

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 July 2015

Public Authority: Liverpool City Council
Address: Municipal Buildings
Dale Street
Liverpool
L2 2DH

Decision (including any steps ordered)

1. The complainant has requested information about a report relating to the transition of Liverpool Direct Limited to Liverpool City Council ownership. Liverpool City Council provide some information, confirmed that some of the information was not held and withheld some information under the exemption for prejudice to commercial interests (section 43(2) of the FOIA).
2. The Commissioner's decision is that Liverpool City Council has failed to demonstrate that section 43(2) of the FOIA is engaged in relation to the information requested in part (2) of the request, namely the agreement between the council and KPMG relating to the engagement of consultants.
3. The Commissioner requires the public authority to disclose the requested information.
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 15 November 2014 the complainant wrote to Liverpool City Council (the "council") and made the following request:

(in relation to a report by KPMG relating to the transition of Liverpool Direct Limited to Council ownership)

"(1) The title page and table of contents page(s) of the full KPMD-LDL report dated 10 October 2014;

(2) A copy of the Engagement Letter reproduced as Appendix 1 of the full report;

(3) Any documentation of agreements, legal opinions, strategies and procedures established and considered by the Council for the handling of requests relating to this report and other LDL material."

6. The council responded on 22 December 2014 and stated that, in relation to (1), there was no table of contents page but it provided the requested title page. In relation to (3), it confirmed that the information was not held and, in relation to (2) it stated that the information was being withheld under the exemption for prejudice to commercial interests (section 43(2) of the FOIA).
7. Following an internal review the council wrote to the complainant on 2 February 2015. It stated that it was maintaining its original position.

Scope of the case

8. On 17 February 2015 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly withheld the information requested in part 2 of the request, namely an "engagement letter".

Reasons for decision

Section 43(2) – prejudice to commercial interests

10. Section 43(2) provides an exemption from disclosure for 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.
11. The withheld information consists of an agreement between the council and KPMG relating to the engagement of consultants.

12. "Commercial interests" in the context of this exemption can include a wide variety of activities. In this case, the withheld information relates to the provision of a service by KPMG to the council, namely the formulation of a report. The Commissioner is, therefore, satisfied that the information falls within the scope of the exemption.
13. The Commissioner wrote to the council and gave it an opportunity to provide any final arguments or submissions in support of its application of the exemption. As the council has not provided any additional information in this regard the Commissioner has considered its position as set out in its initial response and at the internal review stage.
14. In its initial response to the complainant the council stated that the withheld information contains information relating to KPMG's terms of business. It stated that the information is only released by KPMG to their customers and is always done so with the expectation of non-disclosure. The council also argued that if it were to release the information there is the potential for KPMG to undertake legal action against the council.
15. The code of practice issued under section 45 of the FOIA (the "Code") recommends that authorities should consult with any parties which are likely to be affected by disclosures¹. The council has not provided any evidence that it consulted with KPMG during its consideration of the request.
16. The Commissioner considers that the council's arguments in respect of prejudice can be summarised thus:
 - (a) KPMG has shared the information with the council with the expectation that it would not be disclosed.
 - (b) Disclosure might result in KPMG taking legal action against the council, resulting in loss of public funds.
17. In order for the exemption to be engaged a public authority needs to demonstrate that disclosure of the information would or would be likely to prejudice the commercial interest of any party (or parties).

¹ <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

18. In relation to (a), the council will be aware that, since the passing of the FOIA, any information held by public authorities regardless of its origins, can potentially be disclosed in response to a request. In this context, the only cases where information should not be disclosed is where it can be demonstrated that it engages one or more of the FOIA exemptions and, where relevant, the public interest supports the maintenance of the exemption.
19. A third party's wish that information should not be disclosed is not in itself sufficient grounds for information to be withheld and, in the context of section 43(2) does not describe a prejudice to commercial interests which disclosure would cause. The Commissioner has, therefore, dismissed (a) as a ground for engaging the exemption.
20. In relation to (b), the Commissioner considers that, in many cases a distinction can be drawn between commercial interests and financial interests. Ordinarily, for these two interests to be identified, it is necessary to show that there is some direct link to trade or the provision of goods and services. Whilst any potential legal action against the council may well incur financial costs, the council has not shown that these are linked to commercial interests, specifically to *prejudice* to commercial interests, as required by the exemption.
21. The Commissioner notes that the putative legal action described by the council is not linked to the content of the withheld information but rather to the principle of disclosing information which a party has indicated that it would prefer was not disclosed. Whilst it has been established that the information relates to a commercial activity it has not been shown that disclosure of the information *in itself* would result in prejudice to either KPMG or the council. For these reasons the Commissioner has concluded that the council's second grounds for prejudice occurring (b) also fail.
22. In situations where a public authority fails to explain why an exemption or exemptions apply the Commissioner does not consider it to be his role to generate explanations or arguments on the authority's behalf. In this case, the Commissioner finds that the council has failed to demonstrate that section 43(2) of the FOIA is engaged. As the exemption is not engaged he has not gone on to consider the public interest test.

Other matters

23. Although they do not form part of this decision notice the Commissioner would like to note the following matters of concern.
24. Whilst they do not form part of the Code itself, the forward to the Code recommends that authorities should:
- "...ensure that proper training is provided in this regard. Larger authorities should ensure that they have a central core of staff with particular expertise in Freedom of Information who can provide expert advice to other members of staff as needed."*²
25. The Commissioner echoes these recommendations. On the basis of its handling of this request, specifically the inadequate arguments applied in invoking an exemption, he has concerns that the council might not have provided its staff with adequate training.
26. The Commissioner expects that, in its future handling of requests, the council will not withhold information without first ensuring that it has demonstrated that relevant exemptions are engaged.

² <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

Right of appeal

27. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

28. 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.
29. 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
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Wilmslow
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SK9 5AF