information including that which could be disclosed without any prejudice to the commercial interests of the supplier. Unless confidentiality clauses are necessary or reasonable, there is a real risk that, in the event of a complaint, the Commissioner would order disclosure in any case. On the other hand, if the issue is properly addressed as contracts are negotiated, confidentiality clauses may prove of real assistance in identifying prejudice to a third party's commercial interests.

In addition to developing a new approach to confidentiality clauses in the future, authorities may also wish to review their existing contracts and to discuss with suppliers and contractors the circumstances under which information might be released in response to a request for information.

Public authorities should also be aware of the Lord Chancellor's Code of Practice under section 45 of the Act. This sets out the standards public authorities are expected to meet in order to comply with their obligations under Part 1 of the Act. It is available from the Department of Constitutional Affairs' website at

<http://www.dca.gov.uk/foi/codepafunc.htm>. The code discusses public sector contracts and consultation with third parties in more detail.

c) Environmental Information Regulations

The Environmental Information Regulations 1992, which are currently in force, are expected to be replaced by new regulations as from January 2005. A draft of the proposed new regulations is available from the Department for Environment, Food and Rural Affairs' website. Where an application is made for environmental information, the request should be considered under the Regulations rather than the FOI Act.

As currently drafted, the regulations provide an exception from the right of access for information which although broadly similar to the commercial interests exemption in the Freedom of Information Act does not exactly mirror section 43. For instance:

- The exception in the Environmental Information Regulations does not apply to commercial information concerning emissions, discharges and other releases.
- While the commercial interests protected under the FOI Act may include those of the public authority itself, the Regulations are likely only to protect those of third parties.
- The Regulations also include an exception which allows information volunteered to a public authority to be withheld if its release would prejudice the likelihood of such information being provided in the future.

The definition of environmental information is very wide and it would be sensible for all public authorities to familiarise themselves with the differences between the Regulations and the Act.