

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 March 2014

Public Authority: The Governing Body of All Souls College Oxford
Address: High Street
Oxford
OX1 4AL

Decision (including any steps ordered)

1. The complainant has requested a copy of the Option Agreement (the Agreement) made between All Souls College Oxford (the College) and [named individual]. The College refused to disclose this information under section 43(2) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the College has failed to demonstrate that section 43(2) FOIA is engaged in relation to some of the withheld information but has correctly applied section 43(2) FOIA to parts of the withheld information. The Commissioner also considers that section 40(2) FOIA should have been applied to some of the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide a copy of the Option Agreement with redactions made solely to the date of completion, the price and the names and personal details of the buyer and the solicitors involved in the transaction.
4. The public authority must take this step 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 23 April 2013 the complainant requested information of the following description

"Please supply the details of the 'binding agreement' made by the college with developer Platinum Revolver on 26th November 2012 in respect of the sale to the latter of Kensal Rise Library in Brent, north-west London (I understand that this was in fact an 'option agreement' with the buyer having the right to exercise an option to purchase the Kensal Rise library)."
6. On 22 May 2013 the College responded. It refused to provide the complainant with the requested information under section 43(2) FOIA.
7. The complainant requested an internal review on 30 May 2013. The College sent the outcome of its internal review on 24 June 2013. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 14 October 2013 to complain about the way his request for information had been handled.
9. The Commissioner's investigation has looked at whether the College correctly applied section 43(2) FOIA to the withheld information.
10. In addition the Commissioner, as regulator of the Data Protection Act 1998, has considered whether section 40 (2) of FOIA was applicable to some of the information.

Reasons for decision

Section 40(2)

11. Section 40(2) FOIA provides an exemption for information that constitutes the personal data of third parties:

"Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied."

Section 40(3)(a)(i) of the Act states that:

"The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress),"

11. Upon viewing the withheld information the Commissioner noted that it contains the names and personal details of [named individual] and solicitors involved in the transaction. The Commissioner considers that this would be personal data from which the data subjects would be identifiable.
12. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) of the Act are met. The relevant condition in this case is at section 40(3)(a)(i) of the Act, where disclosure would breach any of the data protection principles. In this case the Commissioner has considered whether disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in Schedule 2 should be met.

Likely expectation of the data subject

13. The Commissioner considers that [named individual] would not expect their name or personal details to be disclosed within the Option Agreement as this individual has objected to disclosure of this document in its entirety. Also the Commissioner does not consider that the legal advisers involved in the transaction would expect their names or personal details to be disclosed within the Agreement.

The legitimate public interest

14. The Commissioner considers that there is a legitimate public interest in disclosure of information surrounding the transaction to which there is significant opposition to promote openness, accountability and increase public understanding.

15. However the Commissioner also considers that the data subjects were unlikely to have had an expectation that their personal details would be disclosed into the public domain when the Agreement was drafted.
16. The Commissioner considers that disclosure of the personal details of [named individual] and the legal advisers involved in the transaction only meet the legitimate public interest described above in a very limited way. The Commissioner is satisfied that the interests of the data subject would not be outweighed by the legitimate public interest in this case.
17. The College should therefore have applied section 40(2) FOIA to the personal details of [named individual] and the legal advisers involved in the transaction.

Section 43 – commercial interests

18. 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.
19. 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."*¹
20. The College has explained that the withheld information relates to the sale of College property. The Commissioner has concluded that this falls within the scope of the exemption.
21. Having concluded that the withheld information falls within the scope of the exemption the Commissioner has gone onto consider the prejudice disclosure would cause and the relevant party or parties who would be affected.

¹ See 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

Whose commercial interests and the likelihood of prejudice

22. 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.
23. The College has stated that, in withholding the information it considers that disclosure of the information would prejudice its own commercial interests.

The nature of the prejudice

24. The College has argued that disclosure would prejudice its own, as well as the potential buyer's commercial interests.
25. It explained that the College is required to compete with other sellers (the majority of which are not subject to FOIA) to attract buyers for its assets. It said disclosure would prejudice the College's ability to compete in this commercial activity in the following ways:
 - It explained that the College is required to provide vacant possession of the Property in order to complete the sale. Disclosure of the Agreement (and in particular the anticipated date of completion) would make it easier for opponents of the sale to occupy the Property and increase levels of activism on the intended completion date, prejudicing completion. It said that this is not a speculative risk, it explained that when the Council took steps to close the existing library at the Property, various individuals sought to physically obstruct the Council and its employees. It went on to argue that should the sale of the property to [named individual] not be completed (for this or any other reason) disclosure of the Agreement would also make it more difficult for the College to find an alternative purchaser for the Property, for the reasons set out above.
 - The College said that disclosure of the Agreement would place it at a disadvantage in negotiating with other potential buyers of the property (should the sale to [named individual] not complete), because the terms on which the College is willing to dispose of this asset, including the price, would be in the public domain. It went on to say that the College would also

be disadvantaged in negotiations for the sale of other property assets, for the same reasons.

- Finally it argued that disclosure of the Agreement, in clear breach of the confidentiality clause, which it said is entirely standard in agreements of this kind, and against [named individual's] express wishes would deter potential buyers from this and other College property. It argued that it would suggest that the College is not able to honour its contractual obligations (in relation to confidentiality or otherwise) nor provide appropriate protection for genuinely sensitive confidential information.

26. The College argued that [named individual] is also engaged in the commercial activity of buying and selling property and the subsequent development of the property relevant to the information covered by this request. It said that disclosure of the Agreement would prejudice [named individual's] ability to compete with others engaged in similar commercial activities for the following reasons:

- It said that a failure to complete the sale of the property to [named individual], as a result of disclosure of the agreement, and subsequent occupation or increased activism on the date of completion, would deprive [named individual's] opportunity to develop and sell interests in the property. This would put [named individual] at a disadvantage in comparison with competitors, particularly as a result of [named individual's] significant investment already put into the property.
- Disclosure would put [named individual] at a disadvantage in negotiations with other sellers, because the terms of the agreement would be in the public domain.
- It said that [named individual] has already been required to expend considerable resources in managing opposition to the purchase of the property which has served as a distraction to commercial activities. It said disclosure of the Agreement would inevitably provide a further opportunity for opponents of the sale to disrupt [named individual's] business (and therefore putting [name individual] at a commercial disadvantage).
- It summarised that the above arguments are not speculative, it confirmed that the College had consulted [named individual] at the time of the original request and at the time of the internal review. It explained that [named individual] had objected to disclosure.

27. In this case the College has argued that the prejudice to its own and [named individual's] commercial interests would occur. As stated above, it therefore has a higher evidential burden to meet than if it had claimed the prejudice would be likely to occur. The consequences of disclosure described by the College seem to relate to disclosure of the date of proposed completion and the cost of the transaction. It has said that if the date were disclosed this would result in increased protest and activism to try to prevent completions. It said that this had happened previously on the date the library was closed which is why it considers similar action would happen again on the proposed date of completion. In relation to the price, the College has argued that if the transaction did not complete, it would be put at a commercial disadvantage when trying to negotiate a further sale.
28. The Commissioner's guidance and many previous decision notices have accepted the general principles that information relating to a commercial activity is more likely to be sensitive when the activity in question is live². In this case, at the time the request was made, the transaction had not completed. The Commissioner is however aware that the transaction has subsequently completed.
29. The Commissioner considers that disclosure of the proposed date of completion and the price of the sale, at the time the request was made, would prejudice the College's and the [named individual's] commercial interests. After viewing the withheld information, and based upon the arguments provided by the College, the Commissioner does not consider that disclosure of the other terms of the agreement would prejudice the commercial interests of the College or the [named individual]. The Commissioner has however gone on to consider whether disclosure of the remaining information would be likely to prejudice the College's or [named individual's] commercial interests.
30. The Commissioner considers that the prejudice test is not a weak test, and a public authority must be able to point to prejudice which is "real, actual or of substance" and to show some causal link between the potential disclosure of specific withheld information and the prejudice which would be likely to occur.

² See, for example, this decision notice relating to the London Borough of Newham:
http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs_50431421.ashx

31. The Commissioner considers that an evidential burden rests with public authorities to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, real, actual or of substance. In the Commissioner's view, if a public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected.
32. The Commissioner considers that the College has failed to identify precisely what form the prejudice would take and failed to clarify how this would be caused by the remaining parts of the Agreement.
33. Upon viewing the withheld information, the Commissioner does not consider that the remaining parts of the Agreement would be likely to result in the prejudice claimed. In failing to explain precisely how the disclosure of other specific parts of the Agreement would be likely to result in the prejudice claimed, the Commissioner therefore considers that the College has failed to demonstrate a necessary causal link.
34. The Commissioner has therefore concluded that the College has failed to demonstrate that the exemption is engaged in relation to the requested Agreement apart from the clauses which contain information about the proposed date of completion and the price.
35. As the Commissioner does consider that the exemption is engaged in relation to some parts of the Agreement he has gone on to consider the public interest test in relation to that specific information.

Public Interest Test

Public interest in favour of disclosure

36. The College has acknowledged that there is significant opposition to the sale of the property and therefore disclosure of the Agreement would have some public interest in that regard. The Commissioner considers that as there is opposition to the sale, disclosure would promote openness and transparency. It would enable the public to be more informed in relation to the decision to sell the property.

Public interest arguments in favour of maintaining the exemption

37. The College has provided the following public interest arguments in favour of maintaining the exemption:
 - It said that the sale to [named individual], following an extensive marketing campaign and careful evaluation of all resulting

proposals, is the most likely to provide a viable long term future for the building that both meets the College's charity obligations on disposal and provide for a community library facility. If the sale to [named individual] did not complete, it may not be possible to find another buyer who is willing or able to provide the same community benefits, on terms acceptable to the College. It said that this would not be in the public interest. It said that even if such a buyer could be found, disclosure of the Agreement would prejudice negotiations with that buyer which would not be in the public interest.

- It explained that the College relies on its income from its property assets to conduct its research activities. It said that prejudicing the College's ability to generate such income from the sale of property, would make it less able to conduct research of a similar standard and scale which it said would not be in the public interest.
- Private companies may be deterred from contracting with the College in the future if commercially sensitive information were disclosed into the public domain.

Balance of the public interest

38. The Commissioner considers that as there is strong opposition to the sale of the property in question, there is a strong public interest of disclosure of information which would promote openness, transparency and accountability. The Commissioner also considers that there is a public interest in disclosure of information which would better inform the public of the property transaction to which there is opposition.
39. The Commissioner does however consider that there is a strong public interest in not disclosing information which would prejudice the College's or [named individual's] commercial interests. As the transaction had not completed at the time the request was made, the Commissioner considers that this significantly increases the weight of the public interest in favour of maintaining the exemption. The Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.

Right of appeal

40. 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

41. 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.
42. 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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