

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 June 2014

Public Authority: Cambridgeshire County Council
Address: Shire Hall
Cambridge
CB3 0AP

Decision (including any steps ordered)

1. The complainant submitted a number of requests to Cambridgeshire County Council (the Council) regarding the monitoring of the grant it had awarded to a local community transport association, Fenland Association for Community Transport (FACT). The Council provided some of the requested information; explained that some of the requested information was not held; and withheld some information on the basis of section 43(2) (the commercial interests exemption) of FOIA. The complainant disputed the Council's position that it does not hold any information falling within the scope of requests 4, 5 and 6(c), (d) and (f). He also disputed the Council's decision to withhold the information sought by request 6(e) on the basis of section 43(2).
2. The Commissioner's decision is that:
 - The Council does not hold information falling within the scope of requests 4, 5 and 6(c), (d) and (f).
 - The information falling within the scope of request 6(e) is not exempt from disclosure on the basis of section 43(2) of FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with the information sought by request 6(e).
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. The complainant submitted the following requests to the Council on 19 March 2013:

'Thank you for your response. In the Grant Funding Agreement you sent me under section

3.3. it states (FACT) shall accept Concessionary Fares passes when presented, and offer members a discount in line with the terms and conditions as set down in the separate CCC Concessionary Fare Scheme agreement document.

[1] May I please have a copy of this agreement with FACT.

3.6 it states including transport requests throughout the CCC operated Cambridgeshire Brokerage Scheme (CaMBS)

[2] May I please have the figures for this transport for 2011 and 2012 in mileage and cost and purpose of transport. And in mileage, cost and number of passengers for the third quarter of 2011 & 2012.

3.7 it states 'it is the responsibility of (FACT) to ensure that all members meet the required eligibility criteria IE that all passengers thorough rural isolation or mobility difficulties, would have difficulty in accessing or using conventional means of transport...

...[3] secondly as this is a requirement of the terms and conditions of this annual grant, will the CCC now confirm that this will be implemented immediately, both for new applicants and renewals alike...

...[4] 5.1 Please may I have a copy of the annual budget and action plan for 2013.

[5] Please may I have a copy of the 2011 financial report.

[6] Please could I have a copy of the Quartely service performance indicators (for 2011 and 2012), for each service operations as stated in section 3.1 to 3.5, 3.6 and 3.7 of the agreement.

This would include:

- (a) *Total number of single passengers journeys undertaken (a passenger journey is defined as a one-way journey, therefore the outward and return parts of a return journey are counted as two single passengers)*
- (b) *Total miles travelled*
- (c) *Revenue received from each service operated*
- (d) *A breakdown number of individuals and group members by parish*
- (e) *Total number of group hire bookings including total number of passengers carried, mileage and revenue received*
- (f) *Total number of unmet requests and journeys not operated*

[7] Please could I have a copy of all monitoring information as detailed in section 3.3 and 5.1 of this agreement, including those journeys made using bus passes.'

6. The Council responded to these requests on 18 April 2013 under its reference number FOI 2744. It provided the information sought by request 1. In relation to request 2 it explained that it did not hold information about mileage and costs for CaMBS. However, it did hold the number of enquires received and the number of journeys undertaken and this information was provided. The Council explained that request 3 was not a request for recorded information and the complainant would receive a separate response to this query in due course. For requests 4 and 5 the Council explained that it did not hold this information albeit that the relevant officers have had sight of it. With regard to request 6 the Council explained that it only held the information falling within the scope of points (a) and (b) and this information was provided. With regard to point (e) the Council explained that it did not hold the raw data and thus was unable to separate school journeys from other travel. It asked the complainant to confirm whether he still wished to be provided with this information. Finally the Council provided the information sought by request 7.
7. The complainant contacted the Council on 24 April 2013 in order to ask for an internal review. He raised the following points of complaint:
 - In relation to request 2, he asked whether the Council paid for any of the 36 journeys carried out by FACT.
 - He disputed the Council's position that the information falling within the scope of requests 4, 5, and points (c), (d) and (f) of request 6 was not held.
 - He also asked to be provided with the totalled information that the Council explained that it did hold in respect of part (e) of request 6.

8. The Council informed the complainant of the outcome of the internal review on 27 August 2013. In the review the Council concluded that:
- In relation to request 2, none of 36 journeys were paid for by the Council.
 - The Council did not hold the information falling within the scope of requests 4, 5, and points (c), (d) and (f) of request 6.
 - The information sought by request 6 (e), ie the full data including school journeys, was exempt from disclosure on the basis of sections 43(2) and 41(1) of FOIA.¹

Scope of the case

9. The complainant contacted the Commissioner on 11 September 2013 to complain about the way his requests for information had been handled. He raised the following grounds of complaint:
- He disputed the Council's position that it did not hold information falling within the scope of requests 4 and 5.
 - He also disputed the Council's position that it did not hold the information falling within the scope of parts (c), (d) and (f) of request 6.
 - He argued that the information falling within the scope of section part (e) of request 6 was not exempt from disclosure on the basis of the sections 41(1) and 43(2) and in any event there was a compelling public interest in disclosing this information.
10. He was also dissatisfied with the Council's delay in informing him about the outcome of the internal review.²

¹ The Council withdraw its reliance on section 41(1) during the course of the Commissioner's investigation of this complaint.

² The complainant also submitted two linked complaints to the Commissioner about other related requests he had made to the Council. The Commissioner's findings in respect of those complaints are set out in decision notices FS50511196 and FS50524922.

Reasons for decision

Requests 4 and 5

11. Request 4 sought a copy of FACT's annual budget and action plan for 2013 and request 5 sought a copy of its 2011 financial report.
12. In its responses to the complainant the Council explained that it did not hold the information sought by either request; although the Council had seen this information as part of the monitoring process in respect of the grants, copies of the requested documents had not been retained on file.
13. The complainant's basis for disputing this position is as follows:
14. The complainant argued that it was illogical to suggest that the Council retained some of the information provided to it by FACT as part of the monitoring process (such as the information covered by requests 6(a) and (b)) but then apparently did not retain other documentation that had been supplied. This led the complainant to believe that in fact all of the information provided by FACT to the Council had actually been retained, including the information sought by requests 4 and 5. He also emphasised that the terms and conditions of the agreement between FACT and the Council stated that the latter '**must receive** [complainant's emphasis] annual financial reports by the end of September for the previous financial year'. The agreement did not say 'must see' it says 'must receive'.
15. In circumstances such as this where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of 'on the balance of probabilities'.
16. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request.
17. In applying this test the Commissioner will consider:
 - The scope, quality, thoroughness and results of the searches; and/or
 - Other explanations offered as to why the information is not held.
18. The Commissioner asked the Council to explain what searches had been carried out to locate the information sought by requests 4 and 5 and to explain why such searches would have been likely to retrieve any relevant information.

19. The Council explained that the officers with responsibility for monitoring these contracts had searched the manual files where the information may be held. It explained that these officers are the only staff in the Council with a business need to have this information and therefore the searches they undertook would have identified it if it was held. The Council explained that no electronic searches were made as the information was provided as paper copies as part of FACT's Annual Reports which are given to officers who attend FACT AGMs. As no electronic copies are provided, such documents would not have been stored on the Council's systems.
20. The Commissioner also asked the Council to explain how it monitored FACT's obligations under the Grant Funding Agreement, in particular, with respect to point 5.1 of the agreement. The Commissioner also sought any addition explanation as to why the Council did not apparently hold the information sought by requests 4 and 5.
21. In response the Council explained that the information was used as a basis for discussion at quarterly Management Committee Meetings to enable it to make informed decisions. The Council also noted that it should be remembered that additional checks are made to ensure that all operators, not just FACT, are fulfilling their obligations when they have received grant funding.
22. The Commissioner has some sympathy with the complainant's expectation that the information sought by requests 4 and 5 would be held by the Council given the wording of the terms and conditions of the agreement; ie 'must receive' does suggest that documentation would be retained. However, the Commissioner is satisfied that the searches undertaken by the Council for the requested documentation are logical ones and would have been likely in all of the circumstances to locate the information if it was held. Furthermore, the Commissioner notes that the Council has located (and either provided or withheld on the basis of exemptions) a wide range of other information sought by the complainant in relation to other similar requests he has submitted. This leads the Commissioner to have some confidence in the nature of the searches undertaken by the Council, and the potential for such searches to locate any relevant information in respect of information concerning grants awarded to FACT. Therefore, on the balance of probabilities the Commissioner is satisfied that the Council does not hold the information sought by requests 4 and 5.

Requests 6 (c), (d) and (f)

23. In its response to these requests the Council explained that it did not hold the information in question. It explained the information sought related to categories taken from a previous generic agreement. These

had been reassessed and it was decided that the information concerning these categories was no longer needed by the Council. It also explained that it did not hold these legacy details for FACT and agreements had been updated so that these performance indicators are no longer included in the agreements.

24. The complainant argued that such information would be held by the Council. Again, as with request 4 and 5, he argued that it was illogical to argue that the Council would retain some information provided by FACT associated with monitoring its performance but not other data. More specifically in relation to the information sought by 6(c) the complainant noted that such information – revenue received from each service operated – also happened to be the same information that he believed that FACT were attempting to conceal in their accounts. (He referred to FACT's apparent approach of grouping 65% of their income under one heading in their accounts despite such revenue being from three unrelated revenue streams.) He argued that it seemed too convenient and coincidental that this was also information that the Council had either not collected or had destroyed. Similarly the complainant alleged that disclosure of the information sought by request 6(d) would demonstrate that FACT had made untrue statements and go a long way to confirming that FACT had allegedly been working outside its remit and illegally taking business away from taxi firms.
25. Finally the complainant provided the Commissioner with a copy of a letter he had received from a different public authority in response to a separate FOI request. This letter was from FACT and explained that under a service level agreement it provided the Council with quarterly performance indicators which would include the total number of passenger journeys, total miles travelled, total number of group hire bookings and total number of unmet requests and journeys not operated. The Commissioner understands that this letter dates from 2012. The complainant emphasised that information described in the letter by FACT as data it provided to the Council was the same information that in response to this request the Council was arguing that it did not hold.
26. In order to investigate this particular ground of complaint the Commissioner asked the Council to explain what searches had been carried out to locate the requested information.
27. In response, the Council emphasised that performance indicators to which these requests related were taken from previous generic agreements no longer used by the Council and thus it had no business need to record this information. With regard to the searches, the Council explained officers with responsibility for monitoring these contracts searched the only electronic system where the information may be held.

Only electronic systems were searched as ridership data (ie information falling within the scope of these requests) is only submitted to the Council in electronic format. The Council examined the data that had been submitted but has established that the requested information was not contained within it.

28. On the balance of probabilities the Commissioner is satisfied that the Council does not hold the information falling within the scope of the requests 6 (c), (d) and (f). He has reached that conclusion in light of the fact that the Council has no need to retain the data requested as it relates to obsolete performance agreements and also because he is satisfied that the Council's searches for any information that may have been retained were sufficiently logical and focused to ensure that in all likelihood if relevant information had been retained it would have located. With regard to the letter described at paragraph 25, in the Commissioner's view it more likely that although such information was at one point provided to the Council, this information has not been retained.

Request 6(e)

29. This request sought the following information for 2011 and 2012:
- (i) the total number of group hire bookings;
 - (ii) total number of passengers carried via such bookings;
 - (iii) total mileage of such bookings; and
 - (iv) total revenue of such bookings.
30. In its response to the complainant the Council explained that the information it held concerning group bookings could not be separated from the information concerning school contracts. The complainant confirmed that he wished to be provided with this amalgamated data.
31. The Commissioner has been provided with the withheld information in relation to this request. In relation to this data the Commissioner wishes to note two key points. Firstly, the Council does not hold any information regarding the revenue of such bookings (ie the data described at point (iv) above) because this information is not provided to it by FACT. Secondly, the data falling within this request is broken down into the following financial years: 2010/11; 2011/12; and for the period April 2012 to December 2013. However, it is only the data for this latter period which includes figures for contracted work regarding school contracts in addition to group hire work. In other words, it is the Commissioner's understanding that the data held for the financial years

2010/11 and 2011/12 simply relates to group bookings and is not actually amalgamated with information concerning school contracts.

32. Although the Council initially argued that the information concerning request 6(e) was exempt from disclosure on the basis of sections 41(1) and 43(2) of FOIA it no longer seeks to rely on the former exemption.

33. Section 43(2) states 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).'

34. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner believes that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.

35. In relation to the commercial interests of third parties, the Commissioner does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, the Commissioner expects that arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns.

36. The Council argued that disclosure of the withheld information would be likely to prejudice the interests of FACT. It explained that it had not

exchanged correspondence with FACT on this occasion in relation to this specific request. However it had done so in relation to other requests and whilst FACT had been happy to release the majority of information sought, it had identified certain areas that could be used by competitors / organisations looking to set up a competing service, the disclosure of which it would consider to be likely to have a detrimental impact on its ability to participate in a competitive environment. Such details included information about set up costs, details that are used to predict business growth, eg passenger numbers, and revenues received.

37. With regard to the specific information sought by this request the Council argued that disclosure of this information would enable competitors to see exactly how FACT run their business and how their charges relate to both passenger numbers and mileage.
38. Furthermore, the Council argued that as the information includes further information about school journey services provided by FACT, disclosure of the information would also provide business intelligence about this area of FACT's work.
39. For his part the complainant argued that details of mileage information in respect of school contracts was already available to all other bidders in relation to each contract that the Council put out to tender. In respect of details of the group mileage, the complainant argued that FACT is not meant to be a profit making service and thus it was not supposed to be competing with other industries in a commercial way. Furthermore, the complainant stated that the argument that FACT's commercial interest would be prejudiced by the disclosure of such information was undermined by the disclosure of mileage information in respect of its Dial a Ride and Dial A Car services in response to request 6(a).
40. With regard to the three limb test the Commissioner is satisfied that the first limb is met given that the nature of prejudice envisaged to FACT's interests is clearly one that falls within the scope of the exemption provided by section 43(2).
41. In terms of the second limb, the Commissioner accepts that disclosure of the withheld information, ie details of passenger numbers, bookings and miles, when taken together could potentially provide FACT's competitor organisations looking to set up a rival service with some insight into FACT's business operations. The Commissioner is therefore satisfied that there is a causal relationship between the disclosure of the withheld information and potential prejudice to FACT's commercial interests. In reaching this finding the Commissioner notes the complainant's comments regarding FACT not being a profit making service. However in the Commissioner's view this does not necessarily preclude FACT from competing with other organisations which are profit

making. The underlying motive for commercial transactions is likely to be profit, but this is not necessarily the case, for instance where a charge for goods or the provision of a service is made simply to cover costs. Simply because one organisation, eg FACT, is non-profit making does not, by default mean that it should not compete for contracts with organisations which are profit making.

42. However, in relation to third limb, the Commissioner is not persuaded that on the basis of the submissions provided to him that the likelihood of this prejudice occurring is one that is anything more than hypothetical. The Commissioner has reached this conclusion because in the absence of data concerning revenues, which although sought by this request is not actually held by the Council, he is not at all clear how disclosure of the information that is held would, as is argued, reveal exactly how FACT run their business and how their charges relate to both passenger numbers and mileage. The Commissioner also notes that the information in relation to school contracts is only included in part of the withheld information (ie April 2012 to December 2013) and therefore the argument that disclosure of entirety of the withheld information would reveal business intelligence about this aspect of the FACT's business is only partly correct. Moreover, the Commissioner agrees with the complainant that given that details of the mileage for the school contracts are provided to prospective bidders, and the identity of the contracts that FACT won are in the public domain, it is difficult to see how disclosure of this data associated with school contracts could be obviously prejudicial. It should also be remembered that the school contract data, where it is recorded, is amalgamated with the group booking data anyway thus making it harder to draw any valid insight into the data associated with either activity.
43. The Commissioner has therefore concluded that the information which the Council holds and falls within the scope of request 6(e) is not exempt from disclosure on the basis of section 43(2). This information must therefore be disclosed to the complainant.

Other matters

44. The complainant was dissatisfied with the amount of time it took the Council to complete its internal review. FOIA does not contain a statutory time within which such reviews must be completed. However, in the Commissioner's view most reviews should be completed within 20 working days and reviews in complex cases completed within 40 working days. In the circumstances of this case the Commissioner understands that an administrative error led to this review not being completed

within these timescales. The Commissioner expects the Council to ensure that such timescales are adhered to in the future.

Right of appeal

45. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

46. 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.
47. 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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