FOI and EIRs exemptions Part II — commercially sensitive information

In the second of a six part series on exemptions in the Freedom of Information Act and Environmental Information Regulations, Hazel Grant, Partner, and Sam Ryan, trainee solicitor, at Bristows, consider commercially sensitive information

Case law has demonstrated that where a public authority wishes to protect its own commercially sensitive information, or that of another 'person' which it is holding, the public authority needs to raise some strong arguments to satisfy the exemption to disclosure in section 43 of the Freedom of Information Act 2000 ('FOIA'). Though section 43 is not an easy exemption to apply, it is amongst the most frequently used FOIA exemptions. Statistics published by the Ministry of Justice ('MOJ') in 2008 and for the final quarter of 2009 show that section 43 was amongst the top 6 exemptions.

Section 43 is a two part exemption: it exempts from disclosure (i) 'trade secrets'; and (ii) information that would 'prejudice commercial interests of any person'. This article mostly deals with the more commonly evoked 'prejudice to commercial interests' part of the exemption.

Trade secrets

Section 43(1) FOIA provides that "information is exempt information if it constitutes a trade secret". The FOIA does not define a 'trade secret' but guidance published by the Information Commissioner's Office ('ICO') states that the term has a fairly wide meaning, and will cover things which are generally not known and are a source of a trading advantage for a business. In *Lansing Linde v Kerr* [1991] 1 WLR 251, the Court of Appeal proposed that a trade secret is information which is used in a trade or business, which if disclosed to a competitor would be liable to cause real harm to the owner, and in respect of which the owner limits dissemination.

In *Department of Health v Information Commissioner* (EA/2008/0018), the Information Tribunal ('Tribunal') held that a schedule contained within a contract and which detailed a method used in fulfilling an aspect of the set up of the contract did not have the requisite secrecy about it. The method merely restructured an existing universally recognised method and it would not be difficult for a competitor to discover the elements of the information. The information, though clearly commercially sensitive, was therefore not a trade secret.

The exemption is a 'qualified' exemption, and therefore public authorities must apply 'the public interest test' (see further below).

Commercial interests

Section 43(2) FOIA provides that "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 scope of this exemption is wider than its trade secret counterpart and case law shows that, often, information which does not amount to a trade secret will affect an entity's commercial interests.

For the exemption to apply, the public authority must demonstrate the presence of a commercial interest which will in some way be prejudiced on release of the information and, similarly to section 43(1), it must apply 'the public interest test'.

Guidance published by the ICO provides that trade secrets are one example of commercial interest, but the term is very broad. Any element which relates to a person's ability to participate competitively in a commercial activity will be a commercial interest. Like trade secrets, the exemption is capable of applying to the commercial interests of 'any person' (i.e. public authorities as either buyer or seller of goods/services and other persons, such as private sector suppliers or individuals). Public authorities may find themselves holding commercially sensitive information on their suppliers or the entities that they licence or regulate. Frequently, this gives rise to information requests relating to contractual pricing information provided to public authorities.

It is often emphasised that 'the interests' here must be commercial and not political, financial or

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non-commercial (see for example the MoJ's guidance on section 43). In *University of Central Lancashire v IC and David Colquhoun* (EA/2009/0034), the Tribunal considered a request for the release of course material relating to a homeopathy course at the University. Although the Tribunal did order the release of the information, on the issue of commercial interests it agreed with the University that its interests in the course material are 'commercial'.

The Tribunal stated that "'commercial interests' is a term which deserves a broad interpretation which will depend largely on the particular context. We do not consider that the fundamentally charitable character of a university means that it should have no commercial interests. A body which depends on student fees to remain solvent has a commercial interest in maintaining the assets upon which the recruitment of students depends. Moreover, we accept on the evidence that [the University] operates in competition with other institutions of higher education in seeking to sell it products, namely undergraduate courses, to potential students. Therefore, whether on a broad or narrow construction of the statutory words, we are satisfied that [the University's] interests in teaching material produced for its degree courses are properly described as 'commercial'".

In an earlier case, *Student Loans Company Limited v IC* (EA/2008/0092), the Tribunal held that the ICO's interpretation of commercial interests was too restricted. The Tribunal held that "'commercial' is an ordinary English word. While its meaning is well known, the boundaries of its meaning are not precise. It takes colour from the context in which it is used. In this context we do not consider it appropriate to tie its meaning directly or indirectly to competitive participation in buying and selling goods or services and to exclude all other possibilities".

It was held that parts of the Student Loan Company's ('SLC') manual on how to collect in student debts, could be commercially sensitive information (and not merely information affecting the SLC's 'financial' interests)

In *Anthony Craven v IC* EA/2008/0002, opinions expressed by the Financial Intermediaries, Managers and Brokers Regulatory Association Limited in a draft report on West Bromwich Building Society were held to be information protected by section 43.

So in summary it is not only pricing information but much wider forms of information, that can be protected by section 43(2).

"An assertion that prejudice will be suffered is not sufficient. Reasoned argument and, where practicable, empirical evidence must support any assertion. An early case,* Derry City Council v IC *EA/2006/0014, proved this essential point: no evidence was provided to the Information Tribunal on prejudice to commercial interests and as a result the Tribunal was unable to conclude that there was any commercial prejudice to Ryanair".

The test of prejudice

In deciding whether or not the disclosure of information would, or would be likely to, prejudice a person's commercial interests, the public authority must make a full appraisal of the circumstances present.

A raft of commercial factors must be considered including, but not limited to, the nature of the information and whether it relates to a commercial activity conducted in a competitive environment, where damage to reputation or business confidence would arise through its dissemination. Guidance published by the MOJ provides that plans relating to a new proposed product, product sales forecast information or information relating to the preparation of a competitive bid, are amongst those types of information which have the potential to damage a person's commercial interests if disclosed.

It is not sufficient that there is merely a 'risk' of prejudice. In *John Connor Press Associates Limited v IC* (EA/2005/0005), the Tribunal confirmed that, when considering whether disclosure 'would be likely to prejudice' the commercial interests of any person, "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk".

As the exemption refers to 'would or would be likely', it is important for the public authority to consider which limb of the exemption applies (i.e. 'would' or 'would be likely'). If the public authority considers that there 'would' be prejudice, then there is a higher evidential burden to meet. In an ICO Decision Notice of 10th November 2009 against Doncaster Metropolitan Borough Council (FS 50215335), the Council claimed that disclosure of the sponsorship fee for naming a stadium would prejudice their commercial interests. The ICO held that the higher evidential burden for 'would' had not been met, and went on to consider if the disclosure 'would be likely' to prejudice the commercial interests of the Council. Not even the lower level of evidential burden was met by the Council in this case, as it was not able to show a 'real or significant likelihood of prejudice'.

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An early case, *Derry City Council v IC* EA/2006/0014, proved this essential point: no evidence was provided to the Tribunal on prejudice to commercial interests (in this case, the commercial interests of Ryanair, which had a contract with the Council) and as a result the Tribunal was unable to conclude that there was any commercial prejudice to Ryanair. Subsequent cases have shown how both the ICO and the Tribunal now analyse closely and question any allegation that there is prejudice to commercial interests.

For example, *University of Central Lancashire* (referred to above), the University failed to persuade the Tribunal to maintain the exemptions mainly due to the lack of evidence of prejudice. Although it was accepted that the teaching materials for the homeopathy course were commercially sensitive information, it failed to provide evidence of the impact that disclosure would have.

The University claimed that third parties who provided materials for the teaching materials would be alienated by the disclosure, but no third parties substantiated this with written or witness evidence.

It is possible that the identity of the requester may assist in showing 'prejudice'. In an ICO Decision Notice of 27th May 2008 to Leeds City Council (FS50161274), a contract between the Council and Destiny Wireless (a private company) to jointly sell and provide digital pens, equipment and related services to other public authorities, was covered by section 43(2). This was because the terms of the agreement could contain information on rates agreed between the contractor and the Council which the contractor would not want disclosed to other private companies. The fact that the requester was ultimately a competitor of the Council and Destiny resulted in the ICO concluding that "there is a real and significant risk that disclosure could result in detriment to the parties' commercial interests".

Consultation and procurement

Section 43(2) often requires prompt consultation with third parties, usually the provider of the commercially sensitive information, in order to gauge whether the information is actually commercially sensitive and if the sensitivity persists. Indeed, in some cases it is difficult to see how a public authority can use this exemption *without* liaison with the creator or owner of the information, as the creator will be aware of the market conditions surrounding that information. Needless to say, the final decision of whether to disclose always rests with the public authority and does, on occasion, require arguments advanced by the third party to be regarded 'with a pinch of salt'.

The ICO advises consultation with third parties, but states that if this is not possible (for example due to time constraints) a public authority can put forward details based on its previous experience of the third party's concerns (see the ICO's guidance on 'commercial detriment of third parties' of 24th October 2008).

However, the ICO will not necessarily accept allegations of prejudice to third parties. In an ICO Decision Notice of 18th November 2009 against the Financial Services Authority ('FSA')(FS50129430), the FSA raised the argument that disclosure of information it held about a firm of brokers would cause prejudice to the firm. No evidence was provided that the brokers actually held those views and so the ICO held that section 43 did not apply.

The Office of Government Commerce ('OGC') has published guidance on the application of the FOIA to public procurement information. The guidance gives public authorities direction on how requests for certain types of information should be processed within different phases of the procurement process. The guidance also assists suppliers by indicating which types of information are likely to be released by an authority under a request, and provides that where there is such a request, consultation by the authority with suppliers should be the norm.

Ideally, suppliers should identify truly sensitive materials during the procurement process. If any declared period of sensitivity has not expired, then consultation on any request for information is to take place. If the information is no longer sensitive consultation is unlikely to be necessary.

Where an authority and a bidder have agreed that a piece of information is sensitive, it is up to the authority to then consider whether any relevant exemption applies, and if it does go on to apply the public interest test. The bidders' views on the sensitivity of the information and any associated time limits will be factors which the authority will take into account in weighing the public interest consideration at the time of the request.

In practice, 'the FOIA clause and schedule' approach described above rarely receives the attention it deserves. Often, during the final throes of a procurement many other issues take the attention of the bidders and the public sector customer, meaning that there is no completed schedule listing the commercially sensitive information in the contract and the bidding process.

Timeliness

In the *Department of Health* case above the Tribunal stated that to fall within the exemption at the date of the request, information must still be current and commercially important and not widely known, i.e. if it is common knowledge, the information ceases to be sensitive.

Commercial sensitivity will frequently reduce over time, so it is the sensitivity at the time the request for information is received that must be weighed by the authority in making its decision. *Derry City Council* was also an example of how prejudice can wane over time. In that case, the request was made 6 years after the date of the contract. Therefore, although it was accepted that disclosing the contract would have been likely to prejudice the Council's commercial interests at the time of the contract, due to the passage

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of time the risk of prejudice greatly reduced. Therefore, on application of the public interest test it was decided that withholding the contract did not outweigh the public interest in disclosing the contract.

The public interest test

The exemptions available under section 43 are both subject to the public interest test set out in section 2 of the FOIA. Where a public authority is satisfied that information requested under the FOIA is caught by either section 43(1) ('trade secret') or 43(2) ('prejudice of a person's commercial interests'), it can only hold back the information if it is satisfied that the public interest in withholding the information outweighs the public interest in disclosing it. So, there is a presumption in favour of disclosure.

ICO guidance provides that the public interest in the disclosure of commercial information will generally be served where access to the information would facilitate accountability and transparency of public authorities for decisions taken by them and money spent. Other successful arguments have been on the basis of facilitating further understanding of, and participation in, the debate of issues of the day.

Guidance published by the MOJ provides that factors which may weigh in favour of withholding information include situations where disclosure would make it less likely that companies dealing with the authority will disclose commercially sensitive information in the future (and so weaken the authority's ability to fulfil its role). If disclosure would adversely affect the authority's bargaining position during negotiations this may also be a consideration, as the public's money may be used less effectively.

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A recent ICO Decision Notice in respect of Her Majesty's Revenue & Customs ('HMRC') dated 22nd October 2009 (FS50157117), related to a request for information on pricing applied to HMRC offices.

HMRC agreed to release information relating to pricing of some offices, where these were directly leased by HMRC. However, a number of offices were provided through a PFI-financed deal, and the ICO agreed that pricing information on these offices was commercially sensitive information relating to the provider and HMRC, as the latter would be likely to engage in further similar arrangements.

With regard to the public interest test, the ICO held that as HMRC had already made some information on pricing available at certain offices, this showed that HMRC accepted the need for transparency and accountability. The ICO commented on the "strong public interest in encouraging the wider involvement of the private sector in public procurement, to increase competition".

This is noteworthy given the previous view of the ICO was to doubt that there was any risk to competition if pricing information were disclosed.

Exemptions under the EIRs

Under the Environmental Information Regulations 2004 ('EIRs') there are a number of exemptions which might apply to commercially sensitive information. See the previous article in this series, which analysed the EIR exemptions applicable to confidential information (*Freedom of Information,* Volume 6, Issue 2).

Comment

Organisations interacting with public authorities understandably wish to keep their commercially sensitive information out of the hands of the press and competitors. This is especially the case when such organisations appreciate the difficulties of using section 41 FOIA to protect confidential information (dealt with in the first part of this article).

While the exemptions provided under section 43 FOIA (in particular section 43(2)) can and do provide some relief in protecting discrete parts of agreements, reports and other documents, this requires substantial effort to show (in particular) the prejudice and likelihood of prejudice.

That said, we should spare a thought for local authority contracts. Although section 43 is not a simple exemption to apply, it is at least potentially available to protect sensitive information. In *Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council* [2009] EWHC 2382 (a recent decision of the high court), it was held that a local authority was bound by section15(1) of the Audit Commission Act 1998 to allow a local government elector to inspect parts of a public contract dealing with commercially sensitive pricing issues. In this case, the obligation to make the information available to the elector was not restricted by exemptions for confidentiality or commercially sensitive information. See the article on page 7 of this edition for a discussion on the impact of this decision.

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