Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 3 July 2008

Public Authority: **Department for Environment, Food and Rural Affairs**
Address: **Nobel House**
17 Smith Square
London
SW1P 4QP

Summary

The complainant requested information about a drug used in the prevention of dietary-induced laminitis in horses. Defra withheld the information, citing the exemption in section 43 of the Act. The Commissioner found that the exemption in section 43(1) was not applicable. However, he found that the exemption in section 43(2) was engaged but the public interest in maintaining the exemption did not outweigh the public interest in disclosing the information and the information should therefore be released.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the Act). This Notice sets out his decision. The legislation relevant to this complaint is set out in full in the Legal Annex to this Notice.

The Request

2. The Veterinary Medicines Directorate (VMD) is an executive agency of the Department for Environment, Food and Rural Affairs (Defra). On 15 June 2005 the Soil Association (the association) asked VMD for information about Founderguard, a drug used in the prevention of dietary–induced laminitis in horses.The drug was not licensed in the UK and could only be imported for use if authorised by VMD by means of a Special Treatment Authorisation (STA) (now a Special Treatment Certificate). The association requested details of the quantity of Founderguard being imported from Australia, back to 1999 or earlier if available. It also asked to know, on an annual basis, how many STAs were issued, and the total quantities imported, making it clear whether this was tonnes of product, active ingredient or some fraction of the active ingredient.

3. On 18 July 2005 VMD declined to provide the information, citing the exemption in section 43 of the FOI Act relating to commercial interest. VMD said 'we have considered this request with the (then) importer of Founderguard' (Photonic Therapies Ltd ('Photonic')) 'who has asked us not to release the information as it is commercially sensitive'. VMD said that it had carefully considered the arguments for and against disclosure and had concluded that the public interest test favoured maintaining the exemption, and that release of the information would be of considerable assistance to competitors of the importers, to the obvious detriment of the company.

4. On 13 September 2005 the association requested a review of VMD's decision. It said that the active ingredient of Founderguard was the streptogramin antibiotic virginiamycin. The association believed that the use of Founderguard in horses might lead to streptogramin resistance in methicillin-resistant staphylococcus aureas (MRSA) or methicillin-resistant coagulese-negative staphylococcus (MRCNS) in horses and that these resistant bacteria might transfer to humans with potential for treatment failures. The association said that, in view of the serious problems already posed by MRSA in the UK, the potential for horses to act as a reservoir of MRSA and MRCNS bacteria, which might infect humans, was an important issue that would be of concern to many members of the public. It said that if the use of streptogramins was large, there could be serious human health consequences. The association believed that it was therefore in the public interest for the quantities of Founderguard being used in horses in the UK to be disclosed. (The association has subsequently published a report, entitled 'MRSA in farm animals and meat – A new threat to human health', in which it expands on its concerns, although Defra has drawn attention to the fact that other experts in the field do not support the conclusions reached.) On 16 September 2005 VMD acknowledged the review request and said that it was seeking advice from the (then) Department for Constitutional Affairs (DCA), who were the lead government department on matters relating to the Act, on how VMD had handled the information request.

5. VMD replied on 10 October 2005, maintaining its decision that section 43 applied and that the public interest was best served by withholding the information. It explained that it was not VMD's policy to release sales information of an authorised product as this could be used to identify the market share held by that product. This information was regarded as confidential as it could be used by a competitor company to plan future product developments and/or marketing strategies. VMD said that it recognised that STAs were different from 'normal' marketing authorisations in that they related to products not authorised in the UK: nevertheless, they related to the commercial sale of products, and releasing information about volumes sold could be used by a competitor when planning their business strategy. On 21 October 2005 the association asked VMD for details of the comments made by DCA. VMD regarded this as a new information request.

The Investigation

Scope of the case

6. On 6 November 2005 the association contacted the Commissioner to complain about the way in which its request for information had been handled. The association cited the Commissioner's Awareness Guidance No 5 relating to the interpretation of section 43, which explained that the public interest was served when access to information would further understanding in the debate of the issues of the day; facilitate the accountability and transparency of public authorities for decisions taken by them; or bring to light information affecting public safety. Under those categories, the association said that:

- its ability to establish whether or not Founderguard was contributing to antibiotic resistance in MRSA was constrained by the absence of reliable up to date information on the extent to which the drug was being used;
- publication of the total amount of Founderguard being imported would enable better monitoring of VMD's decision-making process;
- since laminitis could usually be prevented by management practices other than drug use, it was important that there be independent scrutiny to ensure that VMD was not issuing STAs unnecessarily;
- details of the quantity of the drug being authorised by the VMD were also needed to assess whether VMD was acting properly, or whether the quantities involved indicated that the drug should be assessed by the licensing authorities if it was to continue in use;
- excessive use of Founderguard in veterinary medicine could result in treatment failures in humans suffering from MRSA, and awareness of this issue should encourage greater caution by those working with horses which are receiving Founderguard in their feed.

7. The association said that, as far as it was aware, Founderguard was the only drug treatment available for preventing dietary–induced laminitis in horses and, as far as it could establish, no similar treatments were under development. It said that it was not clear how having access to the sales data for Founderguard would be of assistance to potential competitors; any competitor would need to develop new products before it could gain a share of the market; information on the name of the importer was not readily available and it was possible that the importer was also the manufacturer. It quoted from the Commissioner's Awareness Guidance number 5 which said that 'Where a company enjoys a monopoly over the provision of the goods or services in question it is less likely that releasing the information will have a prejudicial impact on the company'. The association said that, since the importers of Founderguard had a market monopoly and would be likely to maintain that position even after the disclosure of sales data, the Guidance document appeared to confirm that there was little risk of harm to their commercial interest. The association said that, even if the release of the data led to a competitor developing an alternative medicine, the public interest could still be served since there would not only be increased competition, but also a

treatment would become available which would be unlikely to have the same drawbacks in terms of its potential effects on human health.

8. The association also provided a copy of a letter, dated 4 May 2001, from VMD to a member of the public in which it set out the number of STAs issued, and the weight of Founderguard imported, between Sept 2000 and March 2001. The association said that it found it unacceptable that VMD was now refusing to provide it with similar information.

9. On 17 November 2005 the association provided VMD with a copy of the 4 May 2001 letter and repeated its request for the information originally sought on 15 June 2005. From VMD's response of 22 November 2005, in which it addressed the association's request to see DCA's comments (declining to provide them under the exemption in section 36(2) of the Act), it appears that VMD treated the email of 17 November 2005 as a new request for information and said that it hoped to respond to the request by 15 December 2005. On that date VMD said that it needed to consult again with the 'owner of the data' in the light of the information provided by the association and that it hoped to reply by 17January 2006.

10. On that date VMD responded, saying that it had informed Photonic of the earlier release of information and sought its views; once again the company had asked VMD not to release the information on the grounds of its commercial sensitivity. VMD said that the association's request was much more extensive than the information released in 2001 and that, in the highly competitive world of veterinary pharmaceuticals, it was widely accepted that knowledge of other companies' sales data could be used by competitors to identify opportunities for them to develop competitor products. VMD considered that release of the information in question could serve to weaken a company's position since it would release market-sensitive information of potential usefulness to competitors. It said that companies were obliged to provide sales information to VMD as part of the regulatory system, that such information was vital for VMD to make judgements, for example on the rate of incidents of suspected adverse reactions, and VMD must be able to ensure that companies supplied accurate sales information in the knowledge that VMD would not release that information. Any breach of this trust by publishing sales information on a particular product could undermine a company's trust in the regulatory process as well as its commercial position. This could lead to companies becoming unwilling to place products on the UK market, which would have a detrimental effect on animal welfare. VMD considered that such factors weighed against the public interest in disclosing the information in question. VMD said that in those circumstances, and despite the earlier release of information, it considered that section 43 applied and that it would not be in the public interest to release the requested information.

11. The association has not sought an internal review of VMD's refusal to provide it with DCA's comments and this is thus outside the scope of the present investigation.

12. Since the association's email of 17 November 2005 effectively reiterates its information request of 15 June 2005, the Commissioner considers that the case should be treated as one single request for information.

Chronology

13. On 2 May 2007 the Commissioner asked Defra, in its capacity as VMD's parent department, for its, and VMD's, relevant papers, including the withheld information, and for its comments on the case, in particular for an expansion of the reasons for citing section 43 and for concluding that the balance of the public interest test favoured withholding the information sought, when VMD had put similar information into the public domain in its letter of 4 May 2001.

14. Defra replied on 25 July 2007 and provided the withheld information. It said that it was still in discussion with the company's successor, JL Management Services ('JLMS'), to establish what commercial harm, if any, had been caused by the release of the data in 2001 and would respond on that point later. It explained that Founderguard was manufactured in Australia by Vetsearch International Pty Ltd (which in turn is now owned by Virbac Australia) and that its active ingredient was virginiamycin. To obtain Founderguard a veterinary surgeon must request a Special Treatment Certificate (previously a STA). The vet can then import the product direct from the manufacturer or via an authorised wholesale dealer in veterinary medicines, which has always been the case. Veterinary practices normally get veterinary medicines through a wholesale dealers' network and there are a number of wholesale dealers currently named as importing Founderguard. (Although Defra has confirmed that VMD's records for the period covered by the information request show Photonic as the only importing wholesale dealer of all the Founderguard applications throughout that period, and at the time that the information request was considered by Defra.)

15. Defra said that although the information it held was derived from the STAs requested by individual veterinary surgeons, collectively this information equated, or was very proximate to, the importers' sales data. This information was therefore commercially significant: Photonic itself claimed it as a trade secret**.** Defra said that while a trade secret is normally thought of as a process or formulae,it may include other information including sales data and referred the Commissioner to Lansing Linde Ltd v Kerr ([1991] 1 WLR 251, 260, CA)**.**

16. Defra recognised that similar information was released in May 2001 for imports between September 2000 and March 2001, and accepted that it had yet to establish any evidence of actual harm having been caused by that release**.** However it said that the information currently requested would constitute a data series covering some five years which would clearly show sales patterns in a way which the earlier limited release could not. Defra said that, in addition, while it might be argued that the passage of time would have diminished possible harm, sales trends would nonetheless still provide useful market information about sales over a period, which might influence competitors' decisions about the possible return on investment.

17. Defra said that to release this information in the face of the company's express concerns risked undermining confidence in the regulatory system which ensured VMD received applications for market authorisations. It said that companies expected VMD to retain information confidentially. Releasing sales data for STAs/Certificates could be regarded by the industry, which is subject to regulation by VMD, as a precedent, harming confidence and undermining the market authorisation system put in place precisely to ensure the public interest with regard to the effective and safe use of these products.

18. In subsequent correspondence with the company in question (JLMS) Defra said that it had established that in 2001 Founderguard had patent coverage which prevented a competitor from launching a similar product. That patent would expire on 31 March 2008. The company was not aware whether the release of information in 2001 might have prompted some other company(ies) to begin work on a product for launch in 2008. The company maintained that the closer to the expiry of the patent that the information was released, the more potentially damaging that release would be.

19. The company said that the requested information would allow competitors to determine with precision the evolution of the market and the volume of the products yearly bought by the distributor, which information would give competitors an estimate of the business concerned. It said that the value of the information lay in the fact that it was the result of successive years of work and investment developed independently beyond the date of registration of the patent, and this would justify its classification as a trade secret. The company said that disclosure of the said information would be harmful to Virbac and would 'cause a prejudice due to unfair competition and misappropriation of Virbac's property'. Moreover, the company said that it was relevant 'to take a distribution network in its entirety; in view of the investment made in the past, it [the distributor] has already organised the future and has made a return of investment for several years. Distributor will have to reconsider its whole business'.

20. On 23 January 2008 and 31 January 2008 the Commissioner asked Defra for clarification of the status of Photonic and its successor, JLMS, and for further details of the process for obtaining STAs. Defra responded on 26 February 2008. It said that, at the time of the information request, Photonic was the only recorded importing wholesale dealer of all Founderguard applications, although this had changed by the time that JLMS took over this role (which was after Defra had considered the complainant's information request).

21. As to process, Defra provided the Commissioner with a copy of VMD's Guidance Note relating to STAs which was valid at the time of the information request. This, in summary, said that: where there was no suitable authorised product to treat a particular condition in a specific animal it was open to a veterinary surgeon to import and supply (or use) a medicine which was available in another country; to do so he or she should apply for a STA; before a STA was issued, VMD must be satisfied that the benefits of using a product will outweigh any risks and will not pose a threat to human or animal health or the environment. The holder of the STA, who was responsible for ensuring that the authorisation conditions were met, would normally be the individual veterinary surgeon caring for the animals

concerned or the partnership for which he or she worked; the completed application form would be validated by VMD; obligations on holders of STAs included taking responsibility for pharmacovigilence, (which meant recording any suspected adverse reactions), and informing VMD of each importation, providing details of the date and the quantity imported. Defra said that once a veterinary surgeon had obtained a STA he or she could import the authorised product direct from the manufacturer, or obtain it from an importing wholesale dealer. VMD did not record details of third party suppliers on its system.

Findings of fact

22. The Commissioner finds as a fact that, since the information sought by the complainant was provided to Defra/VMD by veterinary surgeons under a statutory obligation, it was not owned by Photonic or its successor. The Commissioner also finds that, although VMD has no record of third party suppliers and is thus unable to say what proportion of holders of STAs obtained Founderguard direct from the manufacturer and what proportion obtained it from Photonic, it is nevertheless the case that some holders of STAs may have obtained it direct and that Photonic did not therefore have a monopoly on supplying it (albeit that they would have enjoyed a pre-eminent position in the market).

Analysis

Exemption

Section 43 – Commercial interests

23. Defra has relied on the exemption in section 43 of the Act as its basis for withholding the information sought by the complainant. Section 43 provides that:

> (1) information is exempt information if it constitutes a trade secret.
> (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

24. Defra has contended that both limbs of section 43 could be said to apply to the withheld information. The Commissioner notes that section 43 creates two types of exemptions, section 43(1) being class-based and section 43(2) being prejudice-based. As to the former, the Commissioner notes that the term 'trade secret' is not defined in the Act. However, the Commissioner is aware that it is a term familiar from the common law to describe certain information that is confidential to business. As Defra has argued, the definition can be broader than a process or formulae and may include other information including sales data. In Lansing Linde Ltd v Kerr ([1991] 1 WLR 251, 260, CA), Staughton LJ defined trade secrets as information used in a trade or business of which the owner limits the dissemination or at least does not encourage or permit widespread

publication and which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret. However, as explained in paragraph 22 above, the Commissioner considers the ownership of the withheld information to reside with the veterinary surgeons who hold the STAs and not Photonic or its successor company or the manufacturer. That being so, the Commissioner does not consider that the withheld information is a trade secret of any of the companies mentioned, and section 43(1) does not apply to that information.

25. As to section 43(2), Defra contends that the release of the information in question would be likely to prejudice the commercial interests of the companies involved. In coming to a view as to whether or not the exemption is engaged the Commissioner has taken into account the decision of the Information Tribunal in the case of *John Connor Press Associates v Information Commissioner (EA/2005/005)* and subsequent cases. In that first case the Tribunal interpreted the exemption at section 43(2) as meaning that the chance of prejudice must be more than a hypothetical or remote possibility; it was necessary to demonstrate a real or significant risk. This reasoning was expanded further through the decisions of the Tribunal in the cases of *Hogan v Information Commissioner (EA/2005/0026)* and *England and London Borough of Bexley v Information Commissioner (EA/2006/0060)*. In those cases the Tribunal considered what was meant by 'would be likely to prejudice' and when a prejudice-based exemption might apply: in particular, it concluded that, in order to have effect within the meaning of the exemption "prejudice must be real, actual and of substance" and that "the occurrence of prejudice to the specified interests is more probable than not and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not".

26. Defra has said that it was not VMD's policy to release information on sales of an authorised product as this could be used to identify the market share of that product. This information was regarded as confidential as it could be used by a competitor company to plan future product developments and/or marketing strategies. VMD recognised that STAs were different from 'normal' marketing authorisations in that they concerned products not authorised in the UK: nevertheless, they related to the commercial sale of products and releasing information about volumes sold could be used by a competitor in planning their business strategy. Defra said that, in the highly competitive world of veterinary pharmaceuticals, it was widely accepted that knowledge of other companies' sales data could be used by competitors to identify opportunities for them to develop competitor products. VMD considered that release of the information in question could serve to weaken a company's position since it would release market-sensitive information of potential usefulness to competitors. Defra recognised that similar information to that requested by the complainant was released into the public domain in 2001, and that there was as yet no clear picture as to whether or not that release had prejudiced Photonic's commercial position; however, the information then released covered a relatively short period of time and Defra argued that if the information for the five-year period now requested were to be released it would reveal sales patterns in a way which the earlier limited release could not. Both Photonic and its successor have expressed severe concerns about the likely adverse effect on their business, and that of the

manufacturer of Founderguard were the information in question to be released (see paragraphs 3, 10, 14 and 19 above).

27. Given the exceptionally competitive nature of the pharmaceutical industry, and the strong objections of the companies concerned, the Commissioner accepts that the release of the information in question would be likely to cause a real and significant risk of prejudice to the commercial interests of Photonic and its successor and to the manufacturer of Founderguard. He therefore finds the exemption in section 43(2) to be engaged.

Public Interest

28. Section 43 is, however, a qualified exemption and the Commissioner therefore needs to consider the application of the public interest test, that is the test of whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In this regard, it should be made clear that timing is a crucial factor, as confirmed by the Information Tribunal in *Department for Education and Skills v the Information Commissioner and the Evening Standard (EA/2006/0006)* in which the Tribunal stated that "*The timing of a request is of paramount importance*". In the case of *Guardian and Brooke v the Information Commissioner and the BBC (EA/2006/0011)* the Tribunal stated that "the relevant time at which the balance of public interest has to be judged is the time when the request is considered by the public authority". In the light of the decision of the Information Tribunal in *Department for Business, Enterprise and Regulatory Reform v the Information Commissioner and Friends of the Earth (EA/2007/0072)*, the Commissioner has interpreted this as meaning at the time of the information request, or within the statutory period for response to the request (namely twenty working days). In this particular case, the complainant made his information request on 15 June 2005 and it is the balance of the public interest at that time which is relevant.

29. It is often the case that, over time, the sensitivity of commercial interests and the corresponding prejudice that may be caused to them will decrease. That is not, however, the case here. Defra and the company have maintained that the closer to the expiry of the patent for Founderguard that the information were to be released the more potentially damaging that release would be. However, in 2005, when Defra was considering the information request, the patent was over two years away from renewal, and that is the point at which the public interest test needed to be considered.

30. Defra has argued that companies were obliged to provide sales information to VMD as part of the regulatory system, that such information was vital to enable VMD to make judgements, for example on the rate of incidents of suspected adverse reactions, and that VMD must be able to ensure that companies supplied accurate sales information in the knowledge that VMD would not release it. Defra has emphasised that companies expected VMD to retain information confidentially and that publishing sales information on a particular product, in particular in the face of a company's express concerns, could undermine a company's trust in the regulatory process as well as its commercial position. Defra said that this could lead to companies becoming unwilling to place products

on the UK market, which would have a detrimental effect on animal welfare. VMD considered that such factors weighed against the public interest in disclosing the information in question. Defra said that to release this information risked undermining confidence in the regulatory system which ensured that VMD received applications for market authorisations, which had been put in place precisely to ensure the public interest with regard to the effective and safe use of these products.

31. The association has said that it believes that the use of Founderguard in horses may lead to streptogramin resistance in MRSA in horses and that these resistant bacteria may transfer to humans with a potential for treatment failures: and that the potential for horses to act as a reservoir of MRSA bacteria in this way, which may infect humans, was an important issue that would be of concern to many members of the public. It contended that if there was a significant use of streptogramins, there could be serious human health consequences. The association has argued (paragraph 6 above) that:

- its ability to establish whether or not Founderguard was contributing to antibiotic resistance in MRSA was constrained by the absence of reliable up to date information on the extent to which the drug was being used;
- publication of the total amount of Founderguard being imported would enable better monitoring of VMD's decision-making process;
- since laminitis could usually be prevented by management practices other than drug use, it was important that there be independent scrutiny to ensure that VMD was not issuing STAs unnecessarily;
- details of the quantity of the drug being authorised by the VMD were also needed to assess whether VMD was acting properly, or whether the quantities involved indicate that the drug should be assessed by the licensing authorities if it was to continue in use;
- awareness of the potential for treatment failures should encourage greater caution by those working with horses which are receiving Founderguard in their feed.

The association believed that it was therefore in the public interest for the quantities of Founderguard being used in horses in the UK to be disclosed.

32. The Commissioner has carefully considered the arguments from Defra and the association. In so doing he has had regard to the fact that, when considering the public interest test, only the factors relevant to, and inherent in, the exemption being claimed should be taken into account. This has been confirmed by the Information Tribunal in a number of decisions, including that for the *Department for Work and Pensions v the Information Commissioner (Tribunal reference: EA/2006/0040)*, in paragraph 24 of which the Tribunal said: *"The public authority's assessment of the public interest in maintaining the exemption should focus on the public interest factors specifically associated with that particular exemption rather than a more general consideration of the public interest in withholding the information".*

33. The Commissioner is mindful that, in the highly competitive world of pharmaceuticals, information about the demand for a particular product is a potentially valuable commodity. However, he finds that the arguments put forward by Defra, that the release of the information requested would undermine the regulatory process and would have a detrimental effect on animal welfare, are not public interest factors inherent in the section 43 exemption and should not be taken into account. Even if that were not the case, at the relevant time the information about importation and usage of Founderguard was provided to VMD by veterinary surgeons by means of applications for STAs, and the Commissioner has seen no evidence to show that the release of the information sought would result in inaccurate returns regarding the extent of the use of Founderguard or any other product. Indeed, those wishing to use imported products that have not been authorised in the UK were (and still are) statutorily obliged to provide Defra with details.

34. Moreover, the Commissioner recognises that there is a profound public interest in the prevention and treatment of MRSA and if there is a possibility that exposure to the active ingredient in Founderguard might create streptogramin resistance which may make treatment of MRSA less effective (albeit that there are conflicting views on this), there is a substantial public interest in knowing the extent to which that product is used in order to fully assess the risk. The Commissioner therefore finds the association's contentions to be persuasive, in particular in the absence of any evidence of adverse effects following the earlier release of similar information. He concludes that in all the circumstances of the case, at the time that Defra was considering the information request, the public interest in maintaining the exemption did not outweigh the public interest in disclosing the information, and it should be released to the association.

The Decision

35. The Commissioner's decision is that Defra did not deal with the request for information in accordance with the Act, in that it:

- incorrectly applied the exemption in section 43(1) to the requested information;
- correctly applied the exemption in section 43(2) to that information; but
- incorrectly concluded that the balance of the public interest lay in maintaining the exemption, and was thus in breach of section 1(1)(b).

Steps Required

36. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

    Defra should release to the association the information sought in its request of 15 June 2005.

37. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

38. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

39. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the *3rd* day of *July* 2008

Signed ……..

Anne Jones
Assistant Commissioner

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

Legal Annex

General Right of Access

Section 1(1) provides that -
"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Effect of Exemptions

Section 2(2) provides that –
"In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information"

Commercial interests.

Section 43(1) provides that –
"Information is exempt information if it constitutes a trade secret."

Section 43(2) provides that –
"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."