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**CHAPTER 25 SECTION 13
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1. EXEMPTING INFORMATION WHERE IT WOULD PREJUDICE COMMERCIAL INTERESTS

1.1 Background

Section 43 of the Freedom of Information Act 2000 (“the Act”) provides that:

- Information is exempt information if it constitutes a trade secret.
- Information is exempt information if its disclosure under the Act would, or would be likely to, ***prejudice the commercial interests*** of any person (including the public authority holding it).

It is likely that IND will only have a need to apply this exemption where disclosure may prejudice commercial interests. The exemption here in relation to commercial interests operates as both a prejudice and qualified exemption. This means that in order for it to be applied staff must be able to demonstrate that the commercial interests referred to would, or would be likely to, be prejudiced by disclosure and that the public interest balancing test weighs in favour of non-disclosure.

The Office of Government Commerce (OGC) has produced guidance for Government Departments on the Act in relation to procurement issues and staff should always consult this guidance for advice when seeking to apply this exemption. This can be found at: <http://www.ogc.gov.uk/index.asp?docid=1002588>

This IDI Chapter for IND staff is intended to support the OGC and DCA guidance and establish the general principles behind the operation of this exemption. But the OGC guidance should be the main source of reference for IND staff who are considering applying an exemption on the grounds of procurement related exemptions.

It is important that requests for information under the Act which ask for the release of commercial information are handled with particular care by IND staff. The release or withholding of commercial information must be assessed at all times by staff who have a knowledge of this area so that IND’s commercial interests and those of third parties who work with IND are not in any way damaged.

IND has established a central mechanism for dealing with all requests which ask for information about sensitive commercial information which may be held by IND. In many cases these requests will be dealt with by staff in IND Directorates who have expertise in dealing with procurement and commercial issues. Where this happens, staff will be able to answer a request in line with the guidance here and the guidance issued by the OGC.

However, there may be occasions where staff in an IND Directorate receives a request for information relating to commercial issues, and there is no expertise within that IND Directorate for dealing with such requests. Staff should not answer such requests without seeking further advice as they may not be able to identify the potential damage in disclosing or withholding commercial material held within IND. Instead, they should

refer the request immediately to their relevant Freedom of Information Specialist. If the specialist has no knowledge or expertise in this area and is unsure how the case should be handled, then the request should be immediately referred to the IND Central FOI Team who will allocate it accordingly in liaison with IND's procurement or commercial specialists. The request should be faxed to the IND Central FOI Team. A short covering note should be provided from the IND Directorate and member of staff concerned entitled "*Further information required on possible commercial request*").

Where IND Directorates have consulted the OGC guidance and the relevant IND commercial specialists, and are seeking to apply this exemption, it must be authorised at Grade 7/Assistant Director level or above, and the IND Central FOI Team must also approve its use.

1.2 **Scope of the exemption**

The term '**commercial**' as provided for in this exemption is a broad one and can be interpreted as relating to an activity in the way of a business, trade or profession. The exemption here is also capable of applying not only to the commercial interests of outside organisations, but also to IND's own commercial interests.

The 'person' whose interests may be prejudiced could also under the terms of the Act be any company, sole trader or private individual, IND or the Department itself.

Staff should be alert to the differences between using this exemption to protect the interests of a third party and using it to defend IND or the Department's own interests. These differences are considered in further detail in this guidance.

When it comes to considering IND's interests as part of a Government Department, a range of circumstances may be relevant, including IND's position in the market place both as a purchaser and as a supplier. However, when assessing the **possible prejudice** to the commercial interests of IND, this must be contrasted with prejudice to other IND interests such as the body's political or other non-commercial reputational interests which are not protected by this exemption.

It is also important to bear in mind that there is a distinction between commercial and financial interests in respect of IND and the Department as a whole. A commercial interest relates to a person's ability to participate successfully in a commercial activity, whereas a financial interest concerns the financial position of an individual or organisation.

Although the commercial and financial interests of a commercial entity may be extremely closely related, that is not necessarily so in the case of an organisation such as IND which is part of the wider Home Office. While there may be cases where prejudice to the financial interests of IND may affect the Department's commercial interests, this will not always be the case. Section 29 of the Act provides an exemption relating to the UK's economic interests and an explanation of how to apply this exemption can be found on the DCA website at: <http://www.foi.gov.uk/guidance/exguide/sec29/index.htm>.

'Commercial in confidence' markings

It is important for staff to note that a simple assertion by an individual or body that their commercial interests would be harmed by release is not sufficient grounds for this

exemption to be applied. In particular it is not sufficient for a body simply to mark a document '**commercial in confidence**' for the information in it to be withheld under this or any other exemption within the Act. The assertion must be supported by reasoned argument, and where practicable by empirical evidence which demonstrates the prejudice to commercial interests arising, or likely to arise, from disclosure and it must also be in the overall public interest to withhold the information concerned.

1.3 **General considerations relevant to the test of prejudice**

In order to decide whether or not disclosure could prejudice commercial interests and whether or not to apply the exemption, it is necessary to identify:

- the interests themselves and how disclosure might prejudice them; and
- whose interests they are.

IND's, the Department's, or another body's commercial interests might, for example, be prejudiced where a disclosure would be likely to:

- damage its business reputation or the confidence that customers, suppliers or investors may have in it;
- have a detrimental impact on its commercial revenue or threaten its ability to obtain supplies or secure finance; or
- weaken its position in a competitive environment by revealing market-sensitive information or information of potential usefulness to its competitors.

Examples of information the disclosure of which may have a particular potential to damage commercial interests include:

- Research and plans relating to a potential new product.
- Product manufacturing cost information.
- Product sales forecast information.
- Strategic business plans, including for example, plans to enter, develop or withdraw from a product or geographical market sector.
- Marketing plans, to promote a new or existing product.
- Information relating to the preparation of a competitive bid.
- Information about the financial and business viability of a company.
- Information provided to a public authority in respect of an application for a licence or as a requirement of a licence condition or under a regulatory regime.

1.4 **Prejudice to a third party's commercial interests**

IND is likely to hold a range of information whose disclosure could come within the terms of this exemption by virtue of the effects that this could have on a third party. Staff need to be particularly alert to this possibility where the information was itself originally obtained from the third party. But it may be a possibility in a range of other circumstances too.

IND may obtain commercially sensitive information from third parties in a number of ways, for example:

- through providing support for business – for example information provided by a company or trade association to a public authority to obtain advice, help with a specific project, and/or financial assistance; or
- through contracts, for example for products, services or research; or
- as a result of legal, regulatory, or licensing requirements (this may also be subject to specific statutory requirements preventing or requiring release, and may therefore be more appropriately considered under sections 44 of the Act- see point 2)

In situations where a third party has provided information, for example voluntarily, or where it is bidding for a contract, an important element of considering whether the disclosure would be likely to prejudice that third party's commercial interests will be the terms on which the information was obtained by IND in the first place from that third party.

Although the third party's expectations of commercial confidence cannot determine the question of prejudice, they will often provide important evidence as to the third party's perspective as to the likely effects of disclosure. Establishing that perspective at the outset of a transaction and, where appropriate, consultation at the time of potential disclosure are likely to be important steps in considering whether there is an empirical case for reliance on this exemption. While the prejudice to third party interests have to be assessed objectively by staff, the third party's perspective must be taken into account as part of that process.

Where a disclosure would be likely to prejudice the interests of a third party, it may also be appropriate for staff to consider an approach to that third party with a view to establishing its willingness or ability to waive or mitigate that prejudice.

It should also be noted that IND will not only receive commercially sensitive information as a result of entering into transactions, but may also as a result of regulatory or licensing requirements. In this context, in contrast to transactional situations, the terms upon which the information was obtained by IND are likely to be of much lesser importance. For example, there will be no contract indicating what was to be treated as commercially sensitive and the third party's expectations of commercial confidence is likely to be of less relevance. Where information is required to be provided it should also be checked whether there is a legal prohibition on disclosure of that same information in which case the exemption in section 44 of the Act may be relevant (see point 2 for further details).

1.5 **Prejudice to commercial relations with a third party**

This exemption may also be applied by virtue of the likelihood of prejudice to the commercial interests of both IND and a third party. This will apply where the relationship between IND and the third party is itself in the commercial interests of one **or** both parties, and where disclosure could damage that relationship and hence those interests.

This is again most likely to be the case where commercially sensitive information has been supplied to the authority by the third party – for example in one of the ways described at point 1.4 – although that will not always or necessarily be the case.

The public interest balancing test (considered at point 1.7) which has to be carried out will have to take into account not only the nature and extent of the prejudice to the relationship but the context and quality of the relationship itself. The public interest in promoting that relationship must also be considered in its own right.

1.6 Prejudice to IND's own commercial and procurement interests

This exemption can also be applied to the protection of IND's commercial interests. IND has a number of commercial interests as a purchaser, for example of real estate, IT, office supplies, catering and cleaning services, etc.

As a major procurer of services within the Home Office, IND is likely to have strong and specific commercial interests. A substantial amount of procurement-related information is likely to be commercially sensitive at some stage and care will be needed to assess the effect of disclosure on departments and third parties. Equally, as the majority of this information will, by its nature, have been supplied by a third party, the terms on which it was supplied will also have an important bearing on the assessment of whether or not the information should be disclosed.

The OGC guidance has comprehensive advice for Government Departments on procurement issues which will need to be considered when applying this exemption.

1.7 The public interest balancing test

If staff decide to apply this exemption to requested information, then there is still a requirement to demonstrate the public interest in withholding the requested information by weighing up the factors both for and against disclosure of the information concerned. In determining the public interest in individual cases staff will need to evaluate the nature of the prejudice, including its likelihood and magnitude.

Generally speaking, there is a public interest in the disclosure of commercial information and not applying this exemption in order to ensure:

- that there is transparency in the accountability of public funds;
- that there is proper scrutiny of IND's actions in carrying out licensing functions in accordance with published policy;
- that public money is being used effectively, and that IND is getting value for money when purchasing goods and services;
- that IND's commercial activities, including the procurement process are conducted in an open and honest way; and
- that business can respond better to Government opportunities.

Factors that might weigh in favour of the public interest in withholding information in this area and support the use of the exemption include:

- where disclosure would make it less likely that companies, or individuals would provide IND with commercially sensitive information in the future and consequently undermine the ability of the department/agency to fulfil its role;
- where disclosure would be likely to prejudice the commercial interests of IND or the Department as a whole by affecting adversely its bargaining position during

contractual negotiations which would result in the less effective use of public money;

- where disclosure would, as a consequence, make it more difficult for individuals to be able to conduct commercial transactions or have other dealings with the Department which are not a typical commercial transaction. It would not, for example, be in the public interest to disclose information about a particular commercial body if that information was not common knowledge and would be likely to be used by competitors in a particular market to gain a competitive advantage.

It is important when assessing the public interest test to remember that commercial interests could be prejudiced in many circumstances and the degree of prejudice, and the consequent balance of the public interest in disclosure will often be time sensitive and will often swing in favour of disclosure over time.

1.8 Applying the exemption

Where staff have decided to apply the exemption and not to communicate the information requested, there will still be another separate assessment to be made under the Act's information access provisions as to whether to confirm or deny to the applicant that IND holds the information. Again this assessment must be made with reference to the public interest balancing test

If staff make this further assessment and decide that confirming or denying whether the information is held by IND **would not** prejudice the commercial interests concerned, a reply should be sent by IND Directorates using and adapting the standard template at **Appendix A** entitled: '**Standard letter template for use when applying an exemption under section 43 where information may prejudice commercial interests and the duty to communicate has been exempted**'.

Using a neither confirm nor deny response to the applicant

Staff may, however, decide that in some instances confirming or denying whether the information is held in IND would in itself be prejudicial against the commercial interests concerned, and it is also in the public interest to withhold the fact that IND has this information. Where this occurs, the reply to the applicant should state that it can be neither confirmed nor denied (NCND) whether the information is held under section 43 (3) of the Act. A standard template for IND Directorates to use and adapt in such circumstances is also attached at **Appendix A** entitled: '**Standard template letter for use to an applicant where the duty to confirm has been exempted under section 43 (3) and a neither confirm nor deny response is engaged**'.

1.9 Duration of the exemption and relationship with other exemptions

This exemption does not apply to information contained in records more than 30 years old.

Staff could consider applying a number of other exemptions where information may fall to be commercially sensitive. These could include:

Accessible by other means: There may be relevant legal, regulatory, or licensing requirements governing the disclosure of commercially sensitive information. See Section 6 of this IDI Chapter for further details.

The economy: This exemption could be relevant if the disclosure would be likely to prejudice the financial interests of a department or agency, or the economic interest of the UK. See the DCA website for further details at:

<http://www.foi.gov.uk/guidance/exguide/sec29/index.htm>

Environmental Information: If information is environmental information within the meaning of the Environmental Information Regulations, it will be exempt under section 39 and its disclosure must be considered in accordance with the Environmental Information Regulations. See the DCA website for further details at

<http://www.foi.gov.uk/guidance/exguide/sec33/index.htm>

Information provided in confidence: Potentially commercially sensitive information held by a public authority may often be held on explicit or implicit terms which make it subject to a duty of confidence. This may particularly be the case with procurement information. If it is established that public release of the information would constitute an actionable breach of confidence, then the section confidence exemption may apply. This is an absolute exemption and does not require the public interest test to be applied. See Section 12 of this IDI Chapter for further details.

Statutory prohibitions on disclosure: This section provides an absolute exemption where disclosure is prohibited under other legislation or by EU law. This may be particularly relevant in regulatory and procurement contexts. See point 2 for further details.

2. EXEMPTING INFORMATION WHERE THERE IS A LEGAL PROHIBITION ON DISCLOSURE

2.1 Background

Section 44 of the Freedom of Information Act provides an exemption for public authorities from disclosing information where this may override existing prohibitions set out in law which bar such disclosure. The exemption here is absolute so no public interest test is required when considering its application.

There are three such type of existing legal prohibitions which override the general rights of access under the Act:

- Prohibitions under existing legislation (referred to throughout as '*enactments*');
- Incompatibility with European Community Obligations;
- Disclosures which would constitute or be punishable as a contempt of court.

It is important to note that this exemption is highly dependent on the precise terms of the relevant bar on disclosure. Where a prohibition is general and absolute, then the application of the exemption will be a matter of the legal interpretation of the provision. Some prohibitions, however, may be qualified, and require the application of a judgement in the circumstances of the particular

case. Careful decisions may need to be made as to how much of the information may be lawfully provided, in the light of any restrictions imposed by enactments as to disclosure. Staff seeking to use this exemption in response to a request must **initially** approach the IND Central FOI Team who will consider whether to seek further legal advice from LAB.

2.2 Enactments which prohibit disclosure

Information whose release is prohibited by or under an existing enactment does not have to be released under this exemption. This includes prohibitions in primary (Acts of Parliament) and secondary legislation (orders, rules, regulations or codes).

The Human Rights Act 1998

The most important of enactments for IND staff is the Human Rights Act 1998 (HRA) which imposes broad prohibitions on disclosure. The HRA incorporates the European Convention on Human Rights (ECHR) into UK law. It requires public authorities to act compatibly with rights and freedoms set out in the ECHR, and enables people to enforce those rights in the UK courts in the first instance rather than the Court in Strasbourg. It also requires that all legislation must be interpreted, so far as is possible to do so, in a way, which is compatible with the Convention rights.

Section 6 of the HRA makes it unlawful for public authorities, including government departments, to act in a way that is incompatible with a Convention right. Disclosures that are incompatible with the HRA are therefore exempted by this exemption.

Disclosures which would breach a Convention right are very likely to be the subject of other exemptions in particular in relation to personal information under section 40, but this exemption reinforces an absolute bar on such disclosures. The most relevant Articles of the Convention which may need to be considered in this context are:

- Article 6, the right to a fair trial. This would be relevant if the public disclosure of information could prejudice a fair trial.
- Article 8, the right to respect for private and family life. IDI Chapter 24 '**Disclosing Personal Information**' has more information for staff on applying this article to the disclosure of personal information.

European Community obligations

Information whose release would be incompatible with any of the UK's European Community obligations is also exempted from disclosure. Many of these will already have been enshrined in UK law, so under this section only those EU obligations that do not rely on national legislation will apply. This includes:

- EU Regulations. Article 5 of Regulation 1049/2001 requires Member States to consult with the European Institutions in certain cases before disclosing information. This may, at least temporarily, prevent information being disclosed.
- Obligations deriving from EU treaties entered into by the UK and the Protocols to those treaties. (for example, Article 10 of the EC Treaty requires Member States to abstain from any measure which could jeopardise the attainment of the Treaty's

objectives).

- Directly effective rights under Directives which have not yet been given effect in domestic law. Such Directives must grant identifiable rights to individuals in order to be relied upon (see Francovich [1991] ECR I-5357)
- Other obligations which don't have to be expressed by or under primary legislation, but can be given effect to 'administratively' – e.g. inter-institutional agreements, which are not strictly legally binding, but have legal effect in the interpretation of legally binding instruments.

Common law contempt of court

This exemption also prevents the release of information which would constitute or be punishable as a contempt of court in respect of common law. Disclosure of the following information may constitute a contempt of court if it:

- breaches an order of court not to disclose information which may harm the fairness of a trial;
- constitutes publication of information which would create a risk of prejudice to proceedings that are imminent or pending.

A real risk of prejudice or impediment to a fair trial or the administration of justice needs to be shown for an act to be held contemptuous at common law. The publisher of the information must also be shown to have intended to cause such prejudice or impediment. To knowingly disclose information in the face of a court order will generally be regarded as a sufficient intention in the context of releasing information in response to a request under the Act.

It is safe to say that where IND merely responds to a request for information, and there is no reason to believe that proceedings are imminent or that any relevant court order is extant, the disclosure will not constitute a contempt of court. It is not a contempt of court if the risk of prejudice created by a publication is merely incidental to a discussion of matters of general public interest. There may be, for example, a request for disclosure of a document which is of public importance but contains material which may prejudice the defendant in particular proceedings. If the information is incidental to the main thrust of the report, the disclosure will not constitute a contempt of court.

2.3 Duration of the exemption

There is no period at the end of which this exemption expires. Section 75 provides an order-making power for the Department for Constitutional Affairs (DCA) to amend or repeal enactments prohibiting the disclosure of information. The DCA has been conducting a review of all such enactments to determine whether they may be amended or repealed. Any enactments that remain in place at the end of this process will have passed one of four identified criteria, namely:

- the prohibition fulfils an international obligation; or
- the information being protected may be held by a person or body not covered by the Act; or
- the information being protected has been collected compulsorily by a public authority ; or

- the provision is specific in the information to which it applies, and a form of access regime exists (although limited).

3. APPENDIX A

STANDARD LETTER TEMPLATES

STANDARD LETTER TEMPLATE FOR USE WHEN APPLYING AN EXEMPTION UNDER SECTION 43 WHERE INFORMATION MAY PREJUDICE COMMERCIAL INTERESTS AND THE DUTY TO COMMUNICATE HAS BEEN EXEMPTED

Our Ref:

Your Ref:
Date

Dear **[enter applicant name]**,

Thank you for your *letter/fax/email* **[delete as appropriate]** of **[insert date of letter from applicant]** where you have requested information about **[insert type of information requested by the applicant]** . This falls to be dealt with under the Freedom of Information Act 2000.

I can confirm that this information is held by *IND/IND Directorate* **[delete and or insert relevant Directorate name as appropriate]**

I have decided, however, not to communicate this information to you pursuant to the exemption under section 43(2) of the Freedom of Information Act 2000. This allows us to exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any persons

If we were to disclose the information you have requested this could **[IND Directorates to explain full whose commercial interests would be prejudiced as a result of the disclosure in respect of the request. Then go on to explain what the effects of the prejudice would be in respect of disclosure.]**

The use of this exemption also requires us to consider whether in all the circumstances of the case the public interest in maintaining the exemption stated above outweighs the public interest in disclosing the information.

We have considered the public interest there may be in the circumstances of this case in disclosing the information to you. There may be a public interest in **[IND Directorates to insert the public interest test argument in favour of disclosure on particular request. Refer to OGC guidance for full details of the issues which should be considered]**

We have also considered the public interest there may be in maintaining the exemption to the duty to communicate. **[IND Directorates to insert why it is considered that it is reasonable to withhold information until expected publication date and the public interest considerations against disclosure on particular request and. Refer to OGC guidance for full details of the issues which should be considered]**

We have considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. We have concluded that the balance of the public interests identified lies in favour of

maintaining the exemption **[IND Directorates need to insert reasons for concluding that the arguments for withholding the information requested outweighs the arguments for disclosure]**.

If you are dissatisfied with this response you may request an independent internal review of our decision to turn your request down. During the independent review the department's handling of your information request will be reassessed by staff who were not involved in providing you with this response. An internal review can be requested by submitting your complaint to:

IND Complaints Unit
11th Floor, West Wing
Block 'C'
Whitgift Centre
Wellesley Road
Croydon
CR9 1AT

Should you remain dissatisfied after this internal review, you will have a right of complaint to the Information Commissioner as established by section 50 of the Freedom of Information Act.

Yours sincerely,

[Signature of staff member]
[Insert full name of IND staff member dealing with request]
[Insert IND Directorate]

STANDARD TEMPLATE LETTER FOR USE TO AN APPLICANT WHERE THE DUTY TO CONFIRM HAS BEEN EXEMPTED UNDER SECTION 43 (3) AND A NEITHER CONFIRM NOR DENY RESPONSE IS ENGAGED.

[Insert details of relevant Directorate address here]

Our Ref:

Your Ref:

Date

Dear **[insert name of applicant]**,

Thank you for *your letter/fax/email* **[delete as appropriate]** of **[insert date of letter from applicant]** where you have requested information about **[insert type of information requested by the applicant]**. This falls to be dealt with under the Freedom of Information Act 2000.

I have considered your request carefully and have decided that we are not obliged to inform you whether the IND holds the information of the description specified in your request.

We are not obliged to inform you whether or not the requested information is held pursuant to section 43 (3) of the Freedom of Information Act 2000 which exempts information which relates to commercial interests.

[IND Directorate to insert explanation for using the exemption under section 43 to the extent this is possible without disclosing exempt information.]

[IND Directorate give reasons for the public interest balancing test concluding that the public interest in the maintenance of the exemption outweighs the public interest in disclosing – to the extent this is possible without disclosing exempt information.]

You should not infer from this response that the information you request is or is not held.

If you are dissatisfied with this response you may request an independent internal review of our decision to turn your request down. During the independent review the department's handling of your information request will be reassessed by staff who were not involved in providing you with this response. An internal review can be requested by submitting your complaint to:

IND Complaints Unit
11th Floor, West Wing
Block 'C'
Whitgift Centre
Wellesley Road
Croydon
CR9 1AT

Should you remain dissatisfied after this internal review, you will have a right of complaint to the Information Commissioner as established by section 50 of the Freedom of Information Act.

Yours sincerely,

[Signature of staff member]

[Insert full name of IND staff member dealing with request]

[Insert IND Directorate]