

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 November 2016

Public Authority: Department of Health (DH)

Address: 79 Whitehall

London

SW1A 2NS

Decision (including any steps ordered)

1. The complainant has requested information relating to the DH's Private Finance Unit (PFU), including diary entries of its staff, minutes of meetings and correspondence between its staff and various other parties. Under section 11 he expressed a preference to have the information communicated in a particular format. The DH advised the complainant that the PFU unit no longer existed but ultimately identified two individuals who it said most closely fulfilled the roles referred to in the request and responded to the request on that basis. The DH did not provide the diaries, it said that it did not hold any relevant minutes and although it provided some email correspondence, it redacted information from those emails under section 40(2) – personal information and section 43(2) - commercial interests. At the internal review stage the DH applied section 12 to refuse the request in its entirety on the grounds of costs and during the Commissioner's investigation it also applied section 14(1) on the basis that the request was vexatious due to it being burdensome. The Complainant has also raised concerns over the quality of the refusal notice issued under section 17 and the level of advice and assistance provided under section 16.
2. The Commissioner's decision is that the DH is not entitled to rely on sections 12 or 14 to refuse the request. That it is entitled to refuse to provide requested information in the complainant's preferred format under section 11(2) because of the costs involved in doing so. In respect of the information redacted from the email correspondence initially disclosed to the complainant, the Commissioner finds that the exemptions provided by sections 40(2) and 43 are only partly engaged. The Commissioner finds that there have been no breaches of section 17 or 16.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - In respect of the diary information requested at parts 1 and 2 of the request the DH is required to issue a fresh response in accordance with the FOIA without relying on the procedural exemptions provided by section 12 or 14(1).
 - In respect of the information withheld from the emails requested at part 4 of the request the DH is required to provide the information which does not attract the exemptions provided by sections 40(2) and 43. The information withheld under section 40(2) that should now be disclosed is identified within the body of this notice. The information withheld under section 43(2) which should now be disclosed is identified in a confidential annexe which has been provided exclusively to the DH.
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 18 January 2016 the complainant requested information of the following description:

“Please could you provide:

1. For the previous 18 months, the diary for the Director of the Private Finance Unit. I would expect this to include a list of meetings attended by the individual, dates, attendees etc.

- a. Based on my current understanding, this could be the diary of the ‘Deputy Director for Corporate & Private Finance’, or [named officer]’s diary or another person entirely.

2. For the previous 18 months, the diary for the Deputy Director of the Private Finance Unit. I would expect this to include a list of meetings attended by the individual, dates, attendees etc.

3. The minutes of any meeting in the previous 18 months with the PFU and:

- a. Peterborough and Stamford Hospitals Foundation Trust or its representatives
 - b. Progress Health or its representatives
 - c. Maquarie Bank or its representatives
 - d. Brookfied Multiplex or its representatives
4. The email correspondence in the previous 18 months with the PFU and:
- a. Peterborough and Stamford Hospitals Foundation Trust or its representatives
 - b. Progress Health or its representatives
 - c. Maquarie Bank or its representatives
 - d. Brookfied Multiplex or its representatives”
6. Under section 11 he expressed a preference for the information to be communicated in an electronic format capable of being text searched.
7. On 15 February 2016 the DH responded. It explained that the PFU no longer existed but that it had identified one individual whose job role most closely matched that of the Director and Deputy Director of the PFU. The DH did not provide that post holder’s diary. It did however inform the complainant that the post holder had not met with any of the parties named in the request and therefore the DH did not hold any minutes relevant to the request. It did provide the complainant with some emails between that post holder and the named parties. However information was withheld from those emails under the exemptions provided by section 40(2) – personal data, and section 43 – commercial interests.
8. The complainant requested an internal review on 24 February 2016. In doing so he:
- Queried whether the DH had correctly identified those performing the roles of Director and Deputy Director of PFU.
 - Complained that he had not been provided with the diaries of these individuals.
 - Queried the lack of correspondence between the DH and some of the parties named in the request.
 - Raised concerns about the quality of the refusal notice in terms of how it explained the application of the exemptions.

- Challenged the application of the exemptions provided by section 40(2) and 43.
9. The DH sent him the outcome of its internal review on 23 March 2016. It maintained that the information that been withheld from the emails was exempt under sections 40(2) and 43. In light of the complainant's comments regarding who was now performing the roles of Director and Deputy Director the DH now identified a second individual whose diary was caught by the request (this is explained in more detail under the Scope of the request). Now that it was considering two sets of diary entries rather than just one, the DH advised the complainant that complying with the request would exceed the appropriate limit and therefore the DH could have refused the request under section 12 when originally responding. It therefore stated that it was not prepared to provide any additional information. During the Commissioner's investigation the DH confirmed that it considered the request in its entirety could be refused under section 12. It also argued that if the request could not be refused under section 12, it considered the request was vexatious under section 14 on the basis that it was burdensome.

Scope of the case

10. The complainant contacted the Commissioner on 5 April 2016 to complain about the way his request for information had been handled. At that time he asked the Commissioner to consider the following points:
- Scope of the request
 - Section 11 Format
 - Section 12 Cost of compliance
 - Section 13 Fees
 - Section 14 Vexatious request
 - Section 16 Advice and assistance
 - Section 17 Refusing a request
 - Section 40 Personal information
 - Section 43 Commercial interests
11. The Commissioner wrote to the complainant on 15 July 2016 setting out the scope of her investigation. She explained that the first issue to

consider is whether the DH is entitled to refuse the request on the basis that the cost of compliance would exceed the appropriate limit under section 12. Only if the Commissioner found that section 12 did not apply would it be necessary to consider the application of sections 11, 40 and 43. In order to properly consider the DH's application of section 12 it is necessary for the Commissioner to take a view on whether it interpreted the request correctly and therefore whether it was focussing its searches on just the information which had been requested.

12. Since writing to the complainant the DH has also formally introduced section 14 as a ground for refusing the request. The Commissioner will therefore consider its application too.
13. She will also consider whether the DH complied with its duty under section 16 to provide advice and assistance and whether its refusal notice complied with the requirements of section 17.

Reasons for decision

Scope of the request

14. The request is for information about the PFU, its senior managers together with meetings and correspondences between its staff and a number of named parties. The Commissioner gathers that the complainant had previously made requests to the other public authorities. The information provided in response to those requests included documents which referred to staff from the DH's PFU. Therefore the complainant was under the impression that the unit was still operational.
15. However when originally responding to the request the DH explained that the PFU ceased to exist in 2009 when its functions were encompassed within the DH's Procurement, Investment & Commercial Division, which itself was subsequently renamed the Commercial Division. It suggested that as some former members of the PFU still worked with trusts on private finance issues, it was possible these authorities still referred to those individuals as being members of the PFU.
16. Regardless of how the confusion arose, it is clear that at the time of the request the PFU no longer existed and that therefore there was no Director or Deputy Director of the unit. It also follows that there could have been no meetings or correspondence between its staff and the other named parties. As such the DH would have been entitled to refuse the request on the basis that the requested information did not exist and so was not held.

17. However rather than doing so the DH adopted, what it anticipated would be, a more constructive approach. It identified one former member of the PFU whose current job role most closely matched the responsibilities previously performed by both the Director and Deputy Director of the PFU. Although the DH did not provide the complainant with the name of this individual, it was their diary that was searched in order to determine that no meetings with the other named parties had taken place. It did identify email correspondence between this individual and the other parties and this was provided, apart that is for information redacted under sections 40(2) – personal information, and section 43(2) – prejudice to commercial interests.
18. Although the Commissioner recognises that the DH's intention was to assist the complainant by interpreting the request as it did, difficulties with the handling of this request arose from this point as there was always a mis-match between the information originally requested and that which was actually held. With hindsight it may have been better for the DH to have refused the original request and gone onto offer advice and assistance regarding the structure of the Commercial Division and who within it had responsibilities for private finance initiatives. This would have allowed the complainant to frame a new request based on a proper understanding of the actual structure of the Department rather than tinkering with the parameters of the original request. Nevertheless, in his letter of complaint to the Commissioner, the complainant discusses the consequences of the PFU being disbanded on the scope of his request. He says that,

“... the Department and I are in agreement that the intention of the request means that the scope is directed at the people performing the same kind of work.”
19. Therefore the Commissioner will consider whether the DH has taken a reasonable approach to interpreting the request on the basis that it seeks information about those officers from the commercial Division who now perform the duties most closely matching those previously performed by the PFU. It is possible that some of the more minor or ancillary duties once carried out within the PFU are now widely dispersed within the Commercial Division and therefore it is reasonable to only consider those roles which involve a significant responsibility for issues relating to private finance initiatives. Adopting this approach the Commissioner accepts that the DH was able to correctly identify one officer whose current role most closely mirrored those of the Director/Deputy Director of the PFU.
20. When requesting an internal review the complainant was still confused as to whom the DH had identified as performing these functions. From responses to previous requests he had the name of one individual who

other public authorities had referred to as being the Deputy Director. He therefore clarified that he was seeking the diary of this individual and that of his immediate superior. Therefore the DH now widened its interpretation of the request. Not only did it consider the diary of the individual it had originally identified as performing the Director/Deputy Director role, the DH now included that of their line manager. The Commissioner accepts that this was a reasonable approach for the DH to adopt

21. The Commissioner notes that parts 3 and 4 of the request are not limited to minutes of meetings or correspondence between the senior management of the PFU and other parties. Instead they capture communications between the PFU as a whole and those other parties. However as the PFU no longer existed the Commissioner is satisfied that it was reasonable for the DH to interpret these elements of the request as being limited to communications with the individual identified as the equivalent to Director/Deputy Director, rather than capturing correspondence and meeting with the whole of the Commercial Division.
22. When the complainant asked the DH to carry out an internal review he expressed surprise at the lack of correspondence or minutes of meetings as sought in parts 3 and 4 of the request. The complainant speculated that the DH had interpreted the term "representatives" too narrowly. The Commissioner considers that the term is commonly understood to be someone who is authorised to speak or act on behalf of a particular party in respect of a particular matter, ie someone who acts as an agent. The DH has confirmed that it adopted the same interpretation and in the absence of any evidence to the contrary the Commissioner is satisfied that the DH properly scoped this element of the request.

Section 12 - the appropriate limit

23. Section 12 of FOIA states that a public authority is not obliged to comply with a request for information if it estimates that the cost of doing so would exceed the appropriate limit. The appropriate limit is a cost limit set out in The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. These regulations are commonly known as the 'Fees Regulations'.
24. Each of the four elements of the request is technically a separate request in its own right. However, a public authority can aggregate the cost of complying with a number of requests where those requests relate, to any extent, to the same or similar information. The Commissioner is satisfied that the four parts all relate to DH's contact with the named parties on the issue of a private finance initiative.

25. Under the Fees Regulations the appropriate limit for central government departments such as the DH is £600. Very often the costs of dealing with a request relate to staff time. The Fees Regulations set the cost that can be charged for staff time at £25 per hour. They also specify the activities which a public authority can take into account when estimating whether the appropriate limit would be exceeded. Under regulation 4(3) these activities are restricted to the time taken in determining whether the information is held, locating that information, retrieving that information or a document containing the information and extracting the information from such a document.
26. Therefore if it would cost the DH more than £600, which at £25 per hours equates to 24 hours, to identify, locate and retrieve the information requested in any or all parts of a request, the DH would be entitled to refuse all of them under section 12.
27. The DH has said that it would need to purchase a specialist piece of computer software at a cost of £420 to extract the information from the diaries of the two individuals who are caught by parts one and two of the request. As the Commissioner understands it this software is required in order that the DH can produce redacted versions of the diaries in a pdf format that is capable of being searched by text as requested by the complainant. Once this software was purchased there would be additional installation costs.
28. Once installed DH estimates that it would take one minute to convert each page of the diaries into the required format. The request seeks diary entries for the last eighteen months which equates to 546 days per diary (based on a seven day week), or a total of 1,092. This means it would take a total of just over eighteen hours to produce text searchable copies of both diaries. At £25 per hour this equates to £450, which when combined with the cost of purchasing the software would exceed the appropriate limit.
29. The Commissioner does not dispute the software may be needed in order to provide the information in that format. It is more debatable whether the DH is correct to work on the basis of a seven day week rather than a five day working week. Nor has the DH provided anything in support of its estimate that it would take a full minute to convert each page into a pdf format. One of the Commissioner's staff has undertaken an exercising of converting their own calendar in to a pdf format, albeit not through the process that would allow the creation of a redacted version of the calendar. Nevertheless it only took around thirteen minutes to convert one full month into a series of pdf documents. Therefore the Commissioner has grounds for being sceptical of the DH's estimate. However even at thirteen minutes a month this would mean it would take 234 minutes to convert one diary, or 468 minutes for both,

this equates to nearly 8 hours of work which costed at £25 hour equals £200. When this added to the cost of the software the £600 appropriate limit would be exceeded without taking any account of installation costs or the costs of dealing with parts three and four of the request. Therefore an estimate of over £600 for providing the redacted versions of the diaries in a text searchable pdf format does not seem unreasonable.

30. However when estimating whether the appropriate limit would be exceeded a public authority is only entitled to take account of certain activities, ie determining whether the information is held, locating the information, retrieving the information and extracting the information from a document containing it. The activities considered by the DH appear to be related to providing the information in the complainant's preferred format. This is an issue that will be considered more fully under section 11.
31. In terms of the activities that can be considered under section 12 it appears that, once the individuals referred to in parts one and two of the request had been identified, it would not have been onerous for the DH to determine whether it held the relevant diary entries and to then locate them. Once this had been accomplished it would have been a simple task of printing the diary pages. They could then be provided as hard copies, or, once any redactions were made, they could be scanned back into the computer and saved as pdf files. The time taken to apply exemptions cannot be considered under section 12.
32. In light of the above, and in the absence of any other compelling arguments as to cost of locating and retrieving the information, the Commissioner is not satisfied that complying with the request, albeit not necessarily in the format specified by the complainant, would exceed the appropriate limit. DH is not entitled to refuse the request under section 12.

Section 14 – vexatious requests

33. During the Commissioner's investigation the DH also applied section 14 ie that the request was vexatious on the basis of that the request is burdensome. The Commissioner accepts that a request can be vexatious if it would impose a grossly oppressive burden due to activities not covered by section 12. This means that although it would not exceed the appropriate limit to identify, locate and retrieve the requested information, a public authority can, for example, refuse a request due to the cost of considering the application of exemptions, or of redacting the exempt information. However the threshold for refusing a request on such grounds is a high one.

34. The DH has argued that the request is particularly burdensome on its resources due to the costs of redaction and of marking up those redactions. The focus of the DH's concern appears to relate to the cost involved in preparing the diary entries for release. As discussed previously the DH has worked on the basis that it would need to consider 1,094 diary pages. This is based on two diaries, each for eighteen months and seven day weeks. The Commissioner considers it likely that a five day working week is more realistic which would bring the number of pages down to nearer 780. Although the Commissioner recognises it is likely that some information would have to be redacted from the diary pages, the DH has not provided any explanation of the sort of information that may be captured by parts 1 and 2 of the request. Nor has it given any estimates of the time it would take to consider the exemptions and then redact the exempt information. Therefore the Commissioner is not persuaded by the DH's argument.
35. The DH has also argued that the level of detail and questions being asked under FOIA are inappropriate and would be better handled as official correspondence. The Commissioner does not consider this to be a relevant argument.
36. Finally the DH has said that this is not the first request that it has received from the complainant and described the request a "fishing expedition". It has not however provided any additional evidence to substantiate this point.
37. In light of the above, based on the DH's submission, the Commissioner is not satisfied that the DH has grounds for refusing the request under section 14.

Section 11 form and format

38. Section 11 states that an applicant may express a preference for how the requested is communicated. That preference is limited to three means of communication, the first one (as set out in section 11(1)(a) is the provision of a copy of the information in a permanent form. This would include asking for the information to be provided as an electronic copy. It has also been established at Tribunal that this right extends to asking for the information to be provided in a particular electronic format such as in a Word document or pdf. In this case although the complainant asked for the information in an electronic form, he has not been so demanding as to specify a particular electronic format; he has simply specified a characteristic of the format, ie he has asked that whatever electronic format is used it allows the information to be text searchable. The Commissioner is satisfied that section 11(1)(a) is broad enough to cover such a preference.

39. In order for an applicant to take advantage of section 11, the preference as to the means of communication must be expressed at the time the request is originally made. In this case the complainant's preference for electronic copies in a text searchable format was very clearly stated in his request of 18 January 2016.
40. So far as reasonably practicable the DH is obliged to give effect to that preference. However under section 11(2) it is allowed to take account of cost when deciding what is reasonably practicable.
41. The Commissioner accepts that it is unlikely that the entire contents of the diaries could be released. Those diaries will inevitably contain personal data of third parties including contact details and will very likely also contain references to sensitive issues, not necessarily relating to private finance initiatives. Therefore the Commissioner accepts that the diaries would have to be redacted before disclosure. As explained earlier when discussing the DH's application of section 12, to create a redacted version of the diaries and then convert them into a text searchable pdf format would require the purchase of specialist software at a cost of £420. This would be necessary in order to produce permanent copies of redacted documents, which, as the DH puts it, cannot be "broken into", ie where the method of redaction cannot be reversed to reveal sensitive information. There would then be additional costs for installing the software. The DH has assured the Commissioner that the purchase of the software is necessary and has consulted with senior members of staff within its IT division when considering this matter. Commissioner is therefore satisfied these cost would have to be incurred if the DH was to provide the information on the complainant's preferred format. The costs involved means that the DH is entitled to rely on section 11(2) to refuse to provide the requested information in a text searchable format. That is not to say the DH would not be obliged to consider providing the information in some other form of electronic format.

Subsection 11(1)(A) – datasets

42. So far the focus of the section 11 analysis has been on the provision of the diaries. However the complainant has already received some information from the emails he asked for in part 4 of the request. This information was provided when the DH originally responded to the request on 15 February 2016. The information was provided electronically but as photocopies that had been scanned back into the computer after being redacted by hand. The complainant has specifically complained about the provision of those emails in that format. From the DH's submission in respect of the diaries it follows that the same costs would apply when providing redacted versions of the emails in a text searchable format and therefore, ordinarily, under section 11(2) the DH

would not be obliged to provide the information in a text searchable format.

43. However, in respect of the emails the complainant has specifically asked the Commissioner to consider whether the DH's failure to provide the emails in his preferred format is a breach of section 102 of the Protection of Freedoms Act. Section 102 of the Protection of Freedoms Act amends section 11 of FOIA by introducing subsection 1A. In broad terms this provides that where an applicant makes a request for information which forms part of dataset, the public authority must, so far as is reasonably practicable, provide that information in a form which is capable of reuse.
44. The complainant has argued that "a string of searchable text clearly forms part of a dataset held on email servers".
45. The legislation defines a dataset as a collection of information held in an electronic form where all or most of the information is recorded for the purpose of providing a public authority with information in connection with the provision of its services or carrying out of its functions. Importantly, the information has to be factual information which is not the product of analysis or interpretation and which is not an official statistic. It also has to remain presented in a way that has not been materially altered since it was collected.
46. This definition will very obviously capture information that a public authority will use to inform the delivery of its services, such as figures on expenditure by different departments. It can also capture a list of addresses. The Commissioner has published guidance on datasets¹ which also includes an example of a visitor survey conducted at a tourist attraction run by a local authority. The answers to questions on the time it took respondents to travel to the attraction or a list of their postcodes could form a dataset. The important point being that this is factual information.
47. When deciding whether something comprises of a dataset it is important to look at what has been requested. In this case a series of emails, the contents of which will contain opinions, analysis, discussions of issues, interpretation of events. Such information is of a qualitative nature rather than a factual nature. The Commissioner therefore rejects the complainant's argument that the email information he requested was a dataset. The Commissioner would reject arguments that the diary

¹ [Datasets \(sections 11, 19 & 45\)](#)

entries constituted a dataset on similar grounds. The Commissioner finds that subsection 1A is not relevant.

Consequences of decisions regarding sections 12, 14 and 11

48. The Commissioner has concluded that the DH is not entitled to rely on either sections 12 or 14 to refuse to comply with the request. As a consequence the DH is now required to issue a fresh response in respect to parts 1 and 2 of the request without relying on section 12 or 14.
49. The Commissioner has however found that the DH is not obliged to provide the information requested at parts 1 and 2 or 4 in the complainant's preferred format due to the cost implications of doing so. As the Commissioner has clarified with the DH how it interpreted the term 'representatives' she is satisfied that the DH did not have any meetings described in part 3 of the request and therefore does not hold any information relevant to this element of the request.
50. In respect of part 4 of the request the DH has provided copies of the email correspondence it holds albeit with some information redacted on the basis that it is exempt under sections 40(2) and 43. The Commissioner will now go on to look at the application of these exemptions before considering the complainant's concerns over the quality of the DH's refusal notice and the level of advice and assistance that it offered.

Section 40(2) – personal information

51. Section 40(2) of FOIA states that the personal data of someone other than the applicant can be withheld if its disclosure to the public would breach any of the data protection principles contained in the Data Protection Act 1998 (DPA).
52. Personal data is defined as information which both identifies a living individual and relates to that individual.
53. In this case the exemption has been applied to the names and direct contact details of DH staff contained in the emails that were provided in response to part 4 of the request. Typically the names relate to the sender or recipient of the emails, but may also be included within the body of the email. Such information is clearly the personal data of the individuals referred to.
54. The DH has withheld these names because it believes disclosing them would breach the first data protection principle. The first principle states that the processing of personal data shall be fair and lawful and in particular shall not be processed unless at least one of the conditions listed in Schedule 2 of the DPA can be satisfied.

55. The Commissioner's approach when considering the first principle is to start by looking at whether the disclosure would be fair. Only if the Commissioner finds that it would be fair will she go on to look at lawfulness or whether a Schedule 2 condition can be satisfied.
56. 'Fairness' is a difficult concept to define. It involves consideration of:
- The possible consequences of disclosure to the individual.
 - The reasonable expectations of the individual regarding how their personal data will be used.
 - The legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the particular individual.

Often these factors are interrelated.

57. The staff whose personal data has been redacted are all below the grade of senior civil servant. As explained to the complainant in its internal review, the DH considers that disclosing their names and contact details would be unfair "given they do not have a public facing role. Therefore, junior staff would have no clear expectation that their names or personal identifying details would be made public ...". Although this explanation is limited, the Commissioner does accept that those below the grade of senior civil servant would not expect their details to be disclosed.
58. In light of the above the Commissioner is satisfied that to disclose the personal data of the junior civil servants would be unfair and so breach the first data protection principle. The DH is entitled to rely on section 40(2) to withhold this information.
59. However the DH has also applied section 40(2) to officials from the Trust who the Commissioner assumes would not be employed on Civil Service grades. The DH has not presented any arguments why the personal data of these individuals should be withheld. However as the Commissioner is also the regulator of the DPA she would not wish to order the disclosure of information which may breach the first data protection principle.
60. Some of those whose details have been redacted appear to be relatively senior figures within the Trust and although they might not have public facing roles those at or above the level of Deputy Associate Director should have a reasonable expectation that their names could be released in response to a request under FOIA. Therefore the Commissioner finds that their names and positions should be released in response to the request. However their direct contact details ie email addresses and phone numbers can be withheld under section 40(2) as

the disclosure of this information could result in interference to their daily working practices to the detriment of the individuals concerned.

61. The personal data of any individual below the level of Deputy Associate Director can also be withheld under section 40(2). This includes their name, email address and phone numbers. However their job titles can be released as this would make it easier to understand the nature of the discussions recorded in the emails without causing any discernible detriment to the individual concerned.

Section 43(2) prejudice to commercial interests

62. Section 43(2) states that information is exempt if its disclosure would or would be likely to prejudice the commercial interests of any person. This can include the commercial interests of the public authority holding the information.
63. In this case the DH has withheld information from the email correspondence provided in response to part 4 of the request on the basis that its disclosure would prejudice the commercial interests of the Peterborough and Stamford NHS Foundation Trust. It has explained that at the time the request the Trust was involved in negotiating the terms of a Private Finance Initiative (PFI) agreement with a contractor in respect of a fire safety issue. The DH has provided the Commissioner with a copy of correspondence with the Trust which confirms that negotiations were still ongoing at the time of the Commissioner's investigation. The DH considers that disclosing the withheld information would undermine the Trust's negotiating position and so its ability to obtain best value for money.
64. Where the exemption has been applied to protect the commercial interests of a third party as is the case here, the Commissioner does not consider it appropriate to take into account speculative arguments advanced by the public authority. Therefore the Commissioner would expect the DH to have a good understanding of how the Trust's commercial interests could be prejudiced. Usually this would be as a result of the public authority liaising with the third party.
65. It is clear that the DH made the Trust aware that the information had been requested under the FOIA and that the Trust confirmed the negotiations between itself and its contractor were ongoing. However the actual level of consultation between the two parties appears to be limited. But this does not mean that the DH's application of section 43 should be considered speculative. The Commissioner understands that the officers who were party to the email correspondence captured by the request also advised on the application of section 43. These officers have expertise in PFI agreements and as such their knowledge of this

subject area, combined with their involvement in the particular issues discussed in the emails, would have meant they were well placed to understand the impact of disclosing the information. The application of section 43(2) cannot be considered speculative.

66. That is not to say that the Commissioner agrees with all the redactions that have been made under section 43(2). The main thrust of the DH's argument is that disclosure would undermine the Trust's negotiating position. Included in the withheld information is a document attached to an email. The covering email has already been provided to the complainant. The attachment relates to matters between the DH and the Trust which do not directly affect the PFI negotiations. The Commissioner is satisfied the disclosure of this information could not undermine the Trust's position. Also included in the withheld information is a document which already appears to have been shared with the Trust's PFI contractor. Again the Commissioner does not accept the disclosure of this information would be capable of undermining the Trust's negotiating position.
67. There is other information which appears to the Commissioner to have only a very limited bearing on the progress of the negotiations. Some of it simply updates the DH on developments in the negotiations that the contractor would have already been aware of. The Commissioner notes that the exemption has been engaged on the basis that the Trust's commercial interests 'would be' prejudiced. This is a high test, it means that there must be a real and significant risk of the prejudice occurring. She finds that the DH's limited arguments are not sufficient to persuade her that this test is satisfied. In respect of this information the Commissioner finds that section 43(2) is not engaged and that DH is required to disclose it to the complainant. The Commissioner has produced a confidential annex which will be provided exclusively to the DH and which identifies the information to be disclosed.
68. The Commissioner is satisfied that other information would undermine the Trust's negotiating position if it was disclosed. This information discusses the Trust's negotiating strategy, sets out some of the Trust's concerns and reports candidly on the progress of the negotiations. There is nothing to suggest this information has already been shared with the Trust's contractor. Having viewed this information and having regard for the fact that at the time of the request these negotiations were ongoing, as they still are, the Commissioner is satisfied its disclosure would either reveal the strengths and weaknesses of the Trust's position or impact on relations between the Trust and its business partner.

Public interest test

69. Section 43(2) is subject to the public interest test. This means that even though the Commissioner has found that some of the commercial information is exempt, it can only be withheld if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.
70. The DH recognises that there is a public interest in disclosing information that would promote transparency and governance and that would promote a better understanding of the issues to which the information relates.
71. The Commissioner considers that there is an increasing reliance on PFI contracts to provide public sector facilities and services and therefore there is a strong public interest in people understanding how such PFI agreements work. It is important that the public have confidence that public money is being spent wisely and that public authorities have the competence to negotiate agreements which provide value for money and then manage those contracts effectively.
72. However, having found the exemption is engaged on the basis that the alleged prejudice 'would' occur, the Commissioner finds that disclosing the information at the time of the request while the contract negotiations are ongoing, would seriously undermine the Trust's position. This could result in the Trust failing to obtain value for money when negotiating the agreement in question. This would have an impact not only on the community served by the Trust, but also the general tax payer. Therefore having taken account of the specific details of the exempt information and the timing of the request the Commissioner is satisfied that the public interest in maintaining the exemption outweighs the public interest in favour of disclosure. The DH is not required to disclose this information.

Section 17 – refusal notice

73. The complainant has raised concerns over the quality the refusal notice issued by the DH and whether it satisfies the requirements of section 17. In particular he has asked the Commissioner to consider whether the notice explains in sufficient detail why the exemptions provided by section 40 and 43 apply to information redacted from the emails provided in response to part 4 of his request. These exemptions were cited in the original refusal notice issued to the complainant on 15 February 2016. They were also referred to by the DH when it provided the complainant with the outcome of its internal review on 23 March 2016.

74. The internal review provides a means by which the public authority can correct any flaws in how it originally dealt with a request. Therefore when considering whether the DH has met its obligations under section 17(1) the Commissioner will look at the position at the internal review stage. By the internal review stage the DH had also introduced section 12. However the complainant's concerns relate to how the DH has explained its application of section 40 and 43 to the emails.
75. As far as is relevant, section 17(1) states that where a public authority is relying on an exemption it must give the applicant a notice which –
- (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.
76. Having looked at the original refusal notice the Commissioner is satisfied that the DH stated that it was withholding information from the emails captured by the request and correctly cited the exemptions that were being relied on ie section 40(2) – third party personal data and section 43(2) – prejudice to commercial interests. In this respect the DH satisfied its obligations under 17(1)(a) and (b). The real issue is whether the DH complied with the requirements of section 17(1)(c).
77. Taking into account both the contents of the original refusal notice and any additional explanations provided at the internal review stage, the DH did explain purpose behind each exemption ie it identified the harm that the exemption was designed to protect against. In respect of section 40(2) it explained that the exemption provided protection for personal information and that it had been applied to the names of officials who were below the Senior Civil Service grade. It expanded on this at the internal review stage informing the complainant that the names were those officials it considered junior staff and who did not have a public facing role would have no expectation that their names or identifying details would be made public. To disclose the officials' personal data in these circumstances would be a breach of the Data Protection Act. In particular it would constitute of a breach of what it described as the principle of "fair and lawful" processing. The DH could be criticised for not going on to clarify that the "fair and lawful" principle was actually the first data protection principle as this would have made it easier for anyone new to the legislation to clarify the particular provisions of the DPA that would have been breached. Even so, the Commissioner finds that the DH's refusal notice did comply with the requirements of section 17(1)(c) in respect of its application of section 40(2).

78. The complainant's bigger concern appears to be the DH's explanation of why the commercial interest exemption provided by section 43(2) was engaged. The original refusal notice only alluded to why the exemption was engaged when discussing the public interest test. From that notice it is apparent that the trust named in the request was in the process of negotiating potential changes to a contract as a result of fire safety concerns. The DH argues that disclosing the information would prejudice the Trust's negotiating position in respect of the terms being negotiated and the price.
79. When seeking an internal review the complainant said that he believed the information withheld under section 43 related to an agreement that had already been signed and discharged. Therefore, he argued, it could not be regarded as commercially sensitive. When providing the outcome of the internal review the DH emphasised that the relevant negotiations were still very much live and current. It went on to explain that it believed the complainant was confusing a previous agreement, which had been 'signed and discharged' with the one currently being negotiated.
80. Section 43(2) can be engaged on the basis that the alleged prejudice to commercial interests either 'would' occur or 'would be likely' to occur. It is well established by Tribunals that these represents two different levels of likelihood. The DH also stated at the internal review stage that it considered the risk of the prejudice occurring to be the higher one, ie that the prejudice 'would occur'.
81. The Commissioner has issued guidance on writing refusal notices. The guidance says that the explanation on the refusal notice should be detailed enough to give the requestor a real understanding of how disclosing the information would prejudice the interests protected by the exemption, ie commercial interests in the case of section 43. Whether the explanation provided achieves this will always be a matter of opinion and the complainant clearly feels that he does not properly understand why the exemption is engaged. However although the Commissioner considers that the DH could have presented its explanation of why the exemption was engaged in a more coherent manner, she finds that the DH did ultimately provide a reasonable level of detail as to how and why the exemption was engaged. In respect of its application of section 43(2) the DH did comply with its obligations under section 17(1)(c).

Section 16 Advice and assistance

82. The complainant has raised concerns over the level of advice and assistance which the DH provided during its handling of the request. As previously discussed the Commissioner considers that at the outset of its handling of this request the DH could have taken the opportunity to

provide more meaningful advice and assistance as to the current structure of and responsibilities within the DH's Commercial Division. This would have enabled the complainant to frame a better targeted request. However the approach taken by the DH was to explain that although the PFU no longer existed it had nevertheless been able to identify one officer whose current role most closely matched those of the PFU's former director and deputy director. In effect it clarified how it had interpreted the request and so gave the complainant the opportunity to challenge this interpretation. This he did at the internal review stage when he asked for that individual's line manager to be included in the scope of the request. Ultimately both parties were prepared to proceed on the basis that the request should be interpreted in this way. Therefore the Commissioner does not find there was any breach of section 16 by DH's failure to provide more detailed advice and assistance regarding the current structure of its Commercial Division.

83. If the Commissioner had found that the DH was entitled to refuse the request under section 12 on grounds of cost, the DH would have been obliged to provide advice and assistance aimed at helping the complainant make a fresh, refined request which could have been dealt with within the appropriate limit. However as the DH is not entitled to rely on section 12 to refuse the request under section 12 this obligation does not arise.
84. In light of the above the Commissioner does not find the DH has breached its obligations under section 16 to provide advice and assistance.

Right of appeal

85. 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

86. 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.
87. 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

Rob Mehan
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Information Commissioner's Office
Wycliffe House
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SK9 5AF