

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 2 March 2011

Public Authority: The University of Salford
Address: Clifford Whitworth Building
Salford
Greater Manchester
M5 4WT

Summary

The complainant made a freedom of information request to the University of Salford for details of its rental costs for its MediaCity site. The public authority initially responded to the request by saying that the information was exempt from disclosure under section 21 (Information accessible by other means). The public authority subsequently carried out an internal review of its handling of the request at which point it acknowledged that the section 21 exemption did not apply but that it now considered that the information was exempt from disclosure under section 43 (Commercial interests). The Commissioner has investigated the complaint and has found that section 43(2) is not engaged. The Commissioner also found that in its handling of the request the public authority breached section (1)(b) (General right of access), section 10(1) (Time for compliance), and sections 17(1), 17(1)(b) and 17(1)(c) (Refusal of request). The Commissioner requires the public authority to make the requested information available to the complainant within 35 calendar days of the date of this notice.

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 Request

2. On 4 November 2009 the complainant wrote to the public authority to request details of its rental costs on its site at MediaCity UK. The complainant asked for all rental costs until 2020.
3. The public authority responded to the request on 3 December 2009 when it informed the complainant that the information was exempt from disclosure under section 21 of the Act on the grounds that it was accessible by other means. The public authority explained that the information could be obtained from the Land Registry on request. The public authority also apologised for the delay in responding to the request and acknowledged that the response was being sent on the 21st working day after the request had been received.
4. On the same day as the response was received the complainant asked the public authority to carry out an internal review of its handling of his request. The complainant explained that he had contacted the Land Registry and been told that to possibly access the information would cost £24 and that even then it may not be available or accurate. The complainant said that the cost quoted would be prohibitive for his organisation.
5. The public authority presented the findings of its internal review on 26 May 2010. It now informed the complainant that, contrary to what it said in its initial response, the information was not held by the Land Registry although it said that this was its understanding at the time the request was received. However, it went on to say that the information was now being withheld under section 43 of the Act which it explained provides for an exemption from the Act where disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it. It said that the exemption was being applied because there was a confidentiality clause in its agreement with Peel Holdings (the owner of the MediaCity site) and disclosure would be likely to lead to a breakdown in its relationship with this company. The public authority did not specify whose commercial interests would, or would be likely to be prejudiced, if the information was disclosed.

The Investigation

Scope of the case

6. The complainant originally complained to the Commissioner on 8 April 2010 due to the delay in the public authority carrying out its internal review. Once this was completed the complainant contacted the Commissioner again on 26 May 2010 and asked him to consider the public authority's decision to withhold the requested information under section 43 of the Act.

Chronology

7. On 6 October 2010 the Commissioner contacted the public authority with details of the complaint. The Commissioner now asked the public authority for copies of the requested information together with further details on its application of the section 43 exemption. Specifically, the Commissioner asked the public authority to confirm whose commercial interests would be prejudiced as a result of disclosure and to fully explain why disclosure would prejudice those interests. The Commissioner also asked the public authority to confirm if the exemption was being applied on a 'would prejudice' or 'would be likely to prejudice' basis. Finally, the Commissioner asked the public authority to elaborate on its reasons for concluding that the public interest in maintaining the exemption outweighed the public interest in disclosure.
8. The public authority acknowledged receipt of the Commissioner's letter on 20 October 2010 and said that it would aim to respond by 3 November 2010.
9. Having heard nothing further from the public authority the Commissioner contacted the public authority again on 12 November 2010 to ask when he could expect to receive a substantive response to his earlier letter. The public authority responded on the same day and said that it was in the process of contacting Peel Holdings to seek their views on the disclosure of the information and would provide the Commissioner with a full response once it had heard from them.
10. On 6 December the public authority contacted the Commissioner to say that it had heard back from Peel Holdings and was in the process of formulating a response to his letter which it hoped to be able to send in the very near future.
11. On 6 January 2010 the Commissioner contacted the public authority for a final time. Noting that it was now 3 months since he first wrote to the

public authority, he said that if he did not receive a substantive response by 14 January 2011 he would formally request the co-operation of the public authority by way of an Information Notice issued under section 51 of the Act.

12. On 14 January 2011 the complainant contacted the Commissioner to say that it had now heard from Peel Holdings who had said that they were unwilling to permit the public authority to release this information. It provided the Commissioner with a copy of the relevant letter from Peel Holdings which confirmed that it was unwilling to release the information and considered that disclosure would prove commercially detrimental to its business.

Findings of fact

13. MediaCity is a development on the former Port of Manchester site at Salford Quays, home to a number of organisations including the BBC's new Northern base and the University of Salford.

Analysis

14. A full text of the relevant statutory provisions referred to in this section is contained within the legal annex.

Exemptions

Section 43 – Commercial interests

15. The public authority has said that the requested information is exempt from disclosure under section 43(2) of the Act which provides that information is exempt if disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it. In this case the public authority has not explicitly said whose commercial interests would be prejudiced as a result of disclosure but given the letter from Peel Holdings the Commissioner understands that it is Peel Holdings' commercial interests that the public authority believes would be prejudiced.
16. The public authority has failed to explain why it believes disclosure would, or would be likely to prejudice the commercial interests of Peel. Instead, it has argued that the section 43 exemption applies because its agreement with Peel is confidential and Peel has not permitted the information to be released. The only other information on which the Commissioner has to base his decision is the letter from Peel to the

public authority which said that it believed that disclosure would be commercially detrimental given the “current property market and our negotiations with prospective tenants”.

17. When considering whether a prejudice based exemption is engaged the Commissioner will apply the prejudice test and in doing so is guided by the approach taken by the Information Tribunal in *Hogan v Information Commissioner*. In that case the Tribunal found that:

“The application of the ‘prejudice’ test should be considered as involving a numbers of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption.....Second, the nature of ‘prejudice’ being claimed must be consideredA third step for the decision-maker concerns the likelihood of occurrence of prejudice.”¹

18. The Commissioner has found the public authority’s response to his enquiries to be very unsatisfactory. When claiming reliance on an exemption it is incumbent on a public authority to identify the applicable interests within the relevant exemption. Therefore, in this case it is only arguments pertaining to commercial interests that can be considered. As regards the first step in the prejudice test, the public authority’s argument that its contract with Peel Holdings is confidential is not in itself relevant. Having said that the letter from Peel holdings indicates that disclosure would be likely to prejudice negotiations with prospective tenants. Therefore the Commissioner considers that a relevant interest has been identified by Peel holdings, if not by the public authority itself.

19. When considering the nature of the prejudice being claimed by a public authority the Commissioner is again guided by the findings of the Information Tribunal in *Hogan*:

“An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thoroton has stated ‘real, actual or of substance’...If the public authority is unable to discharge this burden satisfactorily, reliance on ‘prejudice’ should be rejected.”²

20. In this case, the public authority has failed to explain why disclosure would, or would be likely to, prejudice the commercial interests of any person. Indeed it also failed to specify whether the exemption was

¹ *Hogan v Information Commissioner and Oxford City Council* [EA/2005/0026 and EA/200/0030], para. 28 – 34.

² *Hogan*, para. 30.

being applied on a 'would be likely to prejudice' or 'would prejudice' basis and did not provide the Commissioner with further details on its public interest determination as requested in his letter of 6 October 2010. With the exception of a fleeting reference to the "current property market" and "negotiations with prospective tenants" in the letter from Peel Holdings, no further evidence or information has been submitted to support the application of the exemption. The Commissioner is firmly of the view that the public authority has failed to demonstrate a causal relationship between disclosure and the prejudice being claimed in this case.

21. On the basis of the information provided to him and the evidence available the Commissioner cannot accept that disclosure would, or would be likely to prejudice the commercial interests of Peel Holdings or any other person. Consequently the Commissioner has decided that section 43(2) is not engaged.

Procedural Requirements

Section 1 – General right of access to information

22. The Commissioner has decided that the requested information is not exempt by virtue of section 43(2). Therefore the public authority breached section 1(1)(b) of the Act by failing to make this information available to the complainant.

Section 10 – Time for compliance

23. The Commissioner must also record a breach of section 10(1) of the Act because the public authority failed to make the requested information available to the complainant within 20 working days.

Section 17(1) – Refusal of request

24. Where a public authority refuses a request for information it must, within the time for statutory compliance, provide the applicant with a notice which states that fact, specifies the exemption in question and states (if that would not otherwise be apparent) why the exemption applies.
25. The complainant submitted his request to the public authority on 4 November 2009. In response the public authority issued a refusal notice on 3 December 2009 and by its own admission exceeded the deadline of 20 working days. Therefore, by failing to issue a refusal notice within 20 working days of receiving the request the public authority breached section 17(1) of the Act.

26. At the internal review stage the public authority informed the complainant that it no longer wished to rely on the section 21 exemption but instead was applying the exemption under section 43 of the Act. However, the public authority failed to say which specific sub-section of section 43 was being applied and therefore breached section 17(1)(b) of the Act. The public authority failed to say whose commercial interests would, or would be likely to, be prejudiced as a result of disclosure and therefore the public authority also breached section 17(1)(c) by failing to explain why the exemption applied.

The Decision

27. The Commissioner has decided that the following elements of the request were not dealt with in accordance with the Act:
- The public authority breached section 1(1)(b) of the Act by failing to make the requested information available to the complainant.
 - The public authority breached section 10(1) of the Act by failing to make the requested information available to the complainant within 20 working days.
 - The public authority breached section 17(1) by failing to issue a refusal notice within 20 working days of receiving the request.
 - The public authority breached section 17(1)(b) by failing to specify which specific sub-section of section 43 on which it was seeking to rely.
 - The public authority breached section 17(1)(c) by failing to explain why the exemption in section 43(2) applied.

Steps Required

28. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- The public authority shall make the requested information available to the complainant.

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

Failure to comply

30. 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.

Other matters

31. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. In this case the complainant asked the public authority to carry out an internal review of his request on 3 December 2009. The Public authority took well over 5 months to complete the review and presented its findings on 26 May 2010. The Commissioner considers this a significant failure to conform to the Code of Practice.

Right of Appeal

32. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 2nd day of March 2011

Signed

**Steve Wood
Head of Policy Delivery
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."

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Refusal of Request

Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (c) states that fact,
- (d) specifies the exemption in question, and
- (e) states (if that would not otherwise be apparent) why the exemption applies."

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).”