



HM Courts & Tribunals Service

Mr S Elibank

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Crime and Enforcement
Directorate
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Date: January 05 2015

Our Ref: FOI/90976

Dear Mr Elibank

Freedom of Information Act 2000 (FOIA) Request

Thank you for your request dated 21 May 2014 regarding a Freedom of Information (FOI) request in which you asked for:

The release of the Magistrates' Court Manual

I can confirm that HMCTS does hold a document called the Magistrate's Court Manual (MCM) and that we have agreed its release to you with some parts redacted under the FOIA. I attach a schedule which details which parts of which chapters have been redacted and under which section of the FOIA. I apologise for the time it has taken to get this full response to you.

The MCM is made up of 34 separate Chapters (651 pages) and there were in excess of 100 redactions which had to be considered. The consideration of exemptions cannot be factored into the FOIA cost limit under Section 12(1) therefore we had to exceed the 20 working day time limit in order to provide you with a response which addressed the full scope of your request.

An explanation of our decisions

For ease of reference, I have produced a table in Excel format which details the exemptions applied. A complete list of the MCM chapters which was held by the Department at the time of your request is included in column A. The format of each chapter is as follows:

- MCM Chapter X [chapter number], Para X [paragraph number]

Alongside each chapter is a record of the FOIA exemptions (column C),

Below I will explain thoroughly each exemption.

Absolute exemptions

The following exemptions are absolute under the FOIA and under the FOIA conditions we are not obliged to consider the public interest in disclosure.

FOIA Section 23(1)

We are not obliged to provide information relating to bodies who deal with matters of security. In this case, we believe that the information relates to the National Crime Agency (NCA), which was previously the Serious Organised Crime Agency (SOCA) specified in Section 23(3)(m) of the FOIA.

FOIA Section 40(2)

We are not obliged, under section 40(2) of the Act, to provide information that is the personal information of another person if releasing would contravene any of the provisions in the Data Protection Act 1998 (DPA). In these instances we believe that the release of this information would contravene the first data protection principle.

Qualified Exemptions

In considering the application, we identified certain qualified exemptions, for which we are also required to consider the public interest. Most of the public interest tests below are specific to the groups of exemptions used.

FOIA Section 31(1)(a)

We have identified instances where Section 31(1)(a) should be engaged. These instances are marked in the attached table and refer to the prevention or detection of crime. The terms of this exemption mean we must conduct the following public interest test:

Arguments favouring disclosure:

- The public have an interest in knowing that the Department is upholding the law.
- Promoting awareness of the procedures in use which help prevent crime would also help increase public confidence.

Arguments favouring withholding the information:

- Disclosure of the procedures in place which monitor bail or curfew conditions would allow individuals to avoid detection and render the procedures ineffective.
- Disclosure of the procedures in place regarding the enforcement of summons and/or jury service will allow individuals to circumvent the process and break the law.

On balance we are satisfied that Section 31(1)(a) applies to this information and that the public interest is best served in withholding the information relating to the

prevention or detection of crime. We are not obliged to provide information if its release would prejudice law enforcement. In this case, we believe that releasing the information would be likely to prejudice FOIA Section 31(1)(a).

FOIA Section 31(1)(b)

We have identified instances where Section 31(1)(b) should be engaged. These are marked in the attached table and refer to the apprehension or prosecution of offenders. The terms of this exemption mean we must conduct the following public interest test:

Arguments favouring disclosure:

- There is a public interest in keeping the public informed about how they are being protected from offenders who have broken bail conditions.
- The public have an interest in the lawful and just prosecution of offenders which is a core court activity. Transparency will increase public confidence.

Arguments favouring withholding the information:

- Disclosing court processes that relate to the apprehension or prosecution of offenders may affect the fair trial of individuals against whom proceedings may have been initiated.
- Revealing the procedures used in court that aid the detecting of crime would prejudice the fair prosecution of offenders.
- Revealing the process by which a court is able to detect crime will allow individuals to evade apprehension.

On balance we are satisfied that Section 31(1)(b) applies to this information and that the public interest is best served in withholding the information relating to the apprehension or prosecution of offenders. We are not obliged to provide information if its release would prejudice law enforcement. In this case, we believe that releasing the information would be likely to prejudice FOIA Section 31(1)(b).

FOIA Section 31(1)(c)

We also found instances where FOIA Section 31(1)(c) should be applied. These instances are marked in the attached table. For most of the information where Section 31(1)(c) is engaged, the following public interest applies:

Arguments favouring disclosure:

- We have a responsibility to ensure a fair justice system and transparency in court processes will inform the public on how we help to achieve this.
- Sharing will increase public confidence and help informed debate on how justice is administered.

Arguments favouring withholding the information:

- HMCTS must create, develop and adapt methods of facilitating court business in order to ensure a fair justice system. Courts rely on an effective administration service in order to achieve this goal. Disclosure of this information will undermine the methods which are currently in use.
- Revealing the specific processes behind which justice is administered will allow individuals to disrupt or circumvent that process and avoid the administration of justice.
- Disclosure of specific court administration methods will result in HMCTS being potentially forced to change these methods in order to prevent individuals from impeding the administration of justice. Consequently this places unnecessary self-imposed extra work and burden on the Department.

On balance we are satisfied that Section 31(1)(c) applies to this information and that the public interest is best served in withholding the information relating to the administration of justice.

We are not obliged to provide information if its release would prejudice law enforcement. In this case, we believe that releasing the information would be likely to prejudice FOIA Section 31(1)(c).

FOIA Section 31(1)(e)

There was an instance where we found that FOIA Section 31(e) should be engaged. This is in reference to passport control and travel restriction orders. The terms of this exemption mean that we must conduct the following public interest test:

Arguments favouring disclosure:

- The public would have an interest in our ensuring that UK immigration controls are being adhered to.

Arguments favouring withholding the information:

- The detailed processes in place between HMCTS and Her Majesty's Passport Office (HMPO) must be kept secure in order to safeguard border control.
- Disclosure of the information will allow individuals to circumvent or disrupt that process and reduce the effectiveness of UK immigration controls.

On balance we uphold the withholding of the information. We are not obliged to provide information if its release would prejudice law enforcement. In this case, we believe that releasing the information would be likely to prejudice FOIA Section 31(1)(e).

FOIA Section 31(1)(f)

This exemption relates to the release of information that would be likely to prejudice the maintenance of security and good order in prisons or other institutions where

people are lawfully detained. The terms of this exemption mean we must conduct the following public interest test:

Arguments favouring disclosure of the information:

- We must ensure that the public are protected by our prison management processes and transparency of these will gain public confidence.

Arguments favouring withholding the information:

- The transfer of individuals or documents from a court to a prison establishment or vice versa must be kept secure in order prevent disruption in the security or good order of a prison.
- Disclosure of the specific processes involved in the communications of transfers between courts and prison establishments will compromise the effectiveness of the process and jeopardise the security of the prison.
- Disclosure of the procedures in place to ensure the correct transfer of documents from a court to a prison establishment will allow individuals to disrupt or impede this process and compromise the processing of detainees and consequently, the security of a prison.
- If the security of a prison is compromised through disclosure of information, then the safety of the public is potentially affected.

On balance we are satisfied that Section 31(1)(f) applies to the information and that the public interest is best served in withholding the information relating to the good order of prisons.

FOIA Section 38 (1) (a)

We identified information that should be exempted under this section, which relates to the release of information that would be likely to endanger the physical or mental health of an individual. The terms of this exemption mean we must conduct the following public interest test:

Arguments favouring disclosure of the information:

- We have a responsibility to ensure a fair justice system and transparency in court processes will inform the public on how we help to achieve this
- Disclosure could increase public confidence that HMCTS take serious and considered steps to deal with vulnerable people.

Argument against disclosure of the information:

- We have a responsibility to ensure the safety of vulnerable people and this paragraph gives details of the arrangements we have to safely transport and deal with people with mental health issues. Releasing this information would compromise that responsibility.

We have determined that the safety of any individual is of paramount importance and that in all circumstances of the case it is our opinion that the public interest clearly favours the non-disclosure of information covered by section 38(1)(a).

FOIA Section 38 (1) (b)

Section 38(1)(b) exempts information where disclosure would be likely to endanger the safety of any individual. The terms of this exemption mean we must conduct the following public interest test:

Arguments favouring disclosure of the information:

- We have a responsibility to ensure a fair justice system and transparency in court processes will inform the public on how we help to achieve this
- HMCTS should be seen to be actively taking steps to safeguard the safety of all individuals we have a responsibility to.

Arguments favouring withholding the information:

- The safety of any individual coming into contact with the criminal justice system must be our priority and to release any information that might endanger this safety is clearly not in the public's interest.

There is an instance in the MCM where the application of Section 38(1)(b) requires further consideration of the public interest than the arguments listed above. This instance refers to the method used for locating young people in the criminal justice system. The terms of this exemption mean we must conduct the following public interest test:

Arguments favouring disclosure of the information:

- We have a responsibility to ensure a fair justice system and transparency in court processes will inform the public on how we help to achieve this

Arguments favouring withholding the information

- The information relates to specific methods for locating young persons within the criminal justice system and producing them at court. Releasing this could lead to a considerable risk to the safety of these vulnerable individuals.

We have determined that the safety of any individual is of paramount importance and that in all circumstances of the case it is our opinion that the public interest clearly favours the non-disclosure of information covered by section 38(1)(b).

FOIA Section 43(2)

Information is exempt information if its disclosure under this Act would, or would likely to, prejudice the commercial interests of any person (including the public authority holding it). The terms of this exemption mean we must conduct the following public interest test:

Arguments favouring disclosure of the information:

- We must ensure that our budgets paid for by the public purse are managed responsibly and transparency on how we spend our money will increase public confidence.

Arguments favouring withholding the information:

- Disclosure of information which relates to the methods of paying juror, witness or court visitor expenses will allow court users to circumvent or disrupt the process and potentially impact our financial management.
- Any funds lost as a result of disclosure will be a detriment to the court budget and ultimately the public purse.

We are not obliged to provide information relating to commercial interests. In this case, we believe that the information would, or would be likely to, prejudice the commercial interests of any person including the department who holds it (section 43(2) of the Act).

You can also find more information by reading the full text of the Act, available at:

<http://www.legislation.gov.uk/ukpga/2000/36/section/40>;
<http://www.legislation.gov.uk/ukpga/2000/36/section/23>;
<http://www.legislation.gov.uk/ukpga/2000/36/section/31>;
<http://www.legislation.gov.uk/ukpga/2000/36/section/38>;
<http://www.legislation.gov.uk/ukpga/2000/36/section/43>

and further guidance at: <http://www.justice.gov.uk/guidance/foi-exemptions-guidance.htm>. The Data Protection Act can be found at the following link: <http://www.legislation.gov.uk/ukpga/1998/29/contents>.

You have the right to appeal our decision if you think it is incorrect. Details of how you can do so are set out below.

Disclosure Log

You can also view information that the Ministry of Justice has disclosed in response to previous Freedom of Information requests. Responses are anonymised and published on our on-line disclosure log which can be found on the MoJ website: <http://www.justice.gov.uk/information-access-rights/foi-requests/latest-moj-disclosure-log>

The published information is categorised by subject area and in alphabetical order.

Yours sincerely

Tony Apperley

Head of Crime
Crime and Enforcement Directorate

How to Appeal

Internal Review

If you are not satisfied with this response, you have the right to an internal review. The handling of your request will be looked at by someone who was not responsible for the original case, and they will make a decision as to whether we answered your request correctly.

If you would like to request a review, please write or send an email **within two months from the date of this letter** to the Data Access and Compliance Unit at the following address:

Data Access and Compliance Unit (10.34),
Information & Communications Directorate,
Ministry of Justice,
102 Petty France,
London
SW1H 9AJ

E-mail: data.access@justice.gsi.gov.uk

Information Commissioner's Office

If you remain dissatisfied after an internal review decision, you have the right to apply to the Information Commissioner's Office. The Commissioner is an independent regulator who has the power to direct us to respond to your request differently, if he considers that we have handled it incorrectly.

You can contact the Information Commissioner's Office at the following address:

Information Commissioner's Office,
Wycliffe House,
Water Lane,
Wilmslow,
Cheshire
SK9 5AF

Internet address: https://www.ico.org.uk/Global/contact_us

FURTHER INFORMATION:

EXPLANATION OF FOIA - SECTION 40(2) – INFORMATION RELATING TO THIRD PARTIES

We have provided below additional information about Section 40(2) of the Freedom of Information Act. We have included some extracts from the legislation, as well as some of the guidance we use when applying it. We hope you find this information useful.

The legislation

Section 1: Right of Access to information held by public authorities

- (1) Any person making a request for information to a public authority is entitled—
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.

Section 40: Personal Information.

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if—

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.

(3) The first condition is—

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the M1Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the M2Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

Guidance

Section 40 of the Freedom of Information Act applies to:

- requests for the personal data of the applicant him or herself
- requests for the personal data of someone else (a third party)

Personal data of a third party: Personal data of a third party is exempt under section 40(2) if its disclosure to a member of the public would contravene one or more of the data protection principles and a request must be refused.

The Data Protection Principles:

The data protection principles are a statutory code for the processing of personal data. They are set out in Part I of Schedule 1 to the Data Protection Act.

Three data protection principles require personal data to be:

- fairly and lawfully processed
- processed for specified and lawful purposes
- adequate, relevant and not excessive
- accurate, and kept up to date
- not kept longer than necessary
- processed in accordance with individuals' rights under the Data Protection Act
- kept secure
- not transferred to non-EEA (European Economic Area) countries without adequate protection

The principle most likely to be relevant to the disclosure of information under the Freedom of Information Act is the first principle. This requires personal information to be:

- processed 'fairly'
- processed 'lawfully'
- not processed at all unless one of the 'conditions' for fair processing is met

Processing in this context includes disclosure.

In most cases, personal data will be exempt if disclosure would be 'unfair'. Disclosure of personal data relating to a third party will often breach the fair processing principle if there was a legitimate expectation by a third party that this information would remain confidential.

EXPLANATION OF FOIA - SECTION 23 – INFORMATION SUPPLIED BY, OR RELATING TO, BODIES DEALING WITH SECURITY MATTERS

We have provided below additional information about Section 23 of the Freedom of Information Act. We have included some extracts from the legislation, as well as some of the guidance we use when applying it. We hope you find this information useful.

The legislation

Section 1: Right of Access to information held by public authorities

(1) Any person making a request for information to a public authority is entitled—

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

Section 23: Information supplied by, or relating to, bodies dealing with security matters.

(1) Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

(2) A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.

(3) The bodies referred to in subsections (1) and (2) are—

- (a) the Security Service,
- (b) the Secret Intelligence Service,
- (c) the Government Communications Headquarters,
- (d) the special forces,
- (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
- (f) the Tribunal established under section 7 of the Interception of Communications Act 1985,
- (g) the Tribunal established under section 5 of the Security Service Act 1989,
- (h) the Tribunal established under section 9 of the Intelligence Services Act 1994,
- (i) the Security Vetting Appeals Panel,
- (j) the Security Commission,
- (k) the National Criminal Intelligence Service,
- (l) the Service Authority for the National Criminal Intelligence Service.
- (m) the Serious Organised Crime Agency.

(4) In subsection (3)(c) “the Government Communications Headquarters” includes any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.

(5) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

Guidance

The Security and Intelligence Agencies are not 'public authorities' for the purposes of the Act, therefore they are not under any duty themselves to disclose information under the Freedom of Information Act. It is only information supplied by them to public authorities, or information that relates to them and is held by public authorities, which needs to be, and is, addressed by section 23.

The section 23 exemption applies to information received from or related to the bodies listed at section 23(3) of the Freedom of Information Act. This includes the Security Service, the Secret Intelligence Service, Government Communications Headquarters and the Serious Organised Crime Agency.

The fact that a public authority does not hold information supplied by one of the Security Bodies can itself be information relating to those bodies. If information falls within the exemption in section 23, it will very often be important to consider whether

it is necessary to rely on the exclusion of the duty to confirm or deny whether the information is held. A non-committal response can be useful as it will not disclose information as to whether a Security and Intelligence Agency is or is not involved in a certain area of work.

EXPLANATION OF FOIA – SECTION 31 - LAW ENFORCEMENT

We have provided below additional information about Section 31 of the Freedom of Information Act. We have included some extracts from the legislation, as well as some of the guidance we use when applying it. We hope you find this information useful.

The legislation

Section 1: Right of Access to information held by public authorities

- (1) Any person making a request for information to a public authority is entitled—
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.

Section 31: Law Enforcement

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

(2) The purposes referred to in subsection (1)(g) to (i) are—

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,
- (i) the purpose of securing the health, safety and welfare of persons at work, and
- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.

(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 any of the matters mentioned in subsection (1).

Guidance

Section 31 is concerned with protecting a wide range of law enforcement interests and its application turns on whether disclosure would be likely to prejudice those interests.

Some interests that are protected by section 31 are drawn quite widely, for example: the administration of justice, the prevention or detection of crime and the operation of immigration controls. But section 31 also applies where the exercise by any public authority of certain specified functions would be prejudiced by disclosure. Those functions include: ascertaining whether a person is responsible for improper conduct, determining the cause of an accident and ascertaining a person's fitness to carry on a profession.

This section is not restricted to information of any particular description; it turns on consideration of the likely effects of any disclosure. Examples of circumstances in which the prejudicial effects referred to in this part of this exemption are most likely to be relevant could include the following disclosures:

- intelligence about anticipated criminal activities
- information relating to planned police operations, including specific planned operations, and policies and procedures relating to operational activity;
- information relating to the identity and role of police informers
- information relating to police strategies and tactics in seeking to prevent crime

- information whose disclosure would facilitate the commission of any offence; and
- information whose disclosure would prejudice the fair trial of any person against whom proceedings have been or may be instituted.

EXPLANATION OF FOIA - SECTION 38 –HEALTH AND SAFETY

We have provided below additional information about Section 38 of the Freedom of Information Act. We have included some extracts from the legislation, as well as some of the guidance we use when applying it. We hope you find this information useful.

The legislation

Section 1: Right of Access to information held by public authorities

- (1) Any person making a request for information to a public authority is entitled—
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.

Section 38: Health and safety.

(1) Information is exempt information if its disclosure under this Act would, or would be likely to—

- (a) endanger the physical or mental health of any individual, or
- (b) endanger the safety of any individual.

(2) 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, have either of the effects mentioned in subsection (1).

Guidance

Section 38 applies to information that if disclosed would be likely to put the physical or mental health or the safety of any individual at risk or greater risk. The individual does not need to be identifiable and may be a member of the public, where the danger is to the health or safety of the public at large. The exemption can apply equally to a group or class of people who could have their health and safety adversely affected by disclosure.

An act of disclosure may cause mental harm directly – for example resulting in a sufficient level of shock or distress as to endanger an individual's future mental well-being.

There are many different ways in which disclosure of information could endanger someone's health or safety either directly or indirectly. The following are some examples of such disclosures:

- those which would allow individuals, groups or firms to be identified or located and consequently targeted and attacked for their beliefs or practices, including work in controversial scientific areas;
- disclosure of plans and policies relating to the accommodation of individuals, or groups of individuals, where disclosure could lead to their being threatened or harassed (for example, asylum seekers)
- disclosing information about negotiations with kidnappers, where disclosure could endanger the safety of hostages
- information relating to the protection of the Critical National Infrastructure, such as the water supply, national grid, or gas supply from actions intended to cause catastrophic damage and/or cause death or serious injury
- information relating to the identity of informers or undercover officers
- disclosure which may have an adverse effect on public health
- the disclosure of sensitive or graphic information about deceased individuals which could cause serious distress to others such as family members, particularly if they were not previously aware of it.

EXPLANATION OF FOIA - SECTION 43 – COMMERCIAL INTERESTS

We have provided below additional information about Section 43 of the Freedom of Information Act. We have included some extracts from the legislation, as well as some of the guidance we use when applying it. We hope you find this information useful.

The legislation

Section 1: Right of Access to information held by public authorities

- (1) Any person making a request for information to a public authority is entitled—
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.

Section 43: Commercial interests.

- (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).

Guidance

Section 43(1) exempts information if it constitutes a trade secret. The Freedom of Information Act does not define a trade secret, nor is there a precise definition in English law. However it is generally agreed that:

- it must be information used in a trade or business

- it is information which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret
- the owner must limit the dissemination of the information, or at least, not encourage or permit widespread publication

Section 43(2) exempts information, disclosure of which would be likely to prejudice the commercial interests of any person. Section 43(2) is a prejudice-based exemption, so the test for exemption is whether or not the commercial interests referred to in the section would, or would be likely to, be prejudiced by disclosure.

'Commercial' can be taken to mean relating to an activity in the way of a business, trade or profession. Again, the exemption is (expressly) capable of applying not only to the commercial interests of outside organisations, but also to a public authority's own commercial interests. When it comes to considering a public authority's own interests, a range of circumstances may be relevant, including the authority's position in the market place both as a purchaser and as a supplier. However, the prejudice to the commercial interests of a public authority must be contrasted with prejudice to other interests such as the body's political or other non-commercial reputational interests, which are not protected by this exemption.