

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 28 November 2012

**Public Authority:** London Borough of Barnet  
**Address:** North London Business Park  
Oakleigh Road  
South London  
N11 1NP

#### Decision (including any steps ordered)

---

1. The complainant has requested details of the job titles of officers involved in the evaluating of proposals for the New Support & Customer Services Organisation. The London Borough of Barnet (the "council") refused the request, withholding the information under the commercial interests exemption. During the course of the Commissioner's investigation the council also applied the exemption for personal information to the requested information.
2. The Commissioner's decision is that the council has wrongly applied the commercial interests exemption and that it has partially misapplied the exemption for personal information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the job titles of the senior officers and, where more than one person holds the job title, the junior officers identified by the request.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

---

5. On 19 December 2011, the complainant wrote to the council and requested information in the following terms:

*"What are the job titles please of the 40 officers who spent some or all of the week ended 16 December 2011 at the offices of Trowers & Hamlins evaluating the four proposals for the New Support & Customer Services Organisation proposals."*

6. The council responded on 27 January 2012. It stated that the council was in the process of a procurement procedure in relation to the New Support and Customer Services Organisation (NSCSO) project. It confirmed that it considered that disclosure of the requested information would affect this process and this, in turn, would or would be likely to prejudice the council's commercial interests. The request was refused and the information was withheld under the exemption for prejudice to commercial interests.
7. Following an internal review the council wrote to the complainant on. It stated that it was upholding its decision to refuse the request.

## Scope of the case

---

8. On 1 July 2012 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner has confirmed with the complainant that his investigation will consider whether the council has correctly refused the request.
10. During the course of the Commissioner's investigation the council stated that, in refusing the request, it wished to rely on an additional exemption, namely the exemption for personal information. The Commissioner accepted this late application of the exemption and in this notice he has determined whether the exemption has been applied correctly.

## Reasons for decision

---

### Section 43(2) - commercial interests

11. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial

interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.

12. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43. This comments that:

*"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."*<sup>1</sup>

13. The Commissioner's guidance notes that, while the essential feature of commerce is trading, the information which falls within the exemption may relate only indirectly to the activity of buying and selling.
14. In this instance the withheld information is the job titles of council officers involved in the evaluation of proposals for the procurement of the NSCSO.
15. The Commissioner accepts that the council's activities in respect of the broader procurement procedure clearly relate to its ability to engage in a commercial exercise, namely the purchase of goods or services. Whilst the withheld information itself is somewhat obliquely linked to this exercise, the Commissioner accepts that there is, nevertheless, a link to the council's commercial activities and he has concluded that the information falls within the scope of the exemption. He has gone on to consider whose commercial interests would be affected by disclosure, the likelihood of the disclosure of the information resulting in prejudice and the nature of the prejudice which it is alleged would result.

#### *Whose commercial interests and the likelihood of prejudice*

16. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.

---

<sup>1</sup> The ICO guidance is published here:

[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/AWARENESS\\_GUIDANCE\\_5\\_V3\\_07\\_03\\_08.aspx](http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx)

17. The council has stated that, in withholding the information it considers that disclosure of the information would be likely to prejudice its own commercial interests.

*The nature of the prejudice*

18. The council has argued that prejudice would be likely to result from disclosure of the information for 2 reasons – the identification of individual officers from their job titles and, the subsequent targeting of these individuals by members of the public. The council has stated that it has a duty to protect the integrity of the procurement process and this includes protecting its staff from undue harassment and attempts to influence their decisions.
19. The council explained that the NSCSO procurement has experienced opposition from members of the public and pressure groups. It considers that there is a strong likelihood that the disclosure of job titles will, with the availability of other information already in the public domain, allow individual officers to be identified.
20. The council provided the Commissioner with examples where previous disclosures of job titles had resulted in individual officers being identified in online blogs.
21. Having argued that the withheld information could result in the identification of individual officers, the council went on to explain to the Commissioner why it considered that this would be likely to result in prejudice to the NSCSO procurement and to its commercial interests.
22. The council argued that someone opposed to the NSCSO procurement or partisan to a particular company to win the contract would be able to contact the officers directly and try to exert pressure on the decision-making process. The council has stated that this is not an acceptable risk as there is a need to ensure that evaluators are as independent and as objective as possible in reviewing bids and awarding scores. The council pointed to the considerable length of the contract at stake and its potential monetary value as factors intensifying the need for protecting the process.
23. As the council acknowledged in its submissions to the Commissioner, it is entirely appropriate that members of the public should be able to lobby and question the council about its decision making. The Commissioner further argues that, given the acknowledged controversial nature of the NSCSO procurement and the broader public interest in the

council's One Barnet programme, there should be an expectation within the council that its actions in this regard would be subject to scrutiny<sup>2</sup>.

24. Having considered the council's arguments the Commissioner accepts that there is the possibility that disclosure of the information might have an impact on the procurement process. However, he is not convinced that it would be likely to prejudice or even affect the council's commercial interests. This is because, firstly, the withheld information does not reveal anything about the council's approach in relation to the specific procurement exercise and, secondly, council officers are free to disregard and to remain otherwise uninfluenced by correspondence or approaches by members of the public or lobbyists.
25. Whilst the Commissioner accepts that there is a possibility that disclosure might result in correspondence which affects the council's administrative burden, he does not accept this directly impacts on the NSCSO procurement exercise and certainly is not likely to result in any prejudice to the council's commercial interests. Whilst it might be that the council's arguments might have carried weight if transposed to another more relevant exemption provided by the FOIA, the Commissioner is under no obligation to provide arguments on an authority's behalf or to suggest the possible relevance of exemptions to requested information.
26. The Commissioner is mindful of the sensitivity of the NSCSO procurement exercise and alive to the council's concerns about possible disruption to the process. However, the council is only entitled to express such concerns within the discrete context provided by the FOIA in a manner which is targeted towards the information requested and the application of relevant exemptions.
27. The Commissioner has concerns that the council's application of the exemption in this instance is specious and raises concerns that it might have been applied in a blanket manner without due regard for the specific content of the information. Given the FOIA's assumption in favour of disclosure, the Commissioner also has concerns that, in withholding information without providing adequate or relevant arguments, the council might be displaying a disposition which errs on

---

<sup>2</sup> Details of the One Barnet programme can be found here:  
[http://www.barnet.gov.uk/info/920056/one\\_barnet\\_transformation\\_programme/904/one\\_barnet\\_transformation\\_programme](http://www.barnet.gov.uk/info/920056/one_barnet_transformation_programme/904/one_barnet_transformation_programme)

the side of withholding information – a stance which is not within the spirit or the letter of the FOIA<sup>3</sup>.

28. As he has found that the council has failed to demonstrate that disclosure of the information would be likely to result in prejudice to the council's commercial interests the Commissioner has concluded that the exemption is not engaged. He has, therefore, not gone on to consider the public interest test.

#### **Section 40 – personal information**

29. During the course of the Commissioner's investigation the council confirmed that one of the job titles it identified as part of the withheld information was actually the title of an external, non-council officer. The Commissioner agreed with the council that this information fell outside the scope of the request.
30. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the FOIA would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').
31. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

*“personal data” means data which relate to a living individual who can be identified –*

*(a) from those data, or*

*(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

*and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”*

32. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the data protection principles under the

---

<sup>3</sup> Another recently issued decision notice commented on the inadequacy of the council's arguments:

[http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs\\_50448565.ashx](http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs_50448565.ashx)

DPA. In this instance, the council has suggested that disclosure of the information would breach the first data protection principle.

33. The first data protection principle states that:

*“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –*

*(a) at least one of the conditions in schedule 2 is met, and*

*(b) in the case of sensitive personal data, at least one of the conditions in schedule 3 is also met.”*

34. The first consideration is whether the information is personal data. The Commissioner notes that the information falls into 2 categories, job titles of senior officers and job titles of junior officers. The council's Redaction Policy provides guidance on instances where names of employees would be disclosed in relation to information requests. The policy states that information which identifies junior officers should be redacted. Junior officers are defined as those below Assistant Director level. In correspondence with the Commissioner the council explicitly confirmed which job titles identified junior officers and which identified senior officers. The Commissioner has considered each category, as defined by the council, in turn.

#### *Senior Officers*

35. Each senior officer post title equates to an individual post-holder. According to the criteria for whether information constitutes personal data, therefore, a specific individual can, in these instances be identified from post titles. The Commissioner is satisfied that the job titles of senior officers constitute personal data.

#### *Junior Officers*

36. The withheld information identifies a number of junior officer posts. The council has confirmed to the Commissioner how many individuals hold each post. In each instance where a job title is linked to a solitary employee the Commissioner is satisfied that disclosure of the information would result in an individual being identified. Such information is, therefore, personal data. However, where a job title relates to 2 or more individuals, the Commissioner does not consider that disclosure would result in the identification of a specific person. He has concluded that job titles which relate to more than one individual employee do not constitute personal data and do not fall within the scope of the exemption.

37. For the information which does fall within the scope of the exemption, the Commissioner has gone on to consider whether disclosure would



breach the first data protection principle, i.e., whether disclosure would be unfair and/or unlawful.

38. In deciding whether disclosure of the information would be unfair, the Commissioner has taken into account the nature of the information, the reasonable expectations of the data subjects and balanced the rights and freedoms of the data subjects with the legitimate interests in disclosure.

*Nature of the information and reasonable expectations*

39. In his guidance "Requests for personal about public authority employees"<sup>4</sup> the Commissioner notes that a factor to be taken into account when considering whether to release information identifying an employee is whether the information relates to the employee's public or private life. The threshold for releasing professional information will generally be lower than that for releasing truly personal, sensitive information.
40. In this case, the withheld information relates to individuals' roles in relation to the NSCSO procurement. The Commissioner considers that this information relates purely to the individuals' public function and not to their private life.
41. In his guidance, the Commissioner states that it would be good practice for public authorities should (in, for example, their publication scheme) list the sort of information which they routinely make available about employees. The guidance explains:

*"In assessing whether employees can have a reasonable expectation that their names will not be disclosed, key factors will include their level of seniority and responsibility and whether they have a public facing role where they represent the authority to the outside world. A junior employee whose name appears on an email simply because they are organising a meeting or distributing a document in an administrative capacity would have a reasonable expectation that their name would not be disclosed<sup>5</sup>."*

42. The Commissioner's guidance also recommends that public authorities should consider producing a general policy which clarifies its position in

---

4

[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~/\\_media/documents/library/Environmental\\_info\\_reg/Practical\\_application/section\\_40\\_requests\\_for\\_personal\\_data\\_about\\_employees.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Environmental_info_reg/Practical_application/section_40_requests_for_personal_data_about_employees.ashx)

<sup>5</sup> Ibid.



this matter and assists employees in forming a reasonable expectation of what will be done with their personal data.

43. As has already been noted, the council's Redaction Policy performs this function and makes a distinction between junior officers (whose names will not routinely be disclosed in response to requests) and senior officers. The policy also acknowledges that there may be circumstances in which it is appropriate to release the details of junior officers and similarly, where the names of senior officers may be redacted.
44. The council has argued that, whilst the information relates purely to employees' public function, the controversial nature of the NSCSO procurement and the broader, sensitive nature of the One Barnet programme creates a particular context which warrants non-disclosure of the information. The council has drawn the Commissioner's attention to a number of examples where websites and blogs have targeted employees who have been identified in responses to FOI requests which relate to their participation in the One Barnet programme. It has argued that the derogatory tone of such publications amounts to the harassment of staff and unjustified adverse effects on the individuals concerned.
45. In its submissions the council made reference to a previous decision notice issued by the Commissioner. This notice related to a request for the names of junior council staff involved in another aspect of the One Barnet programme<sup>6</sup>. In this instance, following the council's provision of comparable arguments to those cited above, the Commissioner accepted that disclosure of the names of junior officers would cause distress to the individuals concerned. The Commissioner also acknowledged that, given the sensitive nature of the One Barnet programme, the fact that individuals did not have personal responsibility for decision making and the Redaction Policy's default position with regard to junior officers, these individuals would not reasonably expect their details to be disclosed.
46. In this instance, whilst the Commissioner accepts that junior officers identified by job titles would have a reasonable expectation that their data would not be disclosed, he does not consider that the same holds for senior officers. Although the council acknowledges that senior

---

<sup>6</sup> Decision notice issued 20 August 2012; ICO reference: FS50446511; published on the ICO website here:

[http://www.ico.gov.uk/~/media/documents/decisionnotices/2012/fs\\_50446511.ashx](http://www.ico.gov.uk/~/media/documents/decisionnotices/2012/fs_50446511.ashx)

officers would have an expectation that they would be subject to a higher degree of scrutiny, it has stated that its Redaction Policy allows for instances where it would be appropriate to withhold such data. The council has argued that, given the potential distress which disclosure would cause, this provides an instance where senior officers would reasonably expect their personal data to be withheld.

### *Consent*

47. The council did not confirm whether it sought the consent of the individual employees affected by the request.
48. The issue of consent is dealt with in the Commissioner's specialist guidance "Consent"<sup>7</sup>. The guidance states that the Commissioner will take data subjects' comments into account insofar as they represent an expression of the views of the data subject at the time of the request. The Commissioner considers that such views will help to inform the analysis of fairness because of the unique perspective of the data subject on the impact of disclosure on them.
49. The Commissioner notes that an individual's objection to the disclosure of information does not necessarily mean that it cannot be released. It is important to consider whether it is reasonable for the data subject to object to the disclosure. However, as the council has not provided any submissions in this regard, the Commissioner has not considered the question of consent further.

### *Consequences of disclosure*

50. In order to assess the impact of the consequence of disclosure on whether release of the requested information would be fair, it is necessary to consider whether disclosure of the information would cause unwarranted damage or distress to the employee.
51. The council reiterated the arguments which were rehearsed in another decision notice issued by the Commissioner (see footnote 6); namely that it has reasonable proof of damage and distress being caused to employees as a result of their personal data being disclosed in response to FOI requests. The council confirmed that it had received complaints from members of staff who were concerned that the disclosure of their data, particularly in the context of their role on the One Barnet

---

<sup>7</sup> <http://www.ico.gov.uk/foikb/PolicyLines/FOIPolicyConsent1.htm>

programme, would lead to them being personally targeted in blogs and other media.

52. The council reaffirmed in its submissions to the Commissioner that it had developed its Redaction Policy in line with ICO guidance and, in particular, because of a growing trend of incidents where members of staff were being harassed by requesters who use their blogs to make derogatory remarks about the personal and professional lives of council employees. The council stated that it considered that, whilst its policy was weighted towards protecting junior members of staff, it felt that, given the potential for disclosure resulting in distress, senior officers should also, in this context, be similarly protected.
53. Taking the above into account, the Commissioner's view is that disclosure of the withheld information would cause distress to the individuals concerned.

*Legitimate interest in disclosure*

54. The Commissioner accepts that in considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for its own sake. It can also include specific interest which, in this case, is the legitimate interest in knowing individuals' roles in this significant procurement programme. The Commissioner accepts that employees of public authorities should be open to scrutiny and accountability because their jobs are funded by the public purse.
55. The Commissioner is, therefore, satisfied that there is a legitimate public interest in disclosure in this case particularly because of the public concerns about the One Barnet programme.
56. The Commissioner's guidance qualifies that the more senior an employee is and the more responsibility they have for decision making and expenditure of public money, the greater their expectation should be that their name will be disclosed<sup>8</sup>. It follows that more junior employees with less influence over decision making and less direct responsibility for expenditure would have a lower expectation that their personal data would be disclosed.

---

8

[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~/\\_media/documents/library/Environmental\\_info\\_reg/Practical\\_application/section\\_40\\_requests\\_for\\_personal\\_data\\_about\\_employees.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Environmental_info_reg/Practical_application/section_40_requests_for_personal_data_about_employees.ashx)

57. Following the previously referred-to decision he reached in another case, which related to a request made to the council for comparable information, the Commissioner accepts that, in this case also, the legitimate public interest in disclosure does not outweigh the legitimate interests of the junior officers concerned. Whilst the public interest in knowing which officers were involved in the procurement process is strong, this is outweighed by the unwarranted interference or prejudice to the rights of the officers concerned.
58. However, the Commissioner does not accept that the same holds true for the personal data of senior officers. He considers that there is a legitimate public interest in knowing who is responsible for important decisions involving significant sums of public money. The Commissioner does not, therefore, accept that disclosure of the job titles of senior officers and hence their identification as individuals, would be unfair under the terms of principle 1 of the DPA.
59. In cases where disclosure would be fair, there is then a further step to take. This is because, in order to satisfy principle 1, the disclosure must not only be fair but must also meet one of the conditions in Schedule 2 of the DPA.
60. In this instance, the Commissioner considers that condition 6 is most relevant, namely:
- "The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."*
61. The Commissioner has considered whether the disclosure is necessary to meet the legitimate interests in this instance. For example, could the legitimate interests be met by other means that interfere less with the employee's rights and freedoms or is it necessary to provide all of the information requested?
62. In the case of *Corporate Officer of the House of Commons v Information Commissioner* [2008] EWHC 1084 (Admin), the High Court said at paragraph 43 that 'necessary' in Schedule 2 condition 6 meant that there must be a "pressing social need" for disclosure. There is a general social need for transparency about the policies, decisions and actions of public bodies and this is the purpose of FOIA.
63. In this instance the Commissioner considers that disclosure would be necessary for the public to be able to establish the seniority of those involved. Given the specific public concerns about the impact of the One Barnet programme on public services the Commissioner considers that there is a pressing social need for information about the decision-

making process to be made available. In this case, it is only via disclosing details of those responsible for high-level decisions that this legitimate interest can be met.

### *Conclusions*

64. The Commissioner's conclusions make reference to "junior" and "senior" officers. For the avoidance of doubt, the definitions for "junior" and "senior", as they apply to the withheld information, were provided to the Commissioner by the council.
65. The Commissioner has concluded that the council has wrongly applied the exemption to job titles of junior officers which relate to posts held by more than one individual.
66. In relation to job titles of junior officers which relate to just one post-holder, the Commissioner has concluded that the council has correctly applied the exemption because disclosure of the information would be unfair and the legitimate interest in disclosure does not outweigh the rights and freedoms of the data subjects.
67. In relation to the job titles of senior officers, the Commissioner has concluded that the council has wrongly applied the exemption. Whilst he accepts that disclosure would be unfair he considers that, in this instance, the legitimate interest in disclosure outweighs the rights and freedoms of the data subjects.

## Right of appeal

---

68. 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,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

69. 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.
70. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed** .....

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**