

Freedom of Information Act 2000 – Commercial Interests and Confidentiality

The right to request information held by public bodies under the Freedom of Information Act 2000 (the Act) is referred to as the **right to know**.

Section 43 of the Act details an exemption from the right to know. The exemption applies 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 body itself or any other legal entity.)

The very fact information requested constitutes a trade secret (as defined by case law) is sufficient to justify withholding the release of the information, notwithstanding the public interest test. Therefore, if the information is not a trade secret it can only be disclosed if it will not damage someone's commercial interests.

It should be noted that Section 43 does not apply to information which is over 30 years old, as this is classified as a 'historical record'.

The circumstances which need to be considered in order to determine whether disclosure of the information would prejudice the commercial interests of any person including the public body include:

1. Whether the information relates to or could impact on a commercial activity?

A distinction is made between commercial interests and financial interests. Commercial information relates to the activity of buying



or selling goods and services.

2. Whether the commercial activity is 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 there is a monopoly situation it is less likely that the disclosure of such information will have a prejudicial impact on that company, however this may not always be the case.

3. Whether there would be damage to reputation or business confidence?

It may be that the release of information held by a public body could damage a company's reputation or the confidence that customers, suppliers or investors may have in a company. It should be noted that this is not a bar to protect a business from the disclosure of embarrassing information.

4. Whose commercial interests are affected?

In most cases it is fairly obvious whose commercial interests may be prejudiced by a



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disclosure of information. However, in other circumstances it will be necessary to consider other parties who could also be disadvantaged by the disclosure, be this third parties or the local body itself.

5. Whether the information is commercially sensitive?

Companies compete by offering something different from their rivals. This is typically price, but can include quality or specification. A company which has a unique working practice is likely to be more commercially sensitive to the disclosure of that information. Likewise, how a company is able to deliver an efficient service or deliver goods at a certain price is likely to be considered commercially sensitive, as competitors will be able to capitalise on the disclosure of the information.

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

It will be necessary to judge the nature of the harm that may be caused and the likelihood of such harm.

Timing may also be indicative of whether the disclosure of information would impact commercial interests. Information regarding a contract which may have been confidential if disclosed at the time is unlikely to be confidential if disclosed to the market ten years later.

There is no concrete test as to what is or is not commercially sensitive information. Determining factors often include timing of the request and the particular circumstances. However, what is clear is that public bodies cannot hide behind confidentiality clauses in their contracts.

It is necessary for the public body to consider whether an overriding public interest in disclosing the information exists when relying upon a Section 43 exemption. The reality will be that the prejudice caused by possible disclosure will be weighed against the likely

benefit to the applicant and the wider public.

The Information Commissioner has highlighted that when considering commercial interests against the public interest the following criteria should be considered:

■ Accountability for the spending of public money

It is understandable that there is a public interest in the scrutiny of how public money is spent and the transparency of decisions made.

■ Protection of the public

There would be strong public interest argument 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, the disclosure of which may harm the commercial interests of a company.

■ Circumstances in which the information was received

Where a public body obtained information using statutory powers, the disclosure of that information may not prejudice the obtaining of similar information in the future.

■ 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 order to determine whether the disclosure of information would prejudice a commercial interest, a public body may wish to consult with the parties likely to be affected by any disclosure. Time is, however, likely to be limited since the public body must decide whether the exemption applies within 20 working days.

Many of the exemptions in the Freedom of Information Act overlap with other exemptions and very often the commercial interests exemption will

overlap with the exemption to disclose information provided in confidence.

Confidentiality Clauses

Section 41 of the Act provides an absolute exemption where disclosure of the information will constitute an actionable breach of confidence. If documents which are prima facie marked as confidential are disclosed, this will not automatically be classified as a breach of confidence. Likewise, the disclosure of information where a confidentiality clause exists in the contract will not be a breach of confidence. The following criteria must be satisfied to establish that the information has the necessary quality of confidence:

1. The information must have the necessary quality of confidence;
2. This information must have been imparted in circumstances imposing an obligation of confidence; and
3. There is an unauthorised use of the information to the detriment of the party communicating it.

Confidentiality clauses must be reasonable and necessary to be actionable. If the Information Commissioner believes the confidentiality clause is a blanket restriction on the disclosure of all information, it is likely he may order disclosure of the information. However, if the issue of disclosure of information is negotiated effectively and confidentiality clauses reflecting this are inserted into a contract, the confidentiality clauses may be helpful in identifying prejudice to a third party's commercial interest.

Each request for information is examined on its own merits and there is no blanket exemption for commercial confidentiality. Other exemptions in the Act might be applicable, but the starting point is always that there is a right to know.

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