

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 10 November 2016

Public Authority: Police Service of Northern Ireland
Address: PSNI Headquarters
65 Knock Road
Belfast
BT5 6LE

Decision (including any steps ordered)

1. The complainant has requested information relating to a company subcontracted by another company contracted by the Police Service of Northern Ireland (PSNI). PSNI provided some information and said that it did not hold other information. PSNI withheld further information under section 43(2) and section 40(2) of the FOIA.
2. The Commissioner's decision is that PSNI was entitled to rely on section 43(2) in respect of the withheld information. The Commissioner is further satisfied that PSNI correctly denied that it held some of the requested information. No steps are required.

Request and response

3. On 20 July 2015 the complainant requested the following information from PSNI:

"...please provide the (sterling) amount paid to the Contractor 'Greentown Environmental' for sub-contractor services for years

1. *17 August 2009 to 16 August 2010*
2. *17 August 2010 to 16 August 2011*
3. *17 August 2011 to 16 August 2012*
4. *17 August 2012 to 16 August 2013*
5. *17 August 2013 to 16 August 2014*

Please also provide the date by which security vetting was completed and clearance approved for this Sub-Contractor to operate on the

contract above (including all service operations provided for on Royal and VIP visits within N Ireland).

Please confirm the current status of this Contract.

Please confirm the winning tenderer on any new tendered Contract."

4. PSNI sought clarification from the complainant on 23 July 2015. Following this clarification, PSNI issued a substantive response on 2 September 2015. PSNI refused to provide information relevant to the first question (marked 1-5 by the complainant) on the basis that it was exempt under section 43 of the FOIA. PSNI said that it did not hold any information relevant to the second question, and provided the information it held relevant to the third and fourth questions.
5. The complainant requested an internal review on 11 September 2015, and PSNI provided him with the outcome of that review on 16 October 2015. PSNI maintained its reliance on section 43 with regard to the first request. At this stage PSNI clarified that it did hold information relevant to the second request, but stated that this was exempt under section 40(2) by virtue of section 40(3)(a)(i).

Scope of the case

6. The complainant contacted the Commissioner on 12 November 2015 to complain about the way his request for information had been handled.
7. The complainant disputed PSNI's assessment that the disclosure of information relating to the first request would be likely to cause prejudice to the commercial interests of any party. Nor did he accept PSNI's reliance on section 40(2) in respect of the second request.
8. The Commissioner considered that the scope of the case was clear with regard to the first request: whether or not PSNI was entitled to withhold the requested information on the basis of the exemption at section 43(2) of the FOIA. However, it became apparent during the course of the Commissioner's investigation that the second request was not unambiguous. The Commissioner therefore sought to clarify whether or not PSNI did in fact hold the requested information, and if so, whether it ought to have been disclosed.

Reasons for decision

Section 43(2): prejudice to commercial interests

9. Section 43(2) provides an exemption where the disclosure of the information in question would, or would be likely to, prejudice the commercial interests of any person, including those of the public authority holding the information.
10. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers that three criteria must be met.
 - First, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed must 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. The alleged prejudice must be real, actual and of substance.
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met. In relation to the lower threshold, 'would be likely to prejudice', the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather, there must be a real and significant risk. The Commissioner is of the view that the higher threshold, 'would prejudice', places a stronger evidential burden on the public authority.

Applicable interests

11. When identifying the applicable interests, the Commissioner must consider whether the prejudice claimed is to the interest stated in the exemption. In the case of section 43(2) this is commercial interests, which is not defined in the FOIA. The Commissioner considers that commercial interests relate to a person's ability to participate competitively in a commercial activity, ie the purchase and sale of goods or services.
12. The Commissioner is satisfied that the requested information in this case does relate to a commercial interest. The provision of contracted services to PSNI represents a commercial activity, and the tender process indicates that it is conducted in a competitive environment.

Nature of the prejudice

13. In the Commissioner's view, prejudice implies that the disclosure of the requested information must have some detrimental or damaging effect on the applicable interest identified above.
14. Secondly, there must be a causal link between the disclosure and the prejudice claimed. This was identified by the then Information Tribunal in the case of *Hogan and Oxford City Council v the Information Commissioner*.¹ The authority must be able to show *how* the disclosure of the specific information requested would, or would be likely to, cause the prejudice.
15. PSNI told the complainant that disclosure of the information specified in the first request, ie the money paid to the subcontractor, would be likely to harm the process of future tenders and prejudice the commercial interests of PSNI and the contractor.
16. PSNI argued that disclosure of the information in question would expose the contractor's pricing strategy, and would weaken its ability to tender for future contracts in a competitive market. PSNI explained that at the time the request was submitted, the contract to which the request related was "coming up for imminent retender".
17. The complainant disputed PSNI's explanation, claiming that there was
"...no argument that [disclosure of the requested information] could provide gain to a competitor for tending or other purposes."
18. PSNI pointed out that it had already disclosed related information in response to a separate request made by the complainant. That information included the cumulative amount paid to the contractor as at 31 July 2014, and the percentage of the amounts paid to the subcontractor. PSNI was concerned about the consequences of disclosing further information that could be combined with information already available through previous requests.
19. PSNI also provided the Commissioner with extracts of correspondence from the contractor which appeared to indicate two key concerns:
 - a. Disclosure of the withheld information could lead to further requests which in turn could ultimately lead to the release of the entire financial position of the contract.

¹ Appeal no EA/2005/0026 and 0030

- b. The withheld information was not routinely provided to PSNI as a condition of the contract.
20. The Commissioner does not consider that disclosure of the withheld information in this case would necessarily lead to the release of further information. If a further request was received, PSNI would be required – as it is now – to consider that request on its own merits and make a decision as to how to comply with the requirements of the FOIA. This may mean disclosing the requested information (if held), or issuing a refusal notice if it considered the requested information to be exempt from disclosure in any case.
21. With regard to the second point the Commissioner understands the contractor to be querying the extent to which the withheld information is held by PSNI for the purposes of the FOIA. The Commissioner has previously advised PSNI of her approach to cases where the requested information, if held at all, will only be held by a contractor by virtue of its contracted work for the public authority.
22. The issue of “held on behalf of” has been considered at length by the Commissioner and the Tribunal, including *Conscape v The Information Commissioner and the DRD* (EA/2011/0306, 8 May 2012). In that case the Tribunal held that if the requested information is held by a contractor or sub-contractor, rather than the public authority, and it relates to the work being carried out under the contract it will be “held” on the public authority’s behalf as set out at section 3(2) of the FOIA. Therefore the public authority would be required to obtain the requested information from whoever physically holds it and decide whether or not it could be disclosed under the FOIA.
23. In light of the above, the Commissioner would remind companies contracting with public authorities that they should expect that information relating to those contracts, including financial and performance information, may fall to be considered for disclosure under the FOIA.
24. With regard to its own commercial interest PSNI also told the Commissioner that
- “The disclosure of such commercially sensitive information could diminish confidence in the integrity of the public tendering process. Thus discouraging companies from competing in public sector tenders. This would reduce the ability of public authorities to obtain value for money in procurement.”*
25. The Commissioner accepts PSNI’s argument that disclosure of the information in question at that time would have caused reputational damage and raised concerns with potential bidders that sensitive

pricing/costing information would not be adequately protected. This in itself would also have been likely to result in detrimental consequences.

26. The Commissioner is also mindful that PSNI has previously disclosed significant information relating to the contract. In this context, disclosure of the requested information would be likely to facilitate a reasonable estimate of the amounts paid to the contractor. Given that a new tender process was under way at the time of the request, disclosure of this information would have been particularly sensitive and its disclosure would likely have disadvantaged the contractor.
27. Consequently the Commissioner is satisfied that the exemption is engaged on the basis that disclosure of the withheld information would be likely to prejudice the commercial interests of PSNI and the contractor. The Commissioner has therefore gone on to consider whether the public interest lies in maintaining the exemption or disclosing the information into the public domain.

Public interest in disclosing the information

28. PSNI acknowledged the generic public interest in disclosing information in the interests of accountability and transparency. The Commissioner agrees that there will almost always be a general public interest in disclosure of information, although the weight attached will be dependent on the circumstances of the case.
29. The complainant did not put forward any arguments in favour of disclosure. Instead he argued that there was no public interest in withholding the requested information. He pointed out that he had not asked PSNI to disclose the specific amount the sub-contractor had been paid for specific work, but that the request was for the total amounts paid to the sub-contractor in specified years. The complainant argued that:

"There can be no argument for having such a broad release of financial expenditure of public funds paid to a sub-contractor withheld".
30. The Commissioner does not consider the arguments set out above to carry significant weight in the balancing exercise, particularly since PSNI has already disclosed some financial information that would assist the public's understanding.

Public interest in maintaining the exemption

31. The fact that a prejudice-based exemption is found to be engaged means that the Commissioner has accepted that disclosure of the information in question would be likely to have a prejudicial effect on the specified interest. The purpose of the public interest test is not to repeat

the arguments about prejudice, but to assess the weight that should be attached when balancing the arguments in favour of disclosure and in favour of maintaining the exemption.

32. In this case the Commissioner has accepted that disclosure would be likely to prejudice commercial interests. Since this is the lower level of prejudice, the weight it carries is less than would be the case if the Commissioner found that prejudice would be caused.
33. PSNI argued that there was a strong public interest in not disclosing information that would make the tender process more difficult. In addition to the more obvious prejudice to the contractor, PSNI argued that disclosure of the withheld information would have an adverse impact on its own ability to conduct a competitive tendering process. The Commissioner understands that this impact would not be limited to this particular tender, but would be likely to extend to other tenders run by PSNI. This would make PSNI a less attractive opportunity for companies, which would harm PSNI's own ability to manage its business. The Commissioner consider this to be a strong public interest argument in favour of maintaining the exemption in this case.
34. PSNI also drew the Commissioner's attention to the timing of the request, ie the fact that a tender process was ongoing at that time. PSNI was of the view that this constituted a compelling argument in favour of maintaining the exemption, so that the contractor would not be unduly disadvantaged, and other companies would not be deterred by the prospect of disclosure. Again, the Commissioner accepts that there is a strong public interest in protecting the integrity of a tender process, and that the process will be most sensitive while it is "live".

Balance of the public interest

35. The Commissioner has carefully considered the competing public interest arguments in this case. The Commissioner acknowledges that disclosure of the withheld information would increase the public's understanding of how companies contract with PSNI. In addition the information might assist companies who are considering competing for contracts, which as discussed above would be likely to prejudice the interests of the company that had the contract at the time of the request. However it should be recognised that, since there is a public interest in ensuring value for money, the disclosure of information that assists competition in tenders may be seen as beneficial to the public purse. Accordingly the Commissioner recognises that there is a legitimate interest in disclosure of the requested information.
36. However the Commissioner is persuaded that the arguments in favour of maintaining the exemption are more compelling. PSNI has argued that

disclosure of the information in this case would not only be likely to prejudice the commercial interests of the contractor, but would also discourage companies from participating in future tenders. This would have a significant adverse impact on PSNI's ability to ensure value for money as well as operational effectiveness. The Commissioner is also of the view that the ongoing tender at the time of the request carries significant weight.

37. For the reasons set out above the Commissioner finds that in the circumstances of this case the public interest in maintaining the exemption at section 43(2) of the FOIA clearly outweighs the public interest in disclosing the information in question.

The second request: is the information held?

38. As set out above, PSNI originally stated that it did not hold the requested information since it had not appointed the sub-contractor. In his request for internal review the complainant pointed out that non-police personnel, including contractors, were subject to police vetting procedures. Therefore the complainant was of the view that PSNI ought to hold relevant information.
39. Following the internal review PSNI amended its response to take into account the complainant's comments. PSNI confirmed that it did vet all non-police personnel, but it vetted individuals rather than companies. PSNI considered that any information regarding the vetting of individuals would be exempt under section 40(2) since it would be third party personal data. PSNI did not however confirm or deny that it actually held any vetting information relevant to the request.
40. The Commissioner examined the wording of the request, and concluded that there were two elements to it:
- i. Please also provide the date by which security vetting was completed for this Sub-Contractor to operate on the contract above (including all service operations provided for on Royal and VIP visits within N Ireland).
 - ii. Please also provide the date by which clearance approved for this Sub-Contractor to operate on the contract above (including all service operations provided for on Royal and VIP visits within Northern Ireland).
41. The Commissioner is of the view that PSNI responded appropriately to the first element insofar as it has confirmed to the complainant that it does not hold this information as it does not vet companies. If the complainant wishes to obtain information in relation to the vetting of individuals he would need to submit a further request and as indicated

by PSNI, the exemption at section 40(2) of the FOIA would need to be considered.

42. It appeared to the Commissioner that the complainant was seeking assurance that the subcontractor had been properly approved before undertaking work for PSNI. The Commissioner discussed the possibility of PSNI clarifying the vetting process. Subsequently PSNI confirmed that it engaged the contractor, who in turn engaged the sub-contractor. PSNI does not approve or clear sub-contractors to be engaged by a contractor, but would clear relevant sub-contractor staff, as it would for contractor staff. Relevant sub-contractor staff would be cleared on an individual basis, rather than as a group, therefore PSNI would not record a date by which the sub-contractor's staff were all cleared.
43. The Commissioner was of the view that both the complainant and PSNI could have engaged more effectively to clarify this matter at an early stage. Nevertheless, in light of the above the Commissioner is satisfied that PSNI did not in fact hold the requested information with regard to the second request.

Right of appeal

44. 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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. 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.
46. 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

Gerrard Tracey
Principal Policy Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF