

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 January 2013

Public Authority: London Borough of Islington
Address: Town Hall
Upper Street
London
N1 2UD

Decision (including any steps ordered)

1. The complainant has requested information relating to a building reinstatement survey commissioned by the London Borough of Islington ("the Council"). The Council disclosed the majority of the information but withheld parts of a contract under section 43(2) (commercial interests) and an address column of a survey report under section 40(2) (third party personal data) of FOIA. The Commissioner's decision is that the Council correctly relied on section 40(2) but not section 43(2) of FOIA. The Commissioner therefore requires the Council to disclose the information to which section 43(2) has been applied to ensure compliance with the legislation.
2. 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

3. On 13 September 2011 the complainant wrote to the Council and requested information in the following terms:

"Please make available:

- 1. the complete unredacted copy of the contract between Islington Council and Drivers Jonas dated 30 April 2010;*

- 2. the complete unredacted copy of the Drivers Jonas Report resulting from the Contract referred to in 1. above;*
- 3. copy of all invoices, all bills paid relating to fees for the above.*
4. The Council responded on 11 October 2011. It provided the requested information subject to some redactions, citing section 43 (request 1) and section 40(2) (request 2) of FOIA as its basis for withholding these elements.
5. The complainant wrote to the Council again on 8 November 2011 challenging its refusal to disclose all of the requested information. The Council subsequently carried out an internal review, the outcome of which was provided to the complainant on 22 December 2012.
6. The Council opened its letter by apologising for the delay in completing its review. It additionally apologised for the Council's failure to respond initially to the information request within the 20 working day timeframe specified by FOIA. Regarding the substantive contents of the response, the Council accepted that some of the redactions of the contract asked for at request 1 were unnecessary and therefore a revised version of the contract was provided. It maintained, however, that it had correctly redacted parts of the report described at request 2.

Scope of the case

7. The complainant contacted the Commissioner on 20 January 2012 to complain about the way her requests for information had been handled. In particular she has asked the Commissioner to consider the Council's decision to redact parts of the requested information. In addition, the complainant has asked the Commissioner to acknowledge and record the Council's delay in carrying out an internal review.
8. When deciding on the Council's application of exemptions within FOIA, the complainant has clarified that she does not require to be released the names of any individuals mentioned in the withheld information. The Commissioner has therefore proceeded on this basis.

Reasons for decision

Request 1 – information redacted from contract under section 43

9. Section 43(2) of FOIA states –

"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)."

10. The exemption is designed to protect the ability of a party to participate competitively in a commercial activity, particularly the purchase and sale of goods or services. As a prejudice-based exemption, section 43(2) will only be found to be engaged where a public authority can demonstrate that disclosure would, or would be likely to, result in some detriment to the commercial interests of a party. Even if this initial test is satisfied, section 43 is a qualified exemption which means that a public authority must weigh up the public interest in disclosure.

The prejudice test

11. In the Commissioner's guidance on the prejudice test¹ he observes that, in legal terms, the word 'prejudice' is commonly understood to mean harm. To say that disclosure would or would be likely to prejudice the interests specified in the exemption implies that it would (or would be likely to) harm those interests.
12. In the freedom of information guidance² of the Office of Government Commerce, now abolished, it described as follows the prejudice test in the context of section 43 –

"Prejudice to commercial interests will generally mean detriment to the ability to do business. This could involve giving commercial advantage to the competition, and/or loss of shareholder / customer / supplier confidence [...]"

13. The now common approach to considering the prejudice test was set out in the Information Tribunal's decision on *Hogan*³. The Tribunal in that case decided that the framework for assessing the test involved the

¹http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/the_prejudice_test.ashx

²http://webarchive.nationalarchives.gov.uk/20110405225302/http://www.ogc.gov.uk/documents/OGC_FOI_and_Civil_Procurement_guidance.pdf

³<http://www.informationtribunal.gov.uk/DBFiles/Decision/i42/MrCMHoganandOxfordCityCouncilvInfoComm17Oct06.pdf>

advancing of three principal questions. (1) What are the applicable interests within the exemption? (2) What is the nature of the prejudice being claimed and how will it arise? (3) What is the likelihood of the prejudice occurring?

14. The contract in question relates to the Council's commissioning of Drivers Jonas to carry out a survey of the rebuild value of its leasing stock. As the Council explained, it was essential to review rebuilding values on a regular basis to ensure that the right level of insurance cover was in place. The stock had not been measured and then valued for insurance purposes for a period estimated to exceed 10 years.
15. The rebuild value of a property refers to the costs associated with rebuilding a property in the event of fire damage and other risks. It is calculated with reference to standard property sizes, individual property types and the number of properties and types of properties in a building. It also considers a building's structures and fittings.
16. The Council has disclosed a copy of the contract with the following exceptions –
 - (a) Details of the way the contractor produces its reports and samples of the reports.
 - (b) The contractor's price breakdown structure.
17. The Council has argued that it is the contractor's commercial interests which are at stake. It is claimed that competitors could use the withheld information to their own advantage when bidding for future work. The Commissioner is prepared to accept in principle that the prejudice being argued is relevant to the exemption provided by section 43(2) of FOIA. There is also no question that the prejudice cited is 'trivial' or 'insignificant' which could have the effect of making any reliance on the exemption tenuous.
18. The Commissioner's next step is therefore to consider the nature of the prejudice being asserted and the way that this prejudice will arise. This is a crucial component of the test because it describes the causal link between disclosure and the harm being described. For this condition to be satisfied then, a public authority must be able to establish that the prejudice, which is real or of some substance, has a direct connection with the proposed disclosure.
19. Where a public authority feels that the release of information could prejudice the commercial interests of a third party, the Commissioner considers that it will not be appropriate in most cases for a public authority to speculate on the nature and severity of the prejudice that

might arise. Instead, he would expect arguments to have originated from the third party itself.

20. This follows the example set by the Information Tribunal in *Derry Council v Information Commissioner (EA/2006/0014)*⁴. In that case the Information Tribunal was not prepared to take into account an argument made by Derry Council to the effect that disclosure of information would harm the commercial interests of Ryanair. This was because the argument was conceived by the Council and was not the direct representation of Ryanair.
21. The Council has confirmed that it has consulted with Drivers Jonas, the contractor, about the requested information. In advancing its opposition to the release of the requested information, Drivers Jonas has focused on the possibility that disclosure would place it at a disadvantage when bidding for future contracts. This argument should be seen in the context of Drivers Jonas' belief that the withheld information essentially comprises its 'recipe' for carrying out a reinstatement cost assessment.
22. The Commissioner understands that the service provided by Drivers Jonas is not confined to the Council. All councils (and other leasehold landlords) with leasehold properties need to carry out an exercise to calculate building insurance cost as this forms part of a service charge.
23. According to Drivers Jonas the disclosure of the 'recipe' information could affect its bids for future related work not only with the Council but with all local authorities and for any other large reinstatement cost assessment. This is because it would remove Drivers Jonas' ability to bid on its own approach and show 'added value' compared to another provider.
24. Having had sight of the withheld information, however, the Commissioner considers that the arguments do not cogently demonstrate how the prejudice being claimed marries up with the contents of the redactions. In forming this view, the Commissioner has reminded himself that an evidential burden rests with a party to demonstrate that the potential disclosure could be prejudicial.
25. Here, the Commissioner has observed that broadly speaking the redacted information sets out or describes Drivers Jonas' standard

⁴ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i69/Derry.pdf>

reporting format. As such, it only offers a glimpse of the methodology followed by Drivers Jonas and would not allow a competitor an insight into how it would tailor its proposal to suit the particular requirements of a bid.

26. This, in the opinion of the Commissioner, is the critical point. It is not enough simply to show that a party is working in a competitive arena, rather the party must also show that the release of information could also harm its ability to operate in this competitive arena. In effect then, the party must successfully argue that the release of information could unbalance the level playing field on which parties enter their bids for work. Returning to his guidance, the Commissioner observed the following –

"Companies compete by offering something different from their rivals. That difference will often be the price at which the goods or services can be delivered, but that difference may also relate to quality or specification. Information which identifies how a company has developed that unique element is more likely to be commercially sensitive."

27. The Commissioner accepts that the disputed information, particularly the information described at (a), details the way the way that Drivers Jonas produces its reports for the purposes of an assessment. However, the Commissioner believes that the details themselves are too generic or general in nature to have any commercial currency.
28. In essence then, the Commissioner is unable to see how a competitor could use this information to undercut or otherwise adapt their own bid and therefore directly profit from the release of the information.
29. In saying this, the Commissioner has no doubt that public sector contracts of the size mentioned are attractive financially and, with this, highly competitive. However, this fact in itself does not mean any information provided by an interested party, or in this case the winning tenderer, will hold any commercial value to its rivals. Importantly, the Commissioner has reminded himself that while the nature of the work may be similar, the actual contracts offered by a public authority or organisation will vary significantly. Thus, the conditions upon which a contract was awarded at a particular point in time by a particular body, will likewise vary.
30. In this case, a period of over 10 years had passed before it was deemed necessary for an updated rebuild survey to be commissioned. Consequently, there is no indication that surveys are, or should be, undertaken frequently but only at regular intervals. It can therefore be assumed that the terms on which which a survey is carried out in the future will not be identical. This is because of the difference in the

prevailing financial climate and due to the possibility that the housing stock itself may have changed. Equally, the terms of contract offered by a different public authority or organisation will not be the same because of the natural differences in the size and profile of the housing stock.

31. For prejudice to arise then, the Commissioner considers that the information must reveal the unique selling points of Drivers Jonas which will have relevance not only for this contract but for a subsequent tender bid. In the Commissioner's view, it is here that the argument falls down. As stated, the Commissioner does not dispute that the information, particularly (a), reflects the way in which Drivers Jonas presents its assessment information. Nevertheless, he does not agree that this information represents a unique selling point of the contractor or sets out a specific negotiating position.
32. In coming to this view, the Commissioner has recognised that the information listed at (b), namely the pricing structure, could be more easily imagined to have commercial significance. Yet, he has decided that the arguments provided by Drivers Jonas fail to establish a clear and meaningful link between the specific information itself and the harm to its own interests which it considers would occur.
33. For the reasons set out above, the Commissioner has determined that the Council, via Jonas Drivers, has not demonstrated that the second part of the prejudice has been met. The application of section 43(2) therefore falls at this hurdle, meaning the Commissioner has not been required to assess the public interest in disclosure.

Request 2 – information withheld under section 40(2) of FOIA

34. Section 40(2) of FOIA provides an exemption to the right to access recorded information where it is the personal data of any third party. For a public authority to rely on section 40(2) of FOIA it must be satisfied that:
 - the disputed information constitutes the personal data of a third party; and if so
 - disclosure of the disputed information would contravene a data protection principle contained in the Data Protection Act 1998 (DPA).
35. The Commissioner addresses each of these points in turn.

Is the disputed information personal data?

36. The complainant has been provided with a copy of the insurance survey produced by Drivers Jonas. This was with the exception of the

leaseholders' names and property numbers which have been withheld under section 40(2) of FOIA.

37. The report itself was created in an Excel format and includes various columns of information, including the individual lines of a property address and the values and premiums attached to a property for 2008/09 and 2011/12. The Commissioner notes that a question was raised during the investigation regarding whether there was additional outstanding information that originally featured as part of the report, other than the names and property numbers which had been redacted. The Council has, however, confirmed that the Excel spreadsheet represents the entirety of the report, further clarifying that it had not paid for a written report to accompany each survey.
38. The complainant has explained that she does not require the names of the leaseholders included in the survey. The question for the Commissioner is therefore whether a property number will still be personal data for the purposes of the DPA. Where it is not possible to identify the subject of information from the material to be disclosed either on its own, or in conjunction with other information available to the general public, it will not be personal data and therefore section 40(2) will not be engaged.
39. In the Commissioner's guidance 'Determining what is personal data'⁵, the Commissioner states that the starting point –

"might be to look at what means are available to identify an individual and the extent to which such means are readily available. For example, if searching a public register or reverse directory would enable the individual to be identified from an address or telephone number, and this resource is likely to be used for this purpose, the address or telephone number should be considered to be capable of identifying an individual."
40. It therefore follows that even with the names of leaseholders removed from the survey, the property numbers included in the report fall under the description of personal data. This is because the identity of the leaseholder could be matched with a particular property when considered in combination with other available information sources, including the land registry and electoral register.

⁵http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf

41. This finding also corresponds with the finding of the Information Tribunal in *England & London Borough of Bexley v the Information Commissioner* (EA/2006/0060 & 0066)⁶. Although the circumstances are not analogous, the Commissioner has nevertheless found relevant the Tribunal's determination that "knowing the address of a property makes it likely that the identity of the owner will be found" (paragraph 94).
42. In light of this finding, the Commissioner must next consider whether disclosure of the disputed information would be in accordance with the provisions of the DPA.

Would disclosure contravene a data protection principle?

43. The relevant data protection for the purposes of the request is the first. This requires the fair and lawful processing of personal data. The Commissioner's considerations here focus on the question of whether disclosure could reasonably be deemed fair in all the circumstances.

Fairness

44. The application of the first data protection principle in respect of fairness involves striking a course between competing interests, specifically one which upholds the right of a data subject to privacy against one which advocates transparency and accountability. To establish what he considers to be the correct path, the Commissioner will be instructed by the following factors –
 - i. A data subject's reasonable expectations of what would happen to their personal data.
 - ii. The consequences of disclosure.
 - iii. The balance between the rights and freedoms of a data subject with the public's legitimate interest in disclosure.
45. In addition to these factors, the Commissioner has been guided to some extent by the decision notice issued on FS50413081⁷, which involved Exeter City Council. It is noted that the Information Tribunal has heard

⁶ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i146/ENgland.pdf>

⁷ http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs_50413081.ashx

an appeal⁸ on the Commissioner's findings and upheld the decision notice.

46. In the Exeter case a request was made for a list of properties which were owned by, or leased or rented to, the public authority. Exeter Council had agreed to the release of a list of commercial properties it owned, leased or rented but refused under section 40(2) of FOIA the disclosure of the same information for residential properties. In contrast, the Commissioner, and likewise the Tribunal, decided that the requested information should be disclosed with the exception of the properties used to house individuals requiring protection. The issue of vulnerable tenants does not feature as part of this case and so does not require further attention by the Commissioner.
47. The reasons for the Commissioner's findings on FS50413081 can be summarised as follows –
 - The tenants were not likely to have reasonably expected the property list to be disclosed.
 - That in general the information was of a low inherent sensitivity.
 - The disputed information could anyway be obtained by a member of the public if they were minded to do so by, for example, contacting the land registry.
 - That there would not be unwarranted harm or distress caused to the data subjects.
48. Bearing in mind these points, and finding there was a legitimate interest in the public knowing about the assets of the public authority, the Commissioner concluded that disclosure was within the provisions of the DPA and therefore section 40(2) was not engaged.
49. The Commissioner considers that there is a resemblance between these matters, in that the disputed information forms part of a list of properties ultimately owned by a public authority. However, the crucial and defining difference here in the opinion of the Commissioner is the additional detail that disclosure would tell us about the leaseholders. Specifically, the release of the information in the report would allow a

⁸ http://www.informationtribunal.gov.uk/DBFiles/Decision/i857/UKFTT_GRC_EA-2012-0073_2012-09-24.pdf

connection to be made between the leaseholders and the actual insurance premiums that they pay.

50. Like the Exeter case the Commissioner considers that the data subjects would not have a reasonable expectation that their personal data in this case. However, the Commissioner feels that the extra information contained in the report, namely the insurance premium, increases its sensitivity. This is because it tells us something about the financial responsibilities of the leaseholder; a feature of the disclosure that did not arise in the Exeter case. The natural consequence of the increased sensitivity of the information, to the Commissioner's mind, is that there would be a commensurate increase in the distress caused to the leaseholders through the placing of the extra column of the report in the public domain.
51. This would push the release of the information from fair to unfair. Importantly, there is no indication that the insurance premium information could be legitimately obtained elsewhere by a member of the public, which could have had the effect of making disclosure fair.
52. In forming his view, the Commissioner has acknowledged that there may be a legitimate interest in disclosure, particularly in light of concerns that have been raised about the survey commissioned by the Council. The Commissioner, however, considers that caution must always be exercised when deciding whether personal data should be released. This is because of the potential impact that disclosure could have on a data subject.
53. Bearing this in mind, the Commissioner is satisfied that the release of the disputed information does not meet the fairness provision contained in the first data protection principle. He has therefore decided that the Council was entitled to rely on section 40(2) of FOIA to withhold the requested information.

Other matters

54. Under FOIA there is no obligation for an authority to provide a complaints process. However, the section 45 code of practice⁹ considers it is good practice to have one.
55. The Commissioner recommends that in most cases an internal review should be carried out within 20 working days. He notes, however, that this timeframe was not adhered to on this occasion. The Commissioner therefore expects the Council to take steps to ensure that it is able to meet this timeframe in the future.

⁹ <http://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/code-of-practice>

Right of appeal

56. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

57. 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.
58. 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

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