

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 May 2018

Public Authority: Chief Constable of Bedfordshire Police
Address: Bedfordshire Police Headquarters
Woburn Road
Kempston
Bedford
MK43 9AX

Decision (including any steps ordered)

1. The complainant has requested a copy of the filming agreement between Bedfordshire Police and a television production company. Bedfordshire Police refused the request, citing the non-disclosure exemption at section 43(2) (commercial interests) of the FOIA.
2. The Commissioner's decision is that Bedfordshire Police was not entitled to rely on section 43(2) to withhold the requested information. It also breached section 10(1) by failing to comply with section 1(1) within the time for compliance.
3. The Commissioner requires Bedfordshire Police to take the following steps to ensure compliance with the legislation:
 - disclose to the complainant the information which has been withheld under section 43(2) of the FOIA, excluding the camera rig plan and the personal data of the individuals identified in the withheld information.

4. Bedfordshire Police 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 2 November 2016, during ongoing correspondence about the television programme "24 Hours in Police Custody", which is filmed with the cooperation of Bedfordshire Police, and in which the murder of a family member was featured, the complainant wrote to Bedfordshire Police and requested information in the following terms:

"I would like to make a Freedom Of Information request for all information concerning the agreed code of practice and relationship between Bedfordshire Police and Garden Productions with regards to the Channel 4 production '24 hours in Police Custody'".

6. Following the Commissioner's intervention, Bedfordshire Police responded on 22 June 2017. Referring to the Access Agreement in place between Bedfordshire Police and Garden Productions, it stated,

"Much of the document is contractual in nature and is owned by Garden Productions Ltd and considered not disclosable under FOI."

7. Instead, it disclosed a copy of the Ofcom Broadcasting Code (which Garden Productions was required to comply with) and part of a bespoke Code of Conduct which sits alongside the Access Agreement.

8. The complainant requested an internal review on 10 July 2017, stating:

"I specifically require the details of this agreement that cover Bedfordshire Police's advice and guidance to Garden Productions on protecting the privacy and respecting the dignity of victims of crime and family members.

I also require the details of this agreement that cover Bedfordshire Police's advice and guidance to Garden Productions on what footage Garden Productions are invited to film.

None of the above are covered in the 9 points with which you summarise your approach to filming this project.

I have been in contact with Channel 4 which informed me that Garden Productions have acted with 'full consent of the Police and under their

advice' and that Garden Productions understand from the Police 'when the right time might be to contact the family members'.

It is the details of this consent and advice given to Garden Productions that I require."

9. Following an internal review, Bedfordshire Police wrote to the complainant on 30 August 2017. It stated that the requested information was exempt from disclosure under section 43(2) (commercial interests) of the FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 21 November 2017, to complain about Bedfordshire Police's handling of the request. She disagreed with its decision to withhold the requested information.
11. By way of background, the complainant explained that at the outset of the police investigation, Bedfordshire Police passed her contact details to Garden Productions without her consent and as a result, Garden Productions made repeated attempts to speak to her and her family about the investigation, which she found deeply distressing. (The Commissioner has conducted an assessment under the Data Protection Act 1998 ("the DPA") into that incident and found that Bedfordshire Police appeared to have breached the first data protection principle by disclosing her contact details to Garden Productions.)
12. The complainant explained that she believes there is a need for transparency regarding the precise terms under which Bedfordshire Police permits the filming of criminal investigations for fly-on-the-wall documentaries. She has been told by Channel 4 that Bedfordshire Police advises Garden Productions on the terms under which family members may be contacted for filming purposes. The complainant argued that it is in the public interest for this advice to be publicly available as it will provide clarity regarding the extent to which Bedfordshire Police and Garden Productions have considered the rights and best interests of the families and friends of victims featured in the programme.
13. Bedfordshire Police has identified that it holds two items of information which fall within scope of the request: the Access Agreement between it and Garden Productions, and the Code of Conduct appended to that Agreement. The Commissioner has viewed unredacted copies of both documents.
14. The withheld information includes a floorplan of Luton police station, where filming took place, marked up with the location of cameras ("the

camera rig plan"). It also contains the names and contact details of police staff and television crew involved in making the programme ("the personal data"). During the course of the Commissioner's investigation the complainant agreed that the camera rig plan and the personal data should be excluded from the scope of her request and so they are not considered further in this decision notice, and are not subject to the steps specified at paragraph 3, above.

15. The Commissioner has therefore considered Bedfordshire Police's application of section 43(2) of the FOIA to withhold the Access Agreement and Code of Conduct (minus the camera rig plan and the personal data). She has also looked at the time it took to respond to the request.

Reasons for decision

Section 1 – General right of access Section 10 - Time for compliance

16. Section 1(1) of the FOIA states that upon receipt of a request for information, a public authority must confirm or deny whether it holds the information. If it does hold the information, it must disclose it to the requester.
17. Section 10(1) of the FOIA provides that a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
18. The request was made on 2 November 2016 and the response was not provided until 22 June 2017. The Commissioner therefore finds that Bedfordshire Police breached section 10(1) of the FOIA in failing to respond to the request within 20 working days.

Section 43 – Commercial interests

19. Section 43(2) of the FOIA states:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

20. Bedfordshire Police withheld the Access Agreement between it and Garden Productions, and the Code of Conduct referred to in that Agreement, under section 43(2) of the FOIA.

21. In its submissions to the Commissioner, Bedfordshire Police indicated that there was some disagreement between it and Garden Productions regarding the extent to which section 43 could be considered to apply to the withheld information. Bedfordshire Police said that while Garden Productions believed that all of the withheld information was exempt under section 43, it did not agree. However, it did not explain what information it believed was/was not covered by section 43 of the FOIA, despite having previously been advised by the Commissioner that its submissions must represent its own views on the engagement of section 43.

Is section 43(2) engaged?

22. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers that three criteria must be met:

- the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption (in this case, a party's commercial interests);
- 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. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and,
- it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, that disclosure 'would be likely' to result in prejudice or, alternatively, that disclosure 'would' result in prejudice.

Applicable interests

23. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner's guidance on the application of section 43¹ of the FOIA explains that a commercial interest relates to a person's ability to participate competitively in a commercial activity i.e. the purchase and sale of goods or services.

¹ <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

24. In this case, the withheld information relates to the production of a television programme for Channel 4 by Garden Productions, and covers the agreed terms for filming (including but not limited to: timescale for filming, access rights, health and safety arrangements, copyright, confidentiality and procedures for filming police staff, suspects and members of the public).
25. Fly-on-the-wall documentaries of this type are a staple of modern British television, and the Commissioner is satisfied that production companies such as Garden Productions face considerable competition when tendering for television contracts of this type. Having considered the withheld information, the Commissioner is satisfied that it relates to a commercial activity (that is, the development and production of television documentaries by Garden Productions and Channel 4).

Nature and likelihood of prejudice occurring, and affected parties

26. In order for the exemption at section 43 of the FOIA to be engaged it is necessary to demonstrate that disclosing the information would result in some identifiable commercial prejudice which would, or would be likely to, affect one or more parties.
27. The Commissioner 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.
28. In this case, Bedfordshire Police told the Commissioner that it had consulted with Garden Productions and was satisfied that disclosure of the information 'would be likely to' prejudice the commercial interests of both Garden Productions and Channel 4.
29. Commenting on 'would be likely to prejudice', the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) observed 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).
30. Where the lower threshold for engaging the exemption is being relied upon (ie that disclosure would be likely to result in prejudice) the public authority should identify the specific harm envisaged, link it to specific information and explain how disclosure would be likely to cause the ascribed harm.

31. On this point, Bedfordshire Police forwarded submissions from Garden Productions, which stated:

"With respect to the possibility of the Access Agreement and Code of Conduct being released, Channel 4/Garden would have an issue with both documents being in the public domain as both are the product of the expertise of Garden's production team and specialist advice from Channel 4's legal and compliance team. The Access Agreement was carefully negotiated with the Police to ensure compliance with Ofcom's Broadcasting Code (including preserving the broadcaster's editorial integrity) but also to accommodate the commercial interests of Garden and Channel 4 whilst giving paramount consideration to the welfare of the contributors to the program."

32. Bedfordshire Police's position, which was derived almost entirely from the representations made to it by Garden Productions and Channel 4, was that disclosure to the world at large, under the FOIA, would be likely to put Garden Productions and Channel 4 at a commercial disadvantage. This is because disclosure of the withheld information into the public domain would reveal to Channel 4's competitors confidential information about the way in which it negotiates and frames its programme making agreements with third parties. It would also provide the necessary information for Channel 4's broadcasting rivals to potentially replicate and compete against this specific specialist format, and, as a result, impinge upon its market share.
33. Bedfordshire Police considered that the same argument applied to Garden Productions' commercial interests. Given that Garden Productions is in direct competition with multiple independent production companies to win commissions from broadcasters, it considered that disclosure of this information would put Garden Productions at a significant disadvantage in the broadcasting marketplace. The information would be of use to competitors, particularly when competing against Garden Productions for commissions to make fly-on-the-wall documentaries. It considered that Garden Productions would be likely to lose some of its competitive edge as a result.

The Commissioner's conclusion

34. With regard to the harm that would be likely to be caused by disclosure, having viewed the withheld information the Commissioner considers it reasonable to believe that it would be of interest to Garden Productions' competitors. However, it is not clear to the Commissioner precisely how disclosure of the information, beyond revealing Garden Productions' general approach to the filming of the series, would be likely to result in prejudice to its commercial activities.

35. The submissions provided do not explain why placing the information in the public domain would benefit a competitor to the detriment of Garden Productions (and by extension, Channel 4), beyond saying that the information contained in the Access Agreement and the Code of Conduct would allow them to replicate the approach taken by Garden Productions.
36. The Commissioner is mindful that there can be scenarios where disclosing information about a particular strategy or approach would assist a competitor in favourably modifying its approach when competing in the same field. However, in this case the withheld information only sets out in fairly broad terms how filming will be conducted. It appears to be a general description of the rights and responsibilities of each party. It contains no financial information (beyond the public liability insurance sum assured, which the Commissioner does not consider to be commercially sensitive), specialist or innovative technical or editorial information. Bearing in mind that the camera rig plan has been excluded from the scope of the request and is not being considered for disclosure, and in the absence of an explanation as to how other specific elements of the information would provide explicit benefits to a competitor, the Commissioner considers that the withheld information contains little which could not reasonably be guessed at or surmised by a rival seeking to replicate Garden Productions' approach.
37. The Commissioner does not consider that the arguments forwarded by Bedfordshire Police sufficiently demonstrate a causal link between the disclosure of the information and the prejudice to commercial interests. The explanations are couched in general terms and no link is made between the information that has actually been withheld and the prejudice to commercial interests. This was despite Bedfordshire Police being informed by the Commissioner that it must justify its position and that it is a public authority's responsibility to satisfy the Commissioner that information should not be disclosed and that it has complied with the law.
38. Garden Productions also objected on the grounds that the Agreement and the Code of Conduct were products of its expertise and experience in putting together such projects. The Commissioner considers that any private sector organisation seeking to do business with a public authority must, as a matter of course, expect there to be a greater call for openness and transparency about the relationship between them. The Commissioner does not consider the statement that information is being withheld because it represents a party's approach to contracts or agreements to be an adequate argument against its disclosure.

39. As the Commissioner does not consider that Bedfordshire Police has demonstrated that disclosure of the withheld information would be likely to prejudice the commercial interests of Garden Productions or Channel 4, she has concluded that section 43(2) of the FOIA is not engaged.
40. Bedfordshire Police must therefore take the action set out in paragraph 3 of this decision notice.

Other matters

41. As well as issuing this decision notice, the Commissioner has made a separate record of Bedfordshire Police's late response to the request. This issue may be revisited should evidence from other cases suggest that this is necessary.

Right of appeal

42. 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

43. 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.
44. 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

Samantha Bracegirdle
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