

## Guidance

Commercial information exemptions (section 25)

## Table of Contents

USING THE EXEMPTION GUIDANCES .....	3
In brief: the four commercial information exemptions .....	4
Steps to follow when applying the commercial information exemptions.....	5
Background .....	6
How public authorities obtain commercial information .....	6
Commercial confidentiality explained .....	7
Ask first: Is the commercial information exemption unavailable? .....	7
<b>Trade secrets – section 25(1)(a)</b> .....	10
Understanding the harm test for the trade secret exemption .....	11
Questions to consider when applying the trade secrets exemption .....	11
<b>Commercial value – section 25(1)(b)</b> .....	14
Understanding the harm test for the commercial value exemption .....	15
Questions to consider when applying the commercial value exemption .....	17
<b>Commercial interests – section 25(1)(c)</b> .....	20
Understanding the harm test for the commercial interests exemption .....	20
Questions to consider when applying the commercial interests exemption .....	21
<b>Contractual or other negotiations – section 25(1)(d)</b> .....	24
Understanding the harm test for the contractual or other negotiations exemption.....	24
Questions to consider when applying the contractual or other negotiations exemption .....	26
The public interest test: in the commercial information context.....	28
Consulting and notifying third parties .....	30
Consultation .....	31
Third party notification – section 39.....	31
More information .....	32
APPENDICES .....	33

## USING THE EXEMPTION GUIDANCES

This is one of a series of Guidances by the Information Commissioner's Office that offers an overview of the Information Commissioner's understanding of the exemptions in the Public Access to Information (PATI) Act. The Guidances are a reference tool to help decision makers—Information Officers, heads of public authorities and those assisting them—understand when and how to apply the exemptions.

The Guidances provide our general recommended approach and the issues the Information Commissioner will likely consider when deciding an application for review. The Guidances do not replace the need to obtain training on the PATI process and the operation of the exemptions. It may also be necessary for public authorities to obtain legal advice on the interpretation and application of the exemptions.

Each Guidance discusses a specific exemption provision. It provides background and the applicable tests for each exemption, along with examples of questions designed to assist your decision making. The questions may help you identify the issues to consider when applying an exemption in the context of a specific request. It is essential that decision makers are able to explain the factual and reasoned basis for relying on an exemption. The Guidances are designed to support this good practice.

The exemptions limit the new right to access public records and, because of this, should be understood narrowly. This is consistent with the PATI Act's purpose to provide the greatest access as possible to public records.

It is recommended that Guidances are read together when more than one exemption could apply to a record. Decision makers should also refer to our *Guidance: the public interest test* as a companion when applying exemptions that require you to weigh the public interest.

Currently, the use of the exemptions under the PATI Act, a new statutory regime, has not been tested and settled under Bermuda law.

For this reason, these first ICO Guidances are based upon the language and purposes of the PATI Act and Regulations, as well as any related local law. The Guidances are also informed by the guidelines, decisions and legal judgments from the UK and other appropriate Commonwealth countries with comparable exemption provisions. References to other jurisdictions are provided for illustration purposes and to give examples of how those exemptions have been interpreted.

The Guidances are subject to a planned review and may undergo ad hoc revisions to incorporate new Information Commissioner decisions, court judgments, or legislative changes.

Information Commissioner  
September 2016

## In brief: the four commercial information exemptions

1. Section 25 of the PATI Act contains four different exemptions from the right to access records. Each of these applies to a specific kind of commercial activity and they are expressed separately from each other. Records (or parts of records) may be withheld only if they contain information that:
  - i. is a **trade secret** of any person (section 25(1)(a));
  - ii. if disclosed, would (or could reasonably be expected to) destroy or diminish the information's **commercial value** (section 25(1)(b));
  - iii. if disclosed, would (or could reasonably be expected to) have an adverse effect on the **commercial interests** of any person to whom the information relates (section 25(1)(c)); or
  - iv. if disclosed, would (or could reasonably be expected to) prejudice the conduct or outcome of **contractual or other negotiations** of any person to whom the information relates (section 25(1)(d)).
2. The exemptions for commercial value; commercial interests; and contractual or other negotiations each require that disclosure will cause the particular kind of harm described in those exemptions. The 'harm test' for these exemptions requires you to consider three things: the nature of the stated harm, how disclosure would cause this harm and the likelihood it will occur.
3. The trade secrets exemption does not have a harm test set out in the PATI Act. But, as this Guide explains later on, the legal definition of trade secret requires consideration of the harm caused to the owner of a trade secret if the information is disclosed.
4. All of the exemptions in section 25 are qualified exemptions, i.e., they are subject to the public interest test. This means that if you find that one of these exemptions applies, you must then go on to apply the public interest test before deciding whether or not to disclose the record. Despite the exemption, the record must be disclosed unless the public interest in withholding the information outweighs the public interest in disclosing it.
5. The commercial information exemptions may also have implications for third parties. A public authority may need to consult with a third party when considering using one of the exemptions or when working through the public interest test. Or a public authority may need to give formal notice to a third party under section 39 of an intended disclosure.
6. The PATI Act provides a right to access public records. A public authority cannot use a standard confidentiality clause to contract out of its existing legal obligation to provide access to public records. To do so would undermine the rights under the PATI Act.

7. Any confidentiality agreement with a public authority should take into consideration the PATI Act. The public authority should acknowledge upfront that it can maintain confidentiality except 'where disclosure is required by law'. This sets out the public authority's disclosure obligations under the PATI Act in an open and transparent way. Even with a confidentiality agreement, any future PATI request must be considered under all of the circumstances and records only withheld if a specific exemption applies.
8. The PATI Act is retrospective. It applies to records created at any time.
9. The commercial information exemptions will not last forever. They will not apply to any record that is over 30 years old.

## Steps to follow when applying the commercial information exemptions

10. If none of the exclusions listed below apply to the requested record (or the information contained in it), you may go through the tests for the relevant commercial information exemptions in section 25(1).
11. As you go through the tests, pay careful attention that the record (or the information in it) properly fits within the specific section 25(1) exemption that you intend to rely upon.
12. The decision-making process to apply an exemption should always start with a presumption of disclosure. You should assess the records on a case-by-case basis depending on the subject matter, the harm identified and the public interest.
13. In most cases, your public authority will first locate and retrieve the requested records.
14. You may then decide that you should consider whether the records contain commercial information which may be exempt from disclosure. Consider taking the following actions:
  - i. Using the tests set out in this Guidance, decide if any of the section 25 exemptions apply.
  - ii. If the exemptions DO NOT apply, the record cannot be withheld under section 25.
  - iii. If any of the exemptions DO apply, you must then apply the public interest test.
  - iv. If the public interest in favour of disclosing the record is equal to or outweighs that in favour of withholding it, the record (or part of the record) cannot be withheld under section 25.
  - v. If the public interest in favour of withholding the record outweighs that in favour of disclosing it, the record (or part of the record) can be withheld and a decision notice served to that effect.

## Background

### How public authorities obtain commercial information

15. Public authorities are involved in a number of activities that may result in holding records with commercial information.

16. The list below offers examples of how, when fulfilling its functions, a public authority may come to hold information relating to commercial activities. This list is only illustrative. A public authority may engage in other activities that cause it to hold records with commercial information. The list does not imply that all such information would be exempt. The types of activities are:

- **Procurement**  
Public authorities are major purchasers of goods and services. As a result, they will hold a wide range of information relating to the procurement process. This could include emails about the procurement process, records provided during tendering and details of a contractor's performance under a contract. The tender process might involve records ranging from unsuccessful bids through to the details of the contract with the successful vendor.
- **Public authority's purchasing position**  
A public authority will hold information about its own position as a purchaser in a commercial environment.
- **Regulation**  
Public authorities may receive information in order to fulfill their regulatory functions, such as the issuing of licenses. They may also obtain commercial information when investigating potential breaches of regulations within their remit.
- **Public authority's own commercial activity**  
Some public authorities are permitted to engage in commercial activity. Any information held in relation to this will potentially fall within the scope of the commercial information exemptions.
- **Policy development**  
During the formulation or evaluation of policy, a public authority may obtain information of a commercial nature. For example, when developing a policy to promote a specific industry, a public authority may collect commercial data from companies in that sector.
- **Policy implementation**  
When implementing policies, such as awarding grants for development, the public authority may hold information related to the assessment of the business proposals or grant applications.

- **Private Finance Initiative/Public-Private Partnerships**  
The involvement of private sector financing or partnerships is an ever-growing phenomenon. When it occurs, public authorities are likely to hold information both related to the particular project involved as well as more generally about the private entity's business.

## Commercial confidentiality explained

17. Records which are commercially sensitive are often described in layman's terms as being 'commercially confidential'. However, no single exemption in the PATI Act covers what is commonly referred to as commercially confidential or commercially sensitive records.
18. Instead, the PATI Act requires you to decide *why* a record may be commercially sensitive. For example, a record may be commercially sensitive because it contains a trade secret. If so, then you will apply the specific exemption for trade secrets in section 25(1)(a).
19. Commercially sensitive information must be disclosed unless it falls within a specific exemption. You will find that the most relevant exemptions for commercially sensitive information are those for commercial information (section 25, discussed in this Guidance) and the exemptions for information received in confidence (section 26). You may want to read our publication, *Guidance: Information received in confidence (section 26)*, alongside this Guidance, whenever you have a request for commercially sensitive information (see Appendix 1: Resources).
20. There is also potential for overlap with other exemptions depending on the circumstances of the specific request. Other exemptions which may apply include personal information (sections 23 and 24), legal professional privilege (section 35) and disclosure prohibited by other legislation (section 37). It may be useful for you to read our Guidances on these other exemptions as well (see Appendix 1: Resources).
21. The PATI Act recognises the potential benefit and harm to the business community from disclosures under the Act. Through these exemptions, the PATI Act balances the competing interest of the business community (whose information might be disclosed) on the one hand, with the rights of the public to access information and to further accountability, transparency and public participation in decision making and public spending, on the other hand.

## Ask first: Is the commercial information exemption unavailable?

22. As you start to look at the commercial information exemptions, for the sake of efficiency you may first want to check to see if section 25(2) prevents you from using the commercial information exemptions in the first place.

23. Section 25(2) set outs particular circumstances when the commercial information exemptions cannot apply. You may want to consider these circumstances before applying the tests for the commercial information exemptions:

- **Requester's own information**

If the information concerned relates to the requester, it cannot be withheld under a commercial information exemption (section 25(2)(a)).

- **Consent given to Public Authority**

If the person to whom the information relates consents in writing to its disclosure, a public authority cannot rely upon any of the commercial information exemptions (section 25(2)(b)).

This person (or entity) can provide written consent at any time. For example, consent may be given at the time the information is given to the public authority, during informal consultation after a request is received, or after formal third party notification under section 39.

- **Informed in advance by Public Authority**

If before receiving information, the authority had informed persons to whom the information relates that the information they gave belongs to a class of information that would or might be made available to the general public, then it is not exempt under any of the commercial information exemptions (section 25(2)(c)).

### The importance of informing third parties in advance

24. Section 25(2)(c) and the ICO, encourages you to inform the owner of the commercial information that the information they hand over to the authority falls within a class of records (such as tender documents) that is subject to disclosure under the PATI Act. This means that if a request was made for a record containing that information, the record would be disclosed, consistent with section 25(2)(c), unless another exemption applies.

25. The owner of the information might then assert that the entire document falls within an exemption. Or the owner might decide that only part of the record is commercial information, such as a rate sheet or client list. This information could be provided to the public authority in a separate schedule.

26. This process allows the public authority to learn what specific information the third party claims as potential commercial information under a section 25 exemption and what record (or part of a record) would not fall within an exemption.

**Example:**

During the procurement process a public authority may inform a third party in advance (through the Request for Proposal) that tender documents fall within a class of information subject to disclosure under the PATI Act. The public authority can instruct bidders to clearly identify any information that the bidder considers exempt under section 25, explain why it is exempt and move it into a schedule. The notice explains that by submitting a tender, the bidder understands that unless they specifically identify the commercial information, the tender documents may be subject to disclosure without notice.

Then, if a request for the tender documents was made, the commercial information exemptions could not be applied to the main tender documents because the bidder was informed before providing the information that it fell within a class of information the public authority would disclose. The decision-maker would then need to assess only whether the information in the schedule was exempt. The main documents would need to be released without further consideration unless another exemption applied.

27. Providing this information early on (during the procurement process, for example) allows for efficient decision making by public authorities. It means that when a PATI request is received, the public authority will only have to work through the tests for the section 25(1) exemptions when necessary.
28. It also allows third parties to raise their commercial interests at the time they hand over information and make informed decisions about what commercial information they give to public authorities and how they choose to do so.
29. This balances, on the one hand, the purposes of the PATI Act to improve transparency and openness within public authorities and to grant access to public information to the greatest extent possible, with, on the other hand, the need to safeguard specific types of commercial interests to protect the legitimate needs of businesses.
30. Public authorities are cautioned that information flagged by third parties as commercially sensitive in this context are not automatically excluded from being disclosed under the PATI Act. Public authorities seeking to withhold such information must still use their own judgment to apply the appropriate tests in the exemption they wish to rely on.

## Trade secrets – section 25(1)(a)

31. Section 25(1)(a) exempts **trade secrets** from disclosure, unless disclosure would be in the public interest.

32. Information in a record is exempt under section 25(1)(a) if it is a trade secret. The PATI Act does not define what a trade secret is; nor do any of our other statutory laws. Our courts have also not defined the term trade secret in any single judgment.

33. In the UK, though, courts have accepted that the term trade secrets can have a fairly wide meaning. It is impossible to list in this Guidance all of the kinds of information that could qualify as trade secrets.

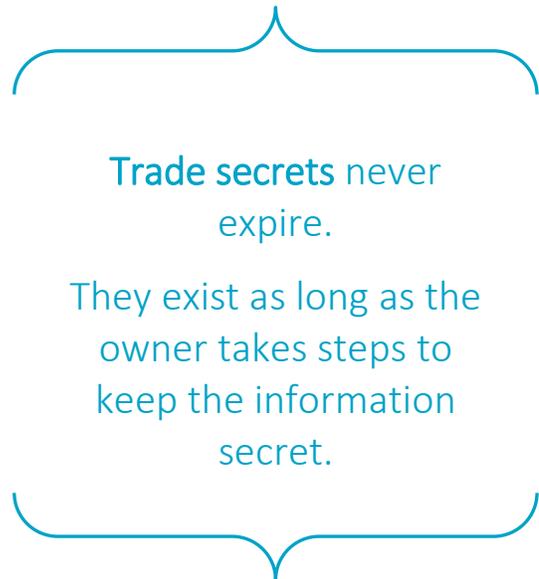
34. In general terms, UK courts have found that information constitutes a trade secret if:

- it is commercial information (i.e., used in the sale or exchange of goods or services);
- that would cause harm to its owner if it was disclosed to a competitor; and
- the owner has made reasonable efforts to keep it secret.

35. Examples of the types of information which the courts in the UK have previously identified as trade secrets include:

- secret recipes
- a list of suppliers
- details of trade practices and processes which would be harmful if they fell into the hands of competitors
- a strategic business approach or methods of doing business
- designs, drawings, architectural plans, blueprints and maps
- technical data relating to special methods of design or construction
- information relating to sales, prices, marketing activity, or customers which would be advantageous to a competing company.

36. A trade secret implies that the owner tried harder to keep the information secret than with other information that may fall under the one of the other commercial information



exemptions. Note, however, that information which falls short of satisfying the trade secret exemption, may still fall within the exemption in section 25(1)(b) for information with commercial value or in section 25(1)(c) information which could harm commercial interests.

### Understanding the harm test for the trade secret exemption

37. There is no harm test in the PATI Act for a trade secret. However, definitions of trade secret in UK law require there to be harm to the owner if the trade secret is disclosed to a competitor.

### Questions to consider when applying the trade secrets exemption

38. If you think a requested record contains trade secret information, it is recommended you seek legal advice to confirm or support your belief.

39. When deciding if information is a trade secret, you may also want to consider the following examples of questions about the general qualities of a trade secret that the Information Commissioner may consider during a review.

**Note:**

These examples of questions presented here (and with each exemption in this Guidance) may help you think through what to ask yourself as you decide if an exemption is appropriate.

Not all of the questions will apply in every case and they are not an exhaustive list of every issue that might arise. You will need to decide what issues are relevant to the specific request you have.

*Is the information used for the purpose of trade (i.e., the sale or exchange of goods or services)?*

- How is the information used for the purpose of trade?
- How is the information commercially valuable to the owner?

*Would the disclosure of the information harm trade – either by harming the commercial interests of the owner or by benefiting the owner’s competitors?*

- How would this occur? Is the information generally known within the trade or business? Do you have evidence that the harm would be real and not just speculative?

*Can the owner of the information demonstrate reasonable efforts to keep it secret or limit the number of people who know the information?*

- Evidence of reasonable efforts would include things such as employee non-disclosure or confidentiality agreements, prior refusals to disclose the information, physical or electronic security measures taken to keep the information secure, policies or procedures concerning the confidential handling of the information and so on.
- Is the information common knowledge? The more people who know the information, the less likely it is to be a trade secret.
- How easy would it be for competitors to discover or reproduce the information for themselves? The easier it would be for competitors to discover or recreate the information through their own efforts, the less likely it is that the information is a trade secret.
- Is the information already known to competitors or could the public readily obtain it, for example, from a business website, annual report, media interviews, Facebook or other social media, or other source? The more readily accessible that the information is, the less likely it is a trade secret.

**Example:**

A vendor might claim that a particular plan for providing community outreach health services is a trade secret. But any competitor could observe the vendor’s public outreach work and see what strategies were used. The plan for providing the community outreach might be a trade secret while a tender process is ongoing. But once a contract is awarded and the services are being provided, the plan is unlikely to be a trade secret because a competitor could learn the information through observation.

40. If you decide that the information is not a trade secret, then the exemption in section 25(1)(a) is unavailable.
41. If you decide, instead, that the information is a trade secret, then it falls within the exemption in section 25(1). You must go on to consider the public interest test to determine whether the information must be disclosed.
42. Applying the public interest test in the context of commercial information is discussed below at paragraphs 104-109.

## Commercial value – section 25(1)(b)

43. Section 25(1)(b) exempts from the right of access information with **commercial value** which ‘would be, or could reasonably be expected to be, destroyed or diminished by disclosure’ to the public at large, unless disclosure would be in the public interest.

44. The PATI Act does not define commercial value. In other jurisdictions with a similar ‘commercial value’ exemption, it is understood that, in general, information may contain commercial value because either (a) it is important to the performance of the owner’s **commercial activities**, or (b) it can be sold for value, i.e., it has **intrinsic commercial value**.

- **Commercial activity**

Commercial activity includes the sale or exchange of goods or services. The information that has commercial value may be valuable to the sustainability or the profitability of an ongoing commercial activity.

The information may also be valuable to a pending one-off commercial transaction, such as a one-time sale, for the time that it is being negotiated or performed. This information will typically lose its commercial value once the transaction or negotiation is completed.

- **Intrinsic commercial value**

Decisions from Queensland, Australia, which has a similar exemption, are helpful for explaining the meaning of intrinsic commercial value within the context of the PATI Act. Under the Queensland framework, if an arms-length buyer is willing to pay for the information, then it has intrinsic commercial value. An arms-length buyer is someone other than the owner or the public authority holding the record.

Information with intrinsic commercial value could include, for example, technical or artistic works such as a software program or an original painting. These will ordinarily have value because they can be sold, licensed for a fee (e.g., a software use license), or sold as copies (e.g., a print copy of a painting).

If the public could obtain the same record or information for free or for only a nominal copying fee using a PATI request, then the ability of a business that owns the information to earn money off its value may be diminished or destroyed.

Examples of information that usually have some commercial value:

- A method created and used by a business that allows it to offer a service more quickly or affordably than its competitors
- A customer list with the customers' specific requirements

Examples of information that usually do not have commercial value:

- Information that is aged or out-of-date
- Information that related to a one-off transaction which has been finalised
- Information that is common knowledge within the relevant industry

45. Either form of commercial value may be attached to information created within a public authority or to information it obtains from a third party.

46. If you decide that the information in the record has commercial value, you must then determine if its disclosure would cause the degree of harm required to justify the application of the exemption.

### Understanding the harm test for the commercial value exemption

47. The harm test for the commercial value exemption requires that disclosure 'would be or could reasonably be expected to destroy or diminish commercial value [of the information]'. If disclosure is not likely to cause this specific harm then the exemption is not available.

48. Working through the requirements of the harm test is an exercise of judgment. You must evaluate the nature of the identified harm, how that harm would be caused and the likelihood of it occurring. At each step, you should support your conclusion with evidence.

*Specific harm: destroy or diminish commercial value*

49. 'Destroy or diminish' is not defined in the PATI Act. Taking the ordinary plain English meaning, it refers to the commercial value of the record or information being lost or lessened.

50. This requires you do identify which type of

Applying a **harm test**, sometimes called a 'prejudice test', involves three considerations:

- a specific kind of harm
- how disclosure can cause this harm
- the likelihood of this harm occurring.

commercial value is at issue and pinpoint what the destruction or diminishment to that value is.

### *How disclosure can cause that harm*

51. You must be able to explain how disclosure will cause the harm; it cannot simply be a remote or hypothetical possibility. This requires explaining how the claimed harm is at least possible. You must describe the possible circumstances, or events, arising from disclosure that can lead to the harm.
52. For example, if the information in a requested record is already known to competitors in the same industry, then you may have difficulty establishing that it is possible for public disclosure to cause any loss of commercial value.

### *Likelihood of harm occurring*

53. The likelihood of the harm required in section 25(1)(b) is that the disclosure 'would or could reasonably be expected to' cause the harm. If you cannot show that the harm identified would or could reasonably be expected to occur, then the exemption is unavailable. Simply speculating is insufficient to justify the exemption.

- **Would be expected**

This means there is a high probability that the harm anticipated can occur. It has also been described as a significant and weighty chance of the harm occurring.

- **Could reasonably be expected to**

The lesser likelihood of harm for the commercial value exemption is 'could reasonably be expected to'. This requires you to distinguish between unreasonable expectations of harm and reasonable expectations of harm in light of all of the circumstances.

Reasonable refers to what a reasonable person would expect considering all the circumstances of the case. You must decide between what is merely speculative, irrational or absurd and expectations that are likely, plausible, or possible based on real and substantial factual grounds.

54. Note that the burden is on the public authority to show the anticipated loss of commercial value and the likelihood of its occurrence. In describing the anticipated loss to commercial value, you should clearly set out how the loss will occur. It is not enough to simply assert that the loss will occur. You must show objective and reasonable evidence to support the loss and the likelihood of it occurring.

## Questions to consider when applying the commercial value exemption

55. When deciding if the commercial value exemption applies to a requested record (or part of a record), you may also want to consider the following examples of the type of questions that the Information Commissioner may consider during a review.

### **Note:**

These examples of questions presented here (and with each exemption in this Guidance) may help you think through what to ask yourself as you decide if an exemption is appropriate.

Not all of the questions will apply in every case and they are not an exhaustive list of every issue that might arise. You will need to decide what issues are relevant to the specific request you have.

### *Does the information have commercial value?*

- To have commercial value the information must either be valuable for the carrying out of a commercial activity, or a genuine market or buyer must exist for the sale of the information and its value to the owner would be destroyed or diminished by disclosure.

### *What is the specific nature of the commercial value? Is the information valuable to the owner's carrying out of commercial activity?*

- What is the specific nature of the commercial activity?
- Is it an ongoing activity or a one-off transaction?
- If it is an ongoing activity, how is the information valuable to the profitability or performance of the commercial activity? Do you have evidence to support this?
- If it is a one-off transaction, is the transaction still being negotiated or performed? If not, how does the information still have commercial value to the owner? Do you have evidence to support this?

### *Or, is the information valuable to the owner because it can be sold for a market price, i.e., does it have intrinsic commercial value like a painting or software?*

- Does a market exist for the information? What evidence do you have of this? What is the estimated market value of the information? How big is the potential market?

- Would the market value cost of the information be significantly more than the cost of obtaining the information through a PATI request?

56. Note that commercial value of information should be assessed at the time of the PATI request, as information that is out of date or old will not usually carry the same commercial value as it held when it was first created.

57. You are also encouraged to take a practical approach to evaluating the commercial value of the information. For example, a one-off transaction may have been pending at the time the Information Officer decided to refuse access to a requested record on the basis of the commercial value exemption. The one-off transaction may be completed, however, by the time the head of authority decided an internal review.

58. The PATI Act's purposes to give the public access to records to the greatest extent possible and to increase transparency, suggest that the head of the authority should take into account the current circumstances and release the information, rather than deny the request and force the requester to submit a new PATI request to take account of the changed circumstances.

59. If you decide that the information has commercial value, you must then consider the harm test, i.e., whether releasing it would, or could reasonably be expected to, destroy or diminish the information's commercial value.

*Can you describe the destruction or diminishment that will occur if the information is disclosed?*

- Specifically, can you describe the resulting destruction or diminishment of the information's commercial value?

*How would this harm be possible? How would disclosure cause it?*

- If disclosure were made, how would the harm (described above) happen as a result? Can you explain what circumstances or events will lead to the harm occurring?
- If the third party is concerned about disclosures to a competitor, is the information already known to competitors or those within the industry, or to the public at large? If so, how would further disclosure cause harm?

*What is the likelihood that the identified harm will occur?*

- Would it occur? Can you show more than a hypothetical assertion? What real, concrete and substantial evidence do you have to support this assertion?
- Or can you show a reasonable expectation that the disclosure of the information could cause its value to be destroyed or diminished?
- What evidence makes the expectation reasonable?

60. If you decide that the information does not have commercial value or that the harm test is not met, then the commercial value exemption is unavailable.
61. If you decide, instead, that the information does have commercial value and the harm test is met, the information falls within the commercial value exemption. You must then consider the public interest test to determine whether the information must be disclosed.
62. Applying the public interest test in the context of commercial information is discussed below at paragraphs 104-109.

## Commercial interests – section 25(1)(c)

63. Section 25(1)(c) exempts from the right of access information if its disclosure would (or could reasonably be expected to) have an adverse effect on the **commercial interests** of any person to whom the information relates, unless disclosure would be in the public interest.
64. Commercial interests are not defined in the PATI Act. Trade secrets are one example of commercial interests, but commercial interests include a far wider category of information.
65. A commercial interest relates to a person's ability to participate in a commercial activity, for example, the exchange or sale of goods or services or the collection of a debt. This is normally within a competitive environment.
66. Usually these activities will be for the purpose of making a profit, but not always. For example, an entity may charge a minimal amount for goods or services that allows it to break even—rather than to make a profit. Not-for-profit entities can have commercial interests even though their activities do not generate profits.
67. Some commercial information may have a very direct effect on commercial activity, for example, the price for a service. Other information may have a less direct link to a commercial transaction. For example, information about a company's potential relocation may have repercussions for its labour relations, which the company would wish to manage in order to minimise disruption in its services.
68. In seeking to withhold information under the commercial interests exemption, you must ensure that you can explain clearly whose commercial interests are likely to be harmed, as well as the particular nature of those interests.

### Understanding the harm test for the commercial interests exemption

69. The harm test for the commercial interests exemption is that disclosure 'would have or could reasonably be expected to have an adverse effect' on the commercial interest of any person to whom the information relates. If disclosure is not likely to cause this specific harm then the exemption is not available.
70. Working through the requirements of the harm test is an exercise of judgment. You must evaluate the nature of the identified harm, how that harm would be caused and the likelihood of it occurring. At each step, you should support your conclusion with evidence.

#### *Specific harm: adverse effect on commercial interests*

71. The specific harm is that disclosure must cause an **adverse effect** on commercial interests. The ordinary plain English meaning of adverse effect is: bringing about an unfavourable or harmful result.

72. Note that the disclosure of information could damage a company's reputation or the confidence that customers, suppliers, or investors may have in the company. It may be that disclosing the information has a significant impact on revenue or threatens its ability to obtain supplies or secure finance. This may justify the commercial interest exemption.
73. Keep in mind, however, that you cannot rely on the exemption to avoid embarrassment. It may only be applied when a real risk of harm to commercial interests would occur or could be reasonably expected to occur.

#### *How disclosure can cause that harm*

74. You must be able to explain how disclosure will cause the harm; it cannot simply be a remote or hypothetical possibility. This requires explaining how the harm claimed is at least possible. You must describe the possible circumstances, or events, arising from disclosure that can lead to the harm.
75. The degree of competition within an industry will affect whether the disclosure of information will cause harm to someone's commercial interests. If a company has a monopoly over providing goods or services, for example, disclosure may not cause an adverse effect on the company.
76. Or, if a public authority is the sole purchaser of specialised equipment or goods, the commercial interests of the company (its ability to sell its products) could be more dependent on the procurement plans of the public authority rather than the disclosure of any commercial information.

#### *Likelihood of harm occurring*

77. The likelihood of the harm to the commercial interests is the same standard for the commercial value exemption, discussed above in paragraphs 53-54. To apply the commercial interests exemption, you must find that disclosure 'would or could reasonably be expected to' cause an adverse effect on the commercial interests.

### Questions to consider when applying the commercial interests exemption

78. When deciding if the commercial interests exemption applies to a requested record (or part of a record), you may also want to consider the following examples of the type of questions that the Information Commissioner may consider during a review.

**Note:**

These examples of questions presented here (and with each exemption in this Guidance) may help you think through what to ask yourself as you decide if an exemption is appropriate.

Not all of the questions will apply in every case and they are not an exhaustive list of every issue that might arise. You will need to decide what issues are relevant to the specific request you have.

*Can you identify commercial interests that could be affected?*

- What is the nature of the commercial activity that would be affected?
  - Can you describe the specific sale or exchange of goods or services that is involved?
- Who is engaging in that commercial activity – a potential contractor, a current vendor, or another person or company?
- When did the commercial activity occur? Is it entirely in the past, ongoing, or planned for the future?
- Is the commercial activity carried out in a competitive environment? What details do you know about this, i.e., number of competitors, size of the market and so on?
- Does the requested information relate to the price at which goods or services are delivered, or to their quality or specifications? Or does the requested information relate to how the company has developed these, or how it achieves its profit margin?

*What is the adverse effect; and how would disclosure cause it?*

- What is the nature of the adverse effect on the commercial interests you described above? For example, would there be damage to reputation or business confidence or would disclosure benefit the owner's competitors?
- Can you clearly explain how disclosure would cause the adverse effect? Do you have evidence to support this?
- You may also want to consider whether the adverse effect can be avoided and the record disclosed by redacting, i.e., removing, some of the information in the record. It won't usually be appropriate for contracts to be withheld in their entirety. Instead, contracts will normally be disclosed with information redacted.

- Have you redacted the least amount of information required to protect the commercial interests?

*What is the likelihood of this occurring?*

- Would this adverse effect occur? Can you show more than a hypothetical assertion? What real, concrete and substantial evidence do you have to support this assertion?
- Or can you show a reasonable expectation that the disclosure of the information could cause an adverse effect to the commercial interests that you have identified?
- What evidence makes the expectation reasonable?

79. If you decide that no commercial interests are involved, or that the harm test is not met, then the commercial interests exemption is unavailable.

80. If you decide, instead, that the information does involve commercial interests and the harm test is met, the information falls within the commercial information exemption. You must then consider the public interest test to determine whether the information must be disclosed.

81. Applying the public interest test in the content of commercial information is discussed below at paragraphs 104-109.

## Contractual or other negotiations – section 25(1)(d)

82. Section 25(1)(d) exempts from the right of access information whose disclosure would prejudice or could reasonably be expected to prejudice the conduct or outcome of **contractual or other negotiations** of any person to whom the information relates, unless disclosure would be in the public interest.
83. The Oxford Dictionary of English defines “negotiation” as “discussion aimed at reaching an agreement”. It goes on to define the verb “negotiate” as to “obtain or bring about by discussion” or to “try to reach an agreement or compromise by discussion”.
84. Factors that may be relevant in deciding whether a negotiation exists include whether the person was trying to reach some compromise or some mutual agreement. It may be helpful to consider whether there is:
- Any proposal for settlement or compromise
  - Any indication of a ‘fall back’ or alternative position
  - Information created for the purpose of negotiation
  - Any negotiating strategy
  - An opening position with a view to further negotiations
85. This exemption would generally apply to ongoing negotiations involving the person to whom the information relates. It prevents negotiations from being prejudiced by the premature or inappropriate release of information.
86. If the negotiations are done at the time of the PATI request, though, the requested information must be released to the public unless there is a real and significant risk of prejudice to future negotiations.
87. Any claim of prejudice to future negotiations must not be speculative. The farther into the future the potential negotiations are and the more speculative the existence of any future negotiations, the less likely the authority will be able to evidence that prejudice could reasonably be expected to occur.

### Understanding the harm test for the contractual or other negotiations exemption

88. The standard of harm for the negotiations exemption is that disclosure ‘would prejudice or could reasonably be expected to prejudice’ the outcome of contractual or other negotiations of any person to whom the information relates. If disclosure is not likely to cause this specific harm then the exemption is not available.

89. Working through the requirements of the harm test is an exercise of judgment. You must evaluate the nature of the identified harm, how that harm would be caused and the likelihood of it occurring. At each step, you should support your conclusion with evidence.

*Specific harm: prejudice to the outcome of contractual or other negotiations*

90. Prejudice is not defined in the PATI Act. It may be helpful to think of it in terms of harm that is actual, real and significant to the outcome of the negotiations. It cannot be a speculative or hypothetical harm.

91. Prejudice also implies that the disclosure would not just have some effect, but that the effect would be negative or detrimental in some way.

92. You should view the issue from the perspective that the disclosure of the requested records will be to the general public and not simply to the individual requester. This is because the disclosure under the PATI Act may not be made subject to any conditions restricting or governing its use.

93. Remember that when responding to a request for records, you are required to consider removing exempt information and disclosing all non-exempt information. This may eliminate any concern about the prejudice claimed.

*How disclosure can cause that harm*

94. You must be able to explain how disclosure will cause the harm; it cannot simply be a remote or hypothetical possibility. This requires explaining how the harm claimed is at least possible. You must describe the possible circumstances, or events, arising from disclosure that can lead to the harm.

95. For example, the stage of the negotiations may impact whether you can show that disclosure will cause prejudice to negotiations, as noted above. You will need to explain how in the context of a particular request, disclosure will prejudice the negotiations at issue or future negotiations.

96. The negotiating parties' knowledge of the information may also be a consideration. If all of the negotiating parties already know the information, you will need to explain how disclosure to the broader public will cause prejudice to the negotiations.

97. The issue that the information relates to may also influence whether or not disclosure will cause prejudice. If it involves a matter that has already been settled in the negotiations, you may consider whether disclosure could re-open negotiations around that issue. Or you may find that disclosure would not impact the settled matter. This will depend on the particular requested information and its context.

### *Likelihood of the harm occurring*

98. The likelihood of the harm to negotiations is the same standard for the commercial value exemption, discussed above in paragraphs 53-54. To apply the negotiations exemption, you must find that disclosure would or could reasonably be expected to prejudice the outcome of contractual or other negotiations.
99. Note that, generally, application of this exemption would not be appropriate after the negotiations are complete or a contract is signed. For example, during a tendering process, disclosure may cause harm to negotiations during the selection process, or immediately after, but the likelihood of harm will diminish with time. Usually, the final contract cannot be withheld under the exemption for negotiations.

### Questions to consider when applying the contractual or other negotiations exemption

100. When deciding if the contractual or other negotiations exemption applies to a requested record (or part of a record), you may also want to consider the following examples of the type of questions that the Information Commissioner may consider during a review.

#### **Note:**

These examples of questions presented here (and with each exemption in this Guidance) may help you think through what to ask yourself as you decide if an exemption is appropriate.

Not all of the questions will apply in every case and they are not an exhaustive list of every issue that might arise. You will need to decide what issues are relevant to the specific request you have.

### *What is the specific nature of the contractual or other negotiations that are the subject of the request?*

- What negotiations would be affected by the disclosure? What is the subject matter of the negotiations?
- Are these negotiations ongoing or have they been concluded?
- If ongoing, at what stage are the negotiations?
- How long have they been going on?

### *What would be the prejudice to the negotiations and how would disclosure cause it?*

- How would disclosure specifically prejudice the conduct or outcome of negotiations?
- Does the information relate to an outstanding issue in the negotiations? If so, how would disclosure prejudice the negotiations on this issue?
- Does the information relate to issues already resolved in the negotiations? Would disclosure cause the issues to be reopened? Why?
- Would it otherwise prejudice the negotiations? How?
- Do all of the parties in the negotiations already know the information? How would disclosure to the wider public cause prejudice?
- Is the information already currently known within the industry?
- Is the information reasonably available elsewhere? If so, how would disclosure by the authority prejudice the negotiations?

### *What is the likelihood of this prejudice occurring?*

- Is it likely that disclosure would prejudice the negotiations? If so, what is the evidence for this?
- Is it likely that disclosure could reasonably be expected to prejudice the negotiations? If so, what is the evidence for this?
- Is the requested information current? If not, how old is it?
- Does the information relate to events prior to the negotiations?
  - If so, how could it affect current negotiations and how likely is this to happen?
- Would the prejudice be against the negotiating position of the person to whom the requested information relates? If not, how will it prejudice the negotiations involving the person to whom the information relates? Could this be reasonably expected or is it too remote a possibility?
- Does the other side of the negotiations already have this information, even if it is not available yet to the wider public? Was the disclosure through official channels or is the knowledge based on rumor or unofficial information? If so, how likely is it that disclosure through official channels would cause prejudice?
- Have the other negotiating parties asked for the requested information?

101. If you decide that the information does not relate to negotiations, or that the harm test is not met, then the exemption for contracts or other negotiations is unavailable.

102. If you decide, instead, that the information does relate to negotiations and the harm test is met, the information falls within the exemption for contracts or other negotiations. You must then consider the public interest test to determine whether the information must be disclosed.

103. Applying the public interest test in the context of commercial information is discussed below at paragraphs 104-109.

## The public interest test: in the commercial information context

104. The public interest test applies to all of the categories of commercial interest exemptions under section 25. This means that even if you find that the exemption applies, you must go on to apply the public interest test to decide whether the record should still be disclosed. The public interest test is set out in section 21 of the PATI Act and regulation 2 of the PATI Regulations.



The public interest is not the same as 'what interests the public'.

105. Under the public interest test, the information contained in a record must be released unless the public interest in maintaining the exemption outweighs the public interest in disclosing it. You may refer to our publication, *Guidance: The public interest test (section 21)*, for general help on applying the public interest test and determining where the balance of public interest lies.

106. In the context of the commercial interest exemptions, the public interest test will often involve weighing the possible harms caused by disclosure against the likely benefit to the wider public. The public interest factors discussed below are not the only ones to consider, but they are provided to illustrate the approach you may want to consider in the commercial information exemption context:

- **Accountability for the spending of public money**

Without question, a strong public interest exists in the public scrutiny of how public money is spent. This is equally true whether a public authority is purchasing goods, contracting services, awarding grants to private sector companies, or hiring consultants. Transparency of decisions on how public funds are spent will generate confidence in the integrity of the procedures involved. Transparency will also allow for accountability for failures of integrity in a public spending process. This is particularly relevant at a time when there is public debate around the procedures being used for the spending of public funds and the need for improvements.

When the public authority is purchasing goods or services, the public also has an interest in ensuring that it gets value for money. This may be particularly relevant around public debates over the increasing role private companies have in delivering public services.

- **Protection of the public**

In its role as a regulator, a public authority may hold information on the quality of products or on the conduct of private companies. There would be strong public interest arguments in allowing access to records which would help protect the public from unsafe products or dubious practices, even though this might involve revealing information that is likely to adversely affect the commercial interests of a company.

- **Competition issues**

There is a public interest in ensuring that companies are able to compete fairly. There is also a public interest in ensuring that there is competition for public sector contracts. This is particularly relevant at a time when there is public debate about the procedures for spending public money and awarding contracts. In considering the release of information, authorities should therefore take these issues into account.

Public authorities should be wary of accepting arguments that the potential for commercial information to be released would reduce the number of companies willing to do business with public authorities, leading to reduced competition and increased costs. In practice, many companies may be prepared to accept greater public access to information about their business as a cost of doing business with public authorities. And the overall value of public sector contracts is a great incentive to bid for them.

Increasing access to information about the tendering process may in fact encourage more potential suppliers to enter the market. A better understanding of the process, the award criteria and knowledge of how successful bids have been put together, could also lead to improved bids being submitted in the future. This will lead to more competition and potentially decreased costs to the public authority. Indeed, where a contract comes up for renewal, limiting this kind of information may well favour the current contractor and reduce competition.

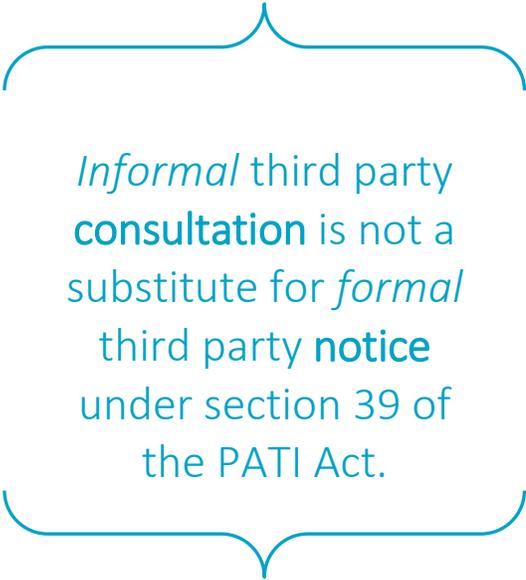
Increasing access to information about the tendering process may also encourage public authorities to adhere more closely to guidelines and instructions concerning the spending of public money.

107. Often in a commercial context, the timing of the disclosure will be of critical importance for the public interest test. The application of any exemption has to be considered in the circumstances that exist at the time that the request is made. Circumstances will change over time, which may impact the suitability of an exemption.

108. The Information Commissioner encourages you, however, to take a practical approach to the exemptions. This is particularly true when changed circumstances would allow a record withheld in the initial decision to be disclosed on an internal review.
109. For example, information submitted during a tendering process is more likely to be commercially sensitive while the tendering process is ongoing. This may no longer be true once the contract has been awarded. Information refused at one point in time does not mean that the information can be withheld in the future. Market conditions will change and some information, such as those related to costs, may quickly become out of date. Changing circumstances could strengthen or weaken the public interest arguments in favour of disclosure.

## Consulting and notifying third parties

110. Releasing records that contain commercial information may have negative effects on third parties (individuals or entities other than the requester or public authority).
111. Third parties may be involved in the PATI request process at several points, including during informal consultation when you determine whether the harm test is met and through the formal third party notification process set forth in section 39. Each serves a separate purpose. If you use an informal consultation, it is not a substitute for the formal notification process under section 39.



*Informal* third party consultation is not a substitute for *formal* third party notice under section 39 of the PATI Act.

112. Whether contacted through a consultation or third party notification, a third party has no right of veto when it comes to the disclosure of its commercial information. The public authority has the *sole responsibility* for deciding whether or not it is legally obligated under the PATI Act to disclose a record.
113. If a public authority ultimately decides to release the record over a third party's objections, the third party notification under section 39 will give the third party a means to challenge that decision through a review by the Information Commissioner.

**Note:**

When consulting with or notifying third parties, take care to keep the requester's identity confidential as required by section 12 of the PATI Act. You may discuss with the owner of the information what records the requester is asking for, but you must not disclose the requester's identity unless it is permitted under section 12.

## Consultation

114. In some instances, you will need to consult with the third party who gave the information (or the third party to whom the information relates) to get information and evidence to support the application of the commercial information exemptions. You should not simply speculate in your decision about whether releasing the requested information would cause harm to a third party.

115. In other instances, you may already have evidence or knowledge that the disclosure of the information would cause the required harm, based upon your past experience, the procurement process, or the current working relationship with the party.

## Third party notification – section 39

116. Section 39 of the PATI Act requires heads of public authorities to decide whether they have 'reason to believe' that records intended for disclosure 'might contain' commercial information that is exempt under section 25.

117. If the head of the authority finds this is the case, then the public authority must give notice under section 39 of the PATI Act to third parties who gave this information to the authority or to whom the information relates.

118. The third party notification in section 39 is only required, however, when four criteria are met:

- The third party was not informed in advance that their information fell within a class of information that would or might be made available to the public (see section 25(2)(c)); and
- the third party has not yet consented in writing to disclosure (see section 25(2)(b)); and

- the head of the authority determines that there is reason to believe a disclosure might contain commercial information; and
- the public authority has initially decided that the information should be disclosed.

119. For an in-depth discussion of third party notification, please refer to our *Guidance: Notifying third parties (section 39)*.

## More information

120. Appendix 1 lists select resources and cases from other jurisdictions. They are provided for illustration and are not intended to be a statement of the law in Bermuda, or to replicate independent legal advice.

121. Appendix 2 cites the exemption as it appears in the Public Access to Information (PATI) Act 2010 at the time of this Guidance's publication. A complete and up-to-date version of the PATI Act is available at [www.bermudalaws.bm](http://www.bermudalaws.bm).

122. If you need any more information about this Guidance or have an inquiry about any other aspect of the PATI Act, or public access to information generally, please contact us:



Valerie T. Scott Building  
60 Reid Street  
Hamilton, HM12  
Bermuda

(441) 294-9181 | [info@ico.bm](mailto:info@ico.bm) | [www.ico.bm](http://www.ico.bm)

## APPENDICES

### Other related ICO Exemption Guidances

- Information received in confidence (section 26)*
- Personal information (sections 23 and 24)*
- Legal professional privilege (section 35)*
- Disclosure prohibited by other legislation (section 37)*
- The public interest test (section 21)*
- Third party notification (section 39)*

These, and other, Information Commissioner’s Guidances are available on our website, [www.ico.bm](http://www.ico.bm), as they are published. Hardcopies are available from our office, Valerie T. Scott Building, 60 Reid Street, Hamilton HM 12.

### Illustrative decisions from other jurisdictions

Decisions by Information Commissioners, Information Tribunals and the Courts of other Commonwealth jurisdictions are not binding in Bermuda (although some may be viewed as persuasive). There are also differences between the PATI Act and the freedom of information laws in other countries. As a result, the decisions summarised below are not directly applicable here, but provide an illustration of how public access to information laws—and exemptions in particular—operate.

Reference	Parties	Citation	Summary
Trade secrets	<i>Lansing Linde v Kerr</i>	[1991] 1 WLR 251  Court of Appeal (England & Wales)	The Court of Appeal set out a legal test for trade secrets: <ul style="list-style-type: none"> <li>• Information used in trade or business;</li> <li>• Limited dissemination or publication by owner; and</li> <li>• Disclosure would cause real or significant harm to the owner.</li> </ul>
	<i>Department of Health v Information Commissioner</i>	EA/2008/0018 (UK Information Tribunal)	The Information Tribunal applied the test for trade secrets from <i>Kerr</i> [above]. The Information Tribunal decided that the highest level of secrecy must be associated with the information for it to qualify under a trade secret exemption. If it would not be difficult for competitors to discover some of the information, the information should be considered under the ‘commercial interests’ exemption instead.

	<i>Streetwork UK and Glasgow City Council</i>	Decision 104/2008 (Scottish Information Commissioner)	The Information Commissioner found that a proposal document forming part of a successful tender package did not contain trade secret information after the contract had been awarded because the nature and design of the service delivery could be observed. There was nothing secret about it after the contract was implemented.
<b>Commercial value</b>	<i>Cannon v Australian Quality Egg Farms Limited</i>	(1994) 1 QAR 491 (Queensland, Australia Information Commissioner)	The Information Commissioner outlined two meanings of commercial value: <ul style="list-style-type: none"> <li>• Information is valuable for the purpose of carrying on the commercial activity (essential to overall profit or one-off transaction).</li> <li>• Information has commercial value if an arm's-length buyer is willing to pay for the information.</li> </ul>
	<i>Bouly and Department of Natural Resources; Stevenson Financial Corporation Pty Ltd (Third Party); Stevenson (Fourth Party)</i>	(1998) 4 QAR 236 (Queensland, Australia Information Commissioner)	The Information Commissioner applied <i>Cannon</i> [above] to find that site specific 'hazard assessment' reports did not have commercial value to the business owner because his business activities continued regardless of the reports' approval or disapproval of the proposal involved and because, as site-specific reports, they were not valuable to an arms' length buyer. Further, the reports had been made public by the third party in prior Land Court hearings.
	<i>Dalrymple Shire Council and Department of Main Roads</i>	(1998) 4 QAR 474 (Queensland, Australia Information Commissioner)	The Information Commissioner applied <i>Cannon</i> [above] to find that unit price rates tendered by a bidder did not have 'commercial value' because the tender pricing for a contract that has already been awarded does not have continuing value to the conduct of an ongoing business operation.  It also does not have ongoing value to the bidder's submissions for future tenders. The bidder's pricing in a future tender will not be determined by reference to this tender pricing, but will instead require the bidder to look at its actual price achieved for this job.
	<i>National Pensions Office</i>	Decision Hearing No. 23-00512 (2012) (Cayman Islands Information Commissioner)	The Information Commissioner found that redacted information from audited financial statements of a national pension plan (containing details of securities held and liquidity strategy) were exempt from

		Commissioner)	<p>disclosure because the information had commercial value. Its disclosure would reasonably be expected to destroy or diminish its commercial value because it would negatively impact the plans' competitive advantage and result in the transfer of pension plans to competitors.</p> <p>No public interest in accountability or service improvement would be achieved by disclosure because the auditor's opinions, the majority of the information in the audited financial statements, the correspondence from the auditors identifying breaches of regulations and a complaints investigation report were already disclosed.</p>
<b>Commercial interests</b>	<i>Royal Parks</i>	Decision Ref. FS50574706 (2015) (UK Information Commissioner)	<p>The Information Commissioner found that the percentage from sales of Christmas trees paid to a public authority by a business operating on public authority property related to a "commercial interest" but concluded that disclosure would not be "likely to prejudice" these interests. The records were ordered disclosed.</p> <p>The asserted harms to commercial interest were too remote. The percentage of sales given to the public authority would not allow competitors to extrapolate details about the contract or the business's profit margin. Additional information, such as the wholesale cost of trees, wages, insurance and liability costs, etc., remained private.</p> <p>The Information Commissioner also noted that the contract between the public authority and the business made reference to the Freedom of Information Act. A strong public interest exists in a public authority's openness about money it receives from public donations.</p>
	<i>Brighton and Hove City Council</i>	Decision Ref. FS50588962 (2015) (UK Information Commissioner)	<p>The Information Commissioner decided that information related to contracts for bus shelter advertising with the City Council involved commercial interests. The disclosure of the information, however, would not be "likely to prejudice" these interests and disclosure was ordered.</p> <p>The commercial sensitivity of the information diminished over time. The Information</p>

			Commissioner found that it was unlikely that the 17-year-old information would affect the outcome of a future tender process and prejudice the commercial interests at stake. Also, the Information Commissioner rejected the argument that that disclosure would be likely to prejudice the City Council’s ability to achieve best value, because healthy competition in the bidding process would likely encourage best value.
	<i>Ministry of Tourism and Development</i>	Decision Hearing 29-02312 (2013) (Cayman Islands Information Commissioner)	<p>The Commissioner ordered full access to records related to expenditures for Department of Tourism funded events. The Information Commissioner found that:</p> <ul style="list-style-type: none"> <li>• Per-diem amounts paid by the public authority for a publicly funded event are not “commercial interests” and should be based on a set policy and be a matter of public knowledge;</li> <li>• Disclosure of the amount of a discounted or reduced performance fee for the public authority would not cause any harm to any commercial interests of the public authority or performer; and</li> <li>• Disclosing the names of performers at a past public event could not cause harm to commercial interests of the authority or the performer.</li> </ul>
	<i>National Pensions Office</i>	Decision Hearing 16-00811 (2011) (Cayman Islands Information Commissioner)	<p>The Information Commissioner ordered disclosure of audited accounts of certain pension plans and related correspondence. The Information Commissioner concluded that:</p> <ul style="list-style-type: none"> <li>• Even where commercial interests did exist, an individual or group of prescribed persons could access the audited accounts and share the information and this diminished the argument that withholding the records was necessary to protect commercial interests; and</li> <li>• Disclosure of historical records for pension funds that no longer existed would not affect the competitiveness or investment returns of existing funds.</li> </ul>

<b>Contractual or other negotiations</b>	<i>Company AB and Limerick County Council</i>	Case No. 080240 (2009) (Irish Information Commissioner)	The Information Commissioner considered whether disclosing records about a site investigation contract “could” prejudice the conduct or outcome of contractual negotiations. The Information Commissioner accepted that the exemption could apply to the records, but concluded that it was in the public interest to grant access. The Information Commissioner engaged in a lengthy discussion of multiple public interest factors related to public spending and accountability.
	<i>Mr X on behalf of ABC and the Department of Agriculture, Food and Marine</i>	Case No. 120049 (2012) (Irish Information Commissioner)	The Information Commissioner upheld the decision to withhold records related to details of a company’s current and preferential pricing strategy because of the potential to prejudice the outcome of an “imminent tender competition” for a similar contract.

**Commercial information – section 25**

- 25 (1) Subject to subsections (2) and (3), a record that consists of the following information is exempt from disclosure—
- (a) trade secrets of any person;
  - (b) information, the commercial value of which would be, or could reasonably be expected to be, destroyed or diminished by disclosure;
  - (c) information, the disclosure of which would have, or could reasonably be expected to have, an adverse effect on the commercial interests of any person to whom the information relates; or
  - (d) information, the disclosure of which would prejudice, or could reasonably be expected to prejudice, the conduct or outcome of contractual or other negotiations of any person to whom the information relates.
- (2) Subsection (1) does not apply if—
- (a) the information concerned relates to the requester;
  - (b) the person to whom the information relates consents in writing to its disclosure; or
  - (c) the information was given to the public authority concerned by the person to whom it relates and the person was informed on behalf of the authority, before the information was given, that the information belonged to a class of information that would or might be made available to the general public.
- (3) A record shall be disclosed if disclosure of it is in the public interest.

