FOI Exemptions: Commercial Interests and Trade Secrets

Section 43 of the Freedom of Information Act 2000 has two limbs. Subsection (1) exempts trade secrets. Subsection (2) exempts information whose disclosure would, or would be likely to, harm the commercial interests of any person, including your own authority. Both are qualified, so you must always weigh the public interest before withholding.

AT A GLANCE

Section	Section 43 FOIA. Section 33 FOISA in Scotland. Regulation 12(5)(e) for environmental information
Type	**Qualified. The public interest test applies**
Main test	Section 43(1): is it a trade secret. Section 43(2): would disclosure, or would it be likely to, harm someone's commercial interests
Neither confirm nor deny	Available under section 43(3) where confirming would cause the harm
Refusal notice	Say which limb applies, whose interests are affected and why, and give the public interest reasoning

1. Whose commercial interests does section 43 protect?

Any person. That includes the supplier who submitted a tender, a contractor, a partner organisation and your own authority when it is negotiating or competing. It does not protect the interests of an authority that has no commercial activity. You need to be able to say whose interests are affected and how.

2. What is a trade secret?

Section 43(1) applies to a category of information, not to a harm. It covers information that gives a business a competitive advantage because it is not generally known, such as a process, formula or pricing method. Do not assume that anything marked commercially sensitive by a supplier is a trade secret. A label on a document is not evidence. Ask the supplier for a specific explanation, and be ready to challenge a blanket claim.

3. How do you show that disclosure would harm commercial interests?

Section 43(2) is a prejudice test. You need to show three things.

1. **The harm relates to commercial interests.** The ability to compete, negotiate or trade must be affected, not just the organisation's reputation or embarrassment.
2. **There is a causal link.** Explain how this specific information, if disclosed, would cause the harm.
3. **The risk is real.** Disclosure must either be more likely than not to cause the harm, or there must be a real and significant chance that it will.

Generic statements such as disclosure would damage our position are not enough. Be specific about the market, the competitors and the timing.

Time matters. Information that is sensitive during a live procurement is often far less sensitive after the contract is awarded. Check whether the commercial sensitivity has already faded.

4. How do you weigh the public interest?

Because section 43 is qualified, you must weigh the public interest in disclosure against the public interest in maintaining the exemption. Factors that often favour disclosure include public money being spent, accountability for how contractors perform and the value of competition in the market. Factors that favour withholding include protecting a fair competition for a live tender and the risk that suppliers stop engaging with the public sector.

Give reasons on both sides. A refusal notice that lists only the harm will not survive an internal review.

5. What about supplier information and consultation?

You are not required to consult a supplier, but it is good practice where their commercial information is likely to be requested, and many contracts include a clause saying so. Consultation does not bind you. The decision is the authority's, and a supplier's objection is a factor to weigh, not an instruction.

If you are working under a contract, check what it says about FOI. A confidentiality clause does not override the Act. You cannot contract out of your obligations.

WORKED EXAMPLE (ILLUSTRATIVE)

An NHS trust receives a request for the full pricing schedule of a recently awarded facilities contract, and the winning supplier's method statement.

- **Headline contract value and the total annual cost.** There is little commercial harm and strong accountability interest. Disclose.
- **Line by line rates that would reveal the supplier's cost structure to competitors.** The trust finds that a rebid is due in eighteen months, and rival suppliers could undercut using the detail. It applies section 43(2) and, after weighing the public interest, withholds the detail.
- **The method statement.** The supplier identifies one section describing a proprietary scheduling process. The trust accepts that part as a trade secret under section 43(1) and releases the remainder.

The decision, the condition relied on, the harm and the public interest reasoning are all recorded against the case.

6. Handling commercial information: spreadsheet or structured case workflow

Task	Spreadsheet and email	Structured case workflow
Tracking supplier consultation	Separate email threads	Notes and timeline held against the case
Public interest delay	A calendar reminder	Public interest delay management that tracks the extended time
Releasing part of a document	Manual edits, hard to evidence	Redaction with reasons recorded and exemptions captured
Evidence at internal review	Reconstructed	Audit log of decisions already attached

Frequently asked questions

Can a supplier stop us disclosing by marking a document confidential?

No. A marking is a starting point for your assessment, not a conclusion. You must test the harm and the public interest yourself.

Does section 43 apply to our own commercial interests?

Yes, where your authority competes or negotiates commercially. A public body with no commercial activity cannot normally show harm.

Does the exemption last forever?

No. Commercial sensitivity fades. Assess the harm at the date of the request, not at the date the document was written.

Can we release part of a document?

Yes, and you should. Withhold only the parts that meet the test, and release the rest.

THE PITFALL

Accepting a supplier's commercially sensitive marking as the reason to withhold.

THE REMEDY

Test the harm and the timing yourself, then weigh the public interest on both sides.

KEY TAKEAWAYS

- Section 43 is qualified. Always weigh the public interest.
- A trade secret is a category. Commercial prejudice is a harm that you must evidence.
- Name whose interests are affected and explain the causal link.
- Sensitivity fades after a procurement ends, so check the timing.
- Supplier markings and contract clauses do not override your duty under the Act.

Conclusion: prioritise evidence of harm, the timing and the public interest

When a supplier says everything is commercially sensitive, ask them to be specific and check whether the procurement has ended. A short, reasoned decision is worth more than a long, general one.

HOW PROVEPRIVACY HELPS

ProvePrivacy DSAR & FOI (Lite) handles fee and public interest delay management for FOIA and FOISA requests, so the extra time you need to weigh a qualified exemption is tracked and visible. The built in redaction tool lets you release the parts of a contract that are not exempt, and the Disclosure tab records the exemption you rely on and the reason for it, adding it to the case audit log.

Where this fits in the FOI process

Section 43 is applied at the decision stage, usually after you have consulted the supplier. See our FOI process hub for the whole journey.

SCOTLAND AND ENVIRONMENTAL INFORMATION

Scottish public authorities apply section 33 of the Freedom of Information (Scotland) Act 2002, which covers trade secrets and commercial interests, and requires substantial prejudice rather than prejudice. For environmental information, the equivalent is regulation 12(5)(e) of the Environmental Information Regulations 2004, which protects commercially sensitive confidential information where the law provides confidentiality to protect a legitimate economic interest, and is subject to the public interest test. See our guides on EIR exceptions and on FOISA and the EIRs in Scotland.

Related guides

- DSAR Exemptions: Finance, Management and Negotiations
- FOI Exemptions: Legal Privilege and Confidence
- FOI Exemptions: Cost, Burden and Vexatious Requests

Sources

- Freedom of Information Act 2000, sections 2, 17 and 43 (legislation.gov.uk)
- Freedom of Information (Scotland) Act 2002, section 33
- Environmental Information Regulations 2004, regulation 12(5)(e)
- ICO guidance: Commercial interests (section 43)
- Scottish Information Commissioner guidance: Commercial interests and the economy (section 33)

Talk to someone who has handled FOI

Book a demo, request a quote or arrange a 15 minute call.

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