



MOD FOI/EIR Compliance Notes

FOI Exemptions

CN39: Section 43 (Commercial Interests)

Document history

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What this is about:

This note provides an overview on exemption section 43 of the Freedom of Information (FOI) Act – information which is a trade secret or which, if released, would prejudice the **commercial interests** of any person. This note provides an outline of MOD compliance points to consider when engaging section 43 and other exemptions to consider.

Detail:

Section 43 of the Act states that:

- (1) Information is exempt information if it constitutes a trade secret.
- (2) 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).
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).

Section 43 is a qualified exemption and is subject to a public interest test. Even where you are satisfied that the information requested is a trade secret or that its release would prejudice someone's commercial interests, you can only refuse to provide the information if you believe that the public interest in withholding the information outweighs the public interest in disclosing it.

MOD compliance points:

Section 43(1) – Trade Secret

- Before relying on section 43(1), you will need to be satisfied that the information does constitute a trade secret. The FOI Act does not define a trade secret and you will need to consult the MOJ and ICO guidance. In case of doubt about whether information constitutes a trade secret, you may seek legal advice.
- 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).
- Where the trade secrets of other bodies, rather than MOD'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 constitutes a trade secret.
- You may also consider whether it is more appropriate to cite section 43(2) or other exemptions.

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- Section 43(1) has not been tested in MOD cases and its legitimate use is likely to be quite rare.

Section 43(2) – Commercial Interests

- Section 43 of the FOI Act not only protects the commercial interests of third parties but also the commercial interests of MOD. You will need to bear in mind that the commercial sensitivity (particularly the market sensitivity) of information will usually decrease with time and that a fresh assessment of the information in scope of a new request, which may have been considered for previous requests, will need to be made. You will therefore need to consider whether the prejudice applies at the time the request is received.
- If you rely on section 43 for disclosures that would, or would be likely to, prejudice commercial interests of third parties, then you will need to explain how the commercial interests of the third party will be adversely affected.
- It is not enough to speculate as to why the third party's commercial interests would, or would be likely to be prejudiced; the third party where possible must be consulted.
- If the third party does not put forward any arguments regarding any prejudice to its commercial interests then you should not speculate on their behalf. If it is not possible to discuss the issue with the third party, it is acceptable to put forward arguments based on your prior knowledge of their concerns.
- It is not appropriate for the third party to decide for the Department which information should or should not be withheld but their views are sought and taken into account. MOD is responsible for any redactions that are to be made to any information in scope of the request that is being withheld and for preparing the public interest test (PIT). The third party views are taken into account and included in the PIT but MOD determines where the balance of the public interest lies.
- When taking into account any views received from the third party, the final decision on disclosure of the information or the application of section 43 will rest with MOD.
- You will need to consider whose commercial interests are affected and whether the release of information would be a disadvantage to MOD or will the information impact on the commercial interests of a contractor's suppliers or investors (or both). As an example, the position in a procurement role is one in which MOD is likely to have strong and specific commercial interests.
- There may be an overlap between commercial interest and confidentiality (section 41) which provides that information is exempt where its release could lead to MOD being taken to court for a breach of confidence. [See ICO guidance on Public Sector Contracts.](#)
- Other FOI exemptions could apply to information concerning the relationship between MOD and a contractor/third party.
- Section 43 does not apply beyond 30 years, the point at which information becomes a "historical record".
- Where large documents are held (e.g. responses to tenders or contract documents) information within the document will need to be assessed section by section, or indeed paragraph by paragraph, to distinguish commercially sensitive from non-commercially sensitive information within the document. It will be unusual for all information within a contract

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document or tender response to be commercially sensitive (for example in a tender response there is likely to be a description of the task being tendered for and a company's business pitch will they will use include generically in all tenders and in company marketing information)

- In the Information Commissioner's view, those contracting with public authorities must expect a more robust approach to the issue of commercial sensitivity than would apply in the private commercial environment. His view is that, following the implementation of FOI Act, companies contracting with public authorities can reasonably expect that their commercial dealings will be subject to a high level of public scrutiny. This needs to be taken into account in the public interest test for the use of section 43.

Section 43(3) - Neither confirm nor deny

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

Other exemptions to consider:

- **Section 41** (Information provided in confidence): This exemption is frequently used in conjunction with section 43(2). 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.
- In the Information Commissioner's view, those contracting with public authorities must expect a more robust approach to the issue of commercial sensitivity than would apply in the private commercial environment. His view is that, following the implementation of FOI Act, companies contracting with public authorities can reasonably expect that their commercial dealings will be subject to a high level of public scrutiny. This needs to be taken into account in deciding whether the contractor can reasonably expect to rely on the Department to engage section 41 as a blanket measure to withhold information it has provided to MOD in pursuit of its commercial interests.
- **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. You should always check if information has been officially made available in the public domain.
- **Section 26 (Defence)**: This is likely to be relevant in defence procurement matters.
- **Section 27 (International relations)**: This exemption could also be relevant in matters involving overseas activities.
- **Section 29 (The economy)**: This exemption could be relevant if the disclosure would be likely to prejudice MOD's financial interests, or the economic interest of the UK.
- **Section 35 (formulation of government policy)**: This exemption could apply 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.

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MOD Casework Example:

- MOD was asked to provide the purchase price per pair of RAF Aircrew boots that were the subject of a special contract. There were several factors to take into account: this particular footwear was now obsolete; the firm that had manufactured it had closed down and the contract was some years ago. These factors were included in the PIT with the outcome that there was no commercial harm to releasing the information requested. However, the potential for commercial harm needs to be considered on a case by case basis. Had the company still been trading and supplying MOD the outcome of the PIT might have been different.
- In response to a request about the costs of a conference it was in MOD's interests to withhold the price per person of the hotel accommodation. This was because a very competitive conference rate had been negotiated and had the price been released it would have harmed our commercial standing with the hotel as it would have in turn harmed theirs (i.e. with their competitors and other potential customers) knowing what they had charged for our block booking. Discussion with the hotel management confirmed that the harm in releasing the information was very real as it would result in MOD being charged the full commercial rates next time. These factors were taken into account in the public interest test and it was determined that the balance of the public interest lay in continuing to be able to negotiate value for money services.

EIR considerations

Regulation 12(5)(e) of the EIR explains that the disclosure of environmental information will be excepted if it would adversely affect the confidentiality of any commercial or industrial information whose confidentiality is provided by law to protect a legitimate economic interest, unless the information relates to emissions, discharges and other releases.

For further information – see the ICO's detailed guidance:

http://www.ico.gov.uk/for_organisations/guidance_index/freedom_of_information_and_environmental_information.aspx

- Section 43 – commercial interest
- Section 43 – commercial detriment of third parties
- Section 43 – public sector contracts]

Department for Environment, Food and Rural Affairs (DEFRA) website

[Guidance on the regulation 12\(5\) exception](#)

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 Office of Government Commerce, see 'FOI (civil procurement) policy and guidance', at www.ogc.gov.uk .

For further guidance on handling requests for information related to Gateway Reviews, see the [MOJ Gateway Review working assumption](#).

Further Commercial Guidance can be found on the DE&S Commercial Toolkit:

<http://www.aof.dii.r.mil.uk/aofcontent/tactical/toolkit/content/topics/fofi.htm>