

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 April 2017

Public Authority: Manchester City Council
Address: Manchester
M60 2LA

Decision (including any steps ordered)

1. The complainant has requested information relating to Manchester Airport and taxi/private hire licensing. Manchester City Council disclosed some information and withheld a copy of a draft agreement under the exemptions for information provided in confidence (section 41) and prejudice to commercial interests (section 43(2)).
2. The Commissioner's decision is that Manchester City Council:
 - disclosed the relevant information it held and complied with section 1(1) but did not do this in accordance with the time limit and breached section 10(1);
 - failed to demonstrate that the exemptions in section 41 and section 43(2) of the FOIA are engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant.
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 28 July 2016, the complainant wrote to Manchester City Council (the "council") and requested information in the following terms:

"1. Copies of all correspondence between Manchester City Council and Manchester Airport concerning Arrow Cars, including the licensing by MCC of Arrow Cars or its drivers.

2. Copies of all correspondence between Manchester City Council and Shiny Sky Limited or Arrow Cars.

3. In particular, please include copies of any correspondence between MCC and Manchester Airport or Arrow Cars or Shiny Sky Limited relating to the removal of licence plates issued by MCC from vehicles owned or operated by Arrow Cars or Shiny Sky Limited.

4. Copies of any reports and notes arising from inspections at Manchester Airport carried out by MCC's licensing enforcement officers.

5. Finally, please provide copies of any reports since 1/1/2010 of the City Solicitor/Monitoring Officer or any other council officer to the council in relation to the provision of taxi/private hire services at Manchester Airport."

6. The council responded on 22 August 2016 and stated that it had estimated that the cost of responding to the request would exceed the amount set out in the Fees Regulations and that it was not obliged to comply with the request, as provided by section 12 of the FOIA. The council confirmed that it could answer parts 1, 3, 4 and 5 of the request within the appropriate limit and, in accordance with section 16 of the FOIA, it invited the complainant to refine or narrow the scope of the request.
7. On 22 August the complainant wrote to the council and confirmed that they wished to revise their request to exclude part 2.
8. On 16 September 2016 the council responded, stating that it still considered section 12 applied but that it could respond to request parts 1, 3, and 5 within the cost limit.
9. On 19 September 2016 the complainant asked the council to carry out an internal review.
10. On 17 October 2016 the council provided an interim response to the internal review, indicating that it could now provide the information in request part 4 within the cost limit but that it needed time to consider

the public interest in relation to the application of the exemption for prejudice to commercial interests – section 43(2) of the FOIA.

11. The council sent its internal review response on 27 October 2016 and disclosed information to the complainant, withholding a “draft agreement” (falling within the scope of part 1 of the request) under section 43(2) and the exemptions for information provided in confidence (section 41) and personal information (section 40(2)).

Scope of the case

12. On 9 November 2016 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
13. During the course of the Commissioner’s investigation the council withdrew its reliance on section 40(2) and disclosed further information falling within the scope of the request.
14. The Commissioner confirmed with the complainant that her investigation would consider whether the council had disclosed all the relevant information falling within the scope of request parts 3 and 4 and whether it had correctly withheld the draft agreement under section 41 and section 43(2).

Reasons for decision

Section 1 – information held

15. Under section 1(1) of the FOIA, public authorities are obliged to confirm or deny whether requested information is held and, where it is, to disclose it to a requester.
16. Section 10(1) of the FOIA requires public authorities to comply with section 1(1) within 20 working days of the date of receipt of the request.
17. In this case the complainant disputes the council’s confirmation that it has provided all the (non exempted) information falling within the scope of the request.
18. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.

19. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
20. The Commissioner approached the council with a range of standard questions used in such scenarios. These questions and summaries of the council's responses are set out below.

What searches were carried out for information falling within the scope of this request and why would these searches have been likely to retrieve any relevant information?

21. The council explained that Licensing Officers were required to provide copies of all pocket notebook entries relating to the time period stated by the complainant and in relation to work carried out at Manchester Airport. It confirmed that a search of the electronic database containing all private hire licenses was undertaken in relation to Arrow Cars. The council stated that a search of Compliance Managers' email records was also undertaken as was a search of the publically available democratic services report database. The council confirmed that the information would not be held anywhere else.

If searches included electronic data, what search terms were used?

22. The council confirmed that the search terms "Arrow Cars" and "Manchester Airport" were used.

If the information were held would it be held as manual or electronic records?

23. The council stated that pocket notebook notes are made and held manually and all other information is held electronically.

Was any recorded information ever held relevant to the scope of the complainant's request but deleted / destroyed?

24. The council confirmed that a relevant pocket notebook belonging to an officer had been stolen prior to the receipt of the request. It confirmed that no relevant information had been destroyed or deleted.

If recorded information was held but is no longer held, when did the council cease to retain this information?

25. The council confirmed that the officer's stolen notebook ceased being held in June 2016.

What does the council's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can the council describe the way in which it has handled comparable records of a similar age?

26. The council explained that its Corporate Retention Schedule sets out the amount of time that the council needs to keep its records. It applies to records in all formats, including paper and electronic records. It confirmed that, as Taxi licensing is a regulatory service, records regarding case files and notes are kept for 6 years following the expiry of a licence.

Is there a business purpose for which the requested information should be held? If so, what is this purpose?

27. The council confirmed that the information would be held to support enforcement activity, and to record compliance outputs so that it could be reported upon.

Are there any statutory requirements upon the council to retain the requested information?

28. The council explained that it is required to retain any information relating to regulatory activity for up to 12 months after the expiry of a licence pursuant to its duties under the Local Authorities (Functions and Responsibilities) (England) Regulation 2000 and in the line with the Limitation Act 1980.

29. During the course of reconsidering the request the council identified additional information falling within the scope of the request. It disclosed this information to the complainant during the course of the Commissioner's investigation.

30. Having considered the searches conducted by the council and the concerns raised by the complainant the Commissioner is satisfied that, on the balance of probabilities, it is likely that the council has disclosed all the held information falling within the scope of the request. However, in disclosing some of the information outside the statutory time limit, she finds that it breached section 10(1).

Section 43(2) – commercial interests

31. 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.

32. "Commercial interests" in the context of this exemption encapsulates a wide variety of activities. In this case, the withheld information is a Draft Agreement between Manchester Airport PLC (the "Airport") and Shiny Sky LTD trading as Arrow Cars ("Arrow") regarding a concession to provide passenger transport services. The Commissioner is satisfied that the withheld information relates to a commercial activity and falls within the scope of the exemption.
33. In order for the exemption to be engaged it is necessary for it to be demonstrated that disclosure of information would result in some identifiable commercial prejudice which would or would be likely to be affect one or more parties.
34. The ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; i.e. either prejudice 'would' occur or prejudice 'would be likely to' occur.
35. With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15).
36. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
37. The council has argued that disclosure of the Draft Agreement would be likely to prejudice the commercial interests of the Airport and Arrow.

The Nature of the Prejudice

38. The council confirmed that, in accordance with the recommendations of the code of practice issued under section 45 of the FOIA, it consulted with the Airport and Arrow as parties likely to be affected by the disclosure of the information¹.

¹ The code of practice issued under section 45 of the FOIA is online here: <http://webarchive.nationalarchives.gov.uk/20150730125042/http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

39. The Commissioner has had sight of submissions provided by both parties to the council.
 40. The council confirmed that the Draft Agreement was provided by the Airport for the purpose of allowing the council (as the private hire licensing authority) to check whether it complied with licensing conditions.
 41. In its submissions to the Commissioner the council has represented the arguments provided by the Airport and Arrow.
 42. In relation to the Airport's interests, the council has argued that the Draft Agreement sets out the commercial structure of the relationship between the two parties. The council considers that release of the information would prejudice current arrangements the Airport has with other private hire concessionaires. It has specifically argued that it would not be appropriate to disclose:

"...detailed information about arrangements in terms of payment of guaranteed minimum sum, and concession fee. The private hire arrangement is due to be retendered and as part of such retender the underlying contract will be reviewed on such matters such as liability, termination and to remodel the financial structure. Full disclosure of the Draft Agreement into the public domain may therefore act to make it more difficult for Manchester Airport Group PLC to revise the agreement terms."
 43. In short, the Commissioner understands that the Airport considers that the disclosure of specific information would be likely to restrict its bargaining position as existing and future concessionaires would be able to use the information to their advantage.
 44. The council has explained that Arrow shares the council's position in relation to the potential damage that disclosure would be likely to cause. It confirmed that Arrow also considers that placing the information in the public domain would provide its competitors with an unfair advantage, resulting in financial loss to its operations.
 45. The Commissioner has considered the arguments provided by the council, viewed the submissions made by the relevant parties and referred to the withheld information. Her first observation, having
-

viewed the information, is that the withheld agreement appears to take the form of a template which has not been populated with any details, including financial information, specific to Arrow, or any contractor.

46. The Commissioner notes the concerns raised by the Airport and Arrow and acknowledges that these might indeed have had some validity in terms of the likelihood of commercial prejudice occurring, had the Draft Agreement been populated with relevant specific details. As it has not, the Commissioner is left with the impression that the document is generic in nature.
47. The Commissioner contacted the council and expressed her view that the document appeared to be a template and that the arguments provided did not appear to be based on the actual content of the document. The Commissioner sought the council's assurances that this was the correct withheld document. The council confirmed that this was the correct withheld document and that it had clarified this with the Airport.
48. Given the apparently general nature of the information, the Commissioner does not consider that it is likely that its disclosure would be likely to result in commercial to prejudice to any of the parties involved. The arguments provided, when applied to the specific withheld information, do not present a plausible or sufficiently concrete scenario. It is unclear why the making public of such general terms would impact on the Airport's negotiation strategy and it is even more obscure how disclosure would be prejudicial to Arrow's commercial interests.
49. As acknowledged above, the Commissioner accepts that a populated version of the Draft Agreement might plausibly contain information that could prejudice a party's commercial interests. However, the withheld information does not take this form and the arguments provided do not explain the sensitivity of the apparently generic, template information.
50. In cases where an authority fails to provide adequate or relevant arguments the Commissioner does not consider it to be her duty to generate arguments on its behalf. In this case, having considered the relevant facts the Commissioner has concluded that the council has failed to demonstrate that disclosing the Draft Agreement would be likely to result in prejudice to the commercial interests of the Airport or Arrow.
51. As she has concluded that the exemption is not engaged the Commissioner has not gone on to consider the public interest.

Section 41 – information provided in confidence

52. The council has also withheld the Draft Agreement under section 41.

53. Section 41(1) of the FOIA states that information is exempt from disclosure if:

“(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Was the information obtained by the council from any other person?

54. The council confirmed that the Airport provided it with the Draft Agreement for the purpose of allowing it to check whether there were any terms that would contradict licensing laws or raise concerns with the council in its capacity as the licensing authority.

55. The Commissioner is satisfied that the information was obtained by the council from another person.

Does the information have the necessary quality of confidence?

56. For the information to have the necessary quality of confidence it must not be trivial and otherwise available to the public. Information which is of a trivial nature or already available to the public cannot be regarded as having the necessary quality of confidence.

57. The council has explained that the Draft Agreement was provided by the Airport with an implicit expectation of confidentiality. The council has confirmed that the information is important to the confider as it relates to the terms of a commercial relationship. The Commissioner is satisfied that the information is not trivial and that it is likely that it was provided to the council with an expectation that it would be subject to confidentiality.

Would an unauthorised use of the withheld information cause detriment to the confider and result in an actionable breach of confidence?

58. In order for the exemption to be engaged it is necessary to demonstrate that disclosure of information would cause detriment to the confider and result in an actionable breach of confidence.

59. The council has argued that it is likely that, if draft agreements provided to it were publically disclosed external organisations would be hindered from taking sensible precautions in future in ensuring any proposals are compatible with relevant licensing laws. The council has argued that

this would be likely to be to the detriment of the external organisation if, for example, licenses were to be revoked or other issues identified which could be prevented before any arrangements amended.

60. However, the Commissioner considers that there is nothing to prevent prospective licensees seeking advice from the council with regard to compliance without providing commercially sensitive information. Indeed, as she has found in her analysis of section 43(2) above, she does not consider that disclosure of the Draft Agreement would be likely to result in commercial prejudice to the Airport or indeed to Arrow. In this specific instance, therefore, the Commissioner does not consider that disclosure of the withheld information would result in any detriment to the confider.
61. Whilst the Commissioner acknowledges that, since the FOIA came into force, third parties should be aware that any information provided to public authorities can be subject to disclosure, she accepts that in certain cases information should be protected by confidentiality. Clearly, this is the provision which the exemption contained within section 41 provides.
62. The Commissioner notes that the council's submission in relation to potential detriment, again, lacks detail and is wholly generic in nature. As she has found in her analysis of the council's application of section 43(2), above, the council has not shown that the disclosure of the information would result in prejudice to the parties concerned. In the absence of any additional detail provided in support of the ascribed detriment in the context of section 41, the Commissioner considers that it has not been shown that disclosure would result in detriment to the confider. She has, therefore, concluded that section 41 is not engaged in this case.

Right of appeal

63. 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

64. 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.

65. 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
Water Lane
Wilmslow
Cheshire
SK9 5AF