

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 January 2021

Public Authority: The Pubs Code Adjudicator
Address: Victoria Square House
Victoria Square
Birmingham
B2 4AJ

Decision (including any steps ordered)

1. In a 12 part request the complainant, on behalf of the Pubs Advisory Service, has requested information about alternative arbitrators from the Pubs Code Adjudicator ('the PCA'). The PCA advised that it does not hold the information requested in five parts of the request. It provided information within the scope of six parts and withheld the remaining information requested in one part under section 41(1) of the FOIA (information provided in confidence).
2. The Commissioner's decision is as follows:
 - On the balance of probabilities, the PCA does not hold information falling within the scope of parts 7 to 11 of the request and complied with section 1(1)(a) of the FOIA.
 - The information requested in part 12 of the request is exempt from disclosure under section 41(1) of the FOIA as it is information that was provided to the PCA in confidence.
3. The Commissioner does not require the PCA to take any remedial steps.

Background and nomenclature

4. A significant proportion of public houses in the UK are in fact owned by one of just six businesses (Pub-Ownning Businesses or 'POBs'). These POBs are: Punch Pubs & Co, EI Group plc, Marstons plc, Star Pubs & Bars Ltd, Greene King plc, and Admiral Taverns Ltd.
5. In many cases, the POB will own the premises of a public house, which it then leases out to the publican. Often the publicans are 'tied' to the particular POB, meaning that they are subject to restrictions on what products they are permitted to sell. Supporters of this system argue that Tied Pub Tenants ('TPTs') benefit from lower rents, bulk-buying discounts and other protections by virtue of being part of large company. Opponents argue that the restrictions prevent TPTs from offering the diversity and quality of products that they might otherwise be able to offer their clientele.
6. The Pubs Code, introduced in 2016, was aimed at redressing the perceived imbalance between individual TPTs and the large POBs to whom they are tied. As well as having an independent regulator to adjudicate on rent terms which may be unfair, TPTs also now have the right to request a Market Rent Only tenancy, which ends the "tie" to the POB. When TPTs have their regular rent reviews, they may request an assessment to find out what their potential rent might be if they were no longer tied – this is known as the MRO option and is subject to adjudication. A TPT then has the choice to decide whether to remain tied or to take the MRO option.
7. The Small Business, Enterprise and Employment Act 2015 created the office of a Pubs Code Adjudicator who is now responsible for overseeing the implementation of and resolving disputes arising under, the Pubs Code. The current Adjudicator is Ms Fiona Dickie.
8. Whilst it is the Adjudicator herself (or the office she occupies) who is the public authority for the purposes of the FOIA, all references to 'the PCA' within this notice should be read as referring to the corporate body and not the individual.

Request and response

9. On 23 December 2019 the complainant wrote to the PCA and requested information in the following terms:
 - "1. What is the total number of PCA referral cases in which alternative arbitrators (AA's) have been appointed since July 2016.

2. How many different AA's have been appointed by the PCA since July 2016?
 3. What is the percentage of 2016 referrals cases for which AA's were appointed?
 4. What is the percentage of 2017 referrals cases for which AA's were appointed?
 5. What is the percentage of 2018 referrals cases for which AA's were appointed?
 6. What is the percentage of 2019 referrals cases for which AA's were appointed?
 7. What number of the AA's appointed by the PCA charge the same or less than the PCA quoted hourly rate?
 8. What number of the AA's appointed by the PCA charge more than the PCA quoted hourly rate?
 9. What is the average hourly rate charged by the AA's appointed by the PCA?
 10. What is the highest hourly rate charged by any of the AA's appointed by the PCA?
 11. What is the total amount charged by the AA's in all cases (where costs have been awarded) payable by either the TPT or the POB?
 12. What was the total amount TPT's had to pay to the AA's in such cases?"
10. The PCA responded on 22 January 2020. It provided information within the scope of parts 1 to 6 of the request and said it did not hold information within the scope of parts 7 to 11. The PCA withheld the information requested in part 12 under section 41 of the FOIA.
 11. Following an internal review, the PCA wrote to the complainant on 17 February 2020. It confirmed it did not hold information within the scope of parts 7 to 10 of the request. The PCA advised that it did hold some information relevant to part 11 but that, in so far as that information fell within the scope of part 11, it was exempt from disclosure under section 41 of the FOIA.

Scope of the case

12. The complainant contacted the Commissioner on 17 February 2020 to complain about the way his request for information had been handled.
13. Having liaised with the complainant, the Commissioner's investigation has focussed on whether, on the balance of probabilities, the PCA holds information within the scope of parts 7 to 11 of the request and has complied with section 1(1) of the FOIA. She has also considered whether the PCA is entitled to rely on section 41(1) to withhold the information requested in part 12.

Reasons for decision

14. In its submission to the Commissioner the PCA has provided the following further background to the request. The PCA is a corporation sole undertaking functions on behalf the Crown. The office was established by Part 4 of the Small Business, Enterprise and Employment Act 2015 (the SBEE Act), under which the Pubs Code etc Regulations 2016 (the Pubs Code) were made. The Department for Business, Energy and Industrial Strategy is the sponsor Department for the PCA. The current PCA, Ms Fiona Dickie was appointed on 03 May 2020. The PCA office is small, with fewer than 20 members of staff.
15. The main purpose of the PCA as regulator is to enforce the Pubs Code, which regulates the relationship between tied pub tenants (TPTs) and large pub-owning businesses (POBs). The PCA has three main statutory functions (1) to arbitrate individual disputes between POBs and TPTs relating to the Pubs Code and (2) to investigate suspected breaches of the Pubs Code (3) to report unfair business practice to the Secretary of State.
16. By virtue of sections 48(5)(b) and 50(4)(b) of the SBEE Act and regulations 58(2)(b) and 60(4)(b) of the Pubs Code, the Pubs Code Adjudicator has the power to appoint another person to arbitrate any dispute referred to her under that legislation. When the PCA exercises this function, the person appointed is colloquially referred to as an alternative arbitrator or AA.

Section 1 – general right of access to information held by public authorities

17. Under section 1(1) of the FOIA, anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b) to have the

information communicated to him or her if it is held and is not exempt information.

18. In parts 7 to 10 of his request the complainant has requested the following:

The number of the AAs appointed by the PCA that charge the same or less than the PCA quoted hourly rate.

The number of the AAs appointed by the PCA that charge more than the PCA quoted hourly rate.

The average hourly rate charged by the AAs appointed by the PCA.

The highest hourly rate charged by any of the AAs appointed by the PCA.

19. In his correspondence to the Commissioner the complainant has said that he has been contacted by two AAs who explained that they send copies of all their awards (including their costs and hourly rates) to the PCA and that this is the standard procedure. In the complainant's view, this indicates that the PCA does hold at least some of the information above. He also believes, however, that all AAs send this information to the PCA. The Commissioner put this point to the PCA.
20. In its submission the PCA has confirmed that it is not the case that every AA provides it with details of their costs. It says that where the PCA appoints an AA to determine a dispute under the Pubs Code, it asks that the appointed person provides it with a copy of any award made in the course of that arbitration. The PCA is tasked with regulating compliance of the pub industry with the Pubs Code and it is necessary for the performance of this task that her office is kept informed of the issues raised within, and the outcomes of, disputes raised under the Pubs Code statutory dispute resolution regime.
21. These awards will sometimes include details of the fees and/or hourly rates charged by AAs where the award includes an order as to payment of the AAs costs. The PCA may also hold this information from other correspondence with an AA, for example if an AA copies to the PCA an invoice for their fees sent to the parties to the arbitration, although the PCA does not require AAs to copy it into such correspondence. Where details of fees and/or hourly rates are included in an award or any correspondence, the PCA will hold this information in accordance with its data retention policy. However, it is not PCA policy to ask for details of an AA's fees or hourly rates. Matters relating to fees or hourly rates are between the AA and the parties to the arbitration.
22. The PCA goes on to say that at the time of the request it had appointed AAs in 86 cases but in respect of parts 7 to 10 of the request it only held fee and hourly rate information for 13 AAs. The PCA says it took the

view that because it did not hold information about all AAs appointed, it did not hold the information that the complainant sought. The PCA notes that in his request for an internal review dated 22 January 2020, the complainant suggested that "... the PCA could easily contact 31 arbitrators ask them what they have billed in 86 referrals and at the same time get their charge-out rates, this is minor administration less than a day's work, you could then answer the other FOI questions". In the PCA's view the complainant clearly sought information relating to *all* AAs appointed by the PCA in respect of requests 7 to 10. This was not information that the PCA held nor was it information that the PCA was obliged to seek under the FOIA or any other enactment.

23. Finally, the PCA has detailed in its submission the searches it undertook for any information relevant to parts 7 to 10 of the request. These included: reviewing Outlook mailboxes, considering information that AAs had provided, and reviewing a relevant spreadsheet. The PCA confirmed that any information would be held electronically, that the information had never been held, has not been held and destroyed, and that the PCA is not under any statutory obligation to either gather or retain details of an AA's fees or hourly rate.
24. The Commissioner has considered the complainant's arguments and the PCA's position. She is satisfied, on the balance of probabilities, that the PCA does not hold the information requested in parts 7 to 10 of the request, for the reasons the PCA has given. The Commissioner finds that the PCA complied with section 1(1)(a) of the FOIA in respect of those parts of the request.
25. In part 11 of his request the complainant has requested the following:

What is the total amount charged by the AA's in all cases (where costs have been awarded) payable by either the TPT or the POB?
26. The PCA initially advised the complainant that it did not hold this information. Following its internal review, the PCA advised the complainant that it had identified that it did hold some relevant information and indicated that, in so far as it fell within the scope of his request, that information was exempt from disclosure under section 41(1) of the FOIA.
27. In its submission to the Commissioner the PCA has confirmed that it has reconsidered its response to this part of the request. It acknowledged that the individual who carried out the internal review considered that the PCA did hold some of the information requested in respect of request 11. This was because some AAs did provide the PCA with information about costs that are payable by either the pub-owning business or the tied pub tenant. But the reviewer advised the

complainant that the information the PCA held did not cover all cases where an AA has been appointed.

28. Having reviewed part 11 of the request, the PCA has confirmed that it does not hold the information requested. The complainant has asked for the total amount charged by the AAs in all cases. The PCA has confirmed that it does not hold information relating to the AAs' costs charged in every case and therefore does not hold or cannot provide a 'total' figure. The PCA has noted that the FOIA does not require it to seek this total figure in order to comply with request. The PCA is correct - the FOIA concerns only information held at the time of a request.
29. The Commissioner accepts that, on the balance of probabilities and for the reasons given above, the PCA does not hold the specific information requested in part 11 of the request. Although it indicated that it holds some relevant information within the scope of this part following the review, in its initial response the PCA had advised the complainant it did not hold the requested information. As such, the Commissioner finds that the PCA complied with section 1(1)(a) of the FOIA with regard to part 11.

Section 41 – information provided in confidence

30. Section 41(1) of the FOIA provides that information is exempt if, under subsection (a) the public authority obtained it from any other person and, under subsection (b), disclosure would constitute a breach of confidence actionable by that person or any other person. This exemption is absolute and therefore not subject to a public interest test, as such.
31. The PCA has applied section 41(1) to the information requested in part 12 of the request, namely:

What was the total amount TPT's had to pay to the AA's in such cases?"

The PCA has provided the Commissioner with that information.

Was the information obtained from another person?

32. The PCA has advised the Commissioner that information about any costs award made against a party in a Pubs Code arbitration is provided to the PCA by the AAs (and potentially by the parties) in the context of those arbitration proceedings. The PCA therefore obtained this information from another person – the AAs – and the condition under section 41(1)(a) has therefore been met.

Would disclosure constitute an actionable breach of confidence?

33. In considering whether disclosing the information constitutes an actionable breach of confidence the Commissioner considers the following:
- whether the information has the necessary quality of confidence
 - whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.
34. **Necessary quality of confidence:** The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. In its submission the PCA has advised that awards made in arbitration proceedings are confidential unless such confidentiality is waived. As such the information would not otherwise be accessible to complainant (or more widely). And since it is associated with arbitration proceedings, the Commissioner is satisfied the information is more than trivial.
35. **Circumstances importing an obligation of confidence:** This limb is concerned with the circumstances in which the confider of information passed the information on. The confider may have attached specific conditions to any subsequent use or disclosure of the information (for example in the form a contractual term or the wording of a letter). Alternatively, the confider may not have set any explicit conditions but the restrictions on use are obvious or implicit from the circumstances (for example information a client confides to their counsellor).
36. The PCA has explained that arbitration proceedings (including information about costs awards) are confidential as between the parties to the arbitration and the arbitrator (unless parties choose to actively waive that right to confidentiality). The PCA says it is understood by all parties that information provided to the PCA in respect of these cases is done so in confidence. The Courts continue to uphold this principle. The Commissioner is satisfied that the circumstances associated with the information in question – arbitration proceedings – import an obligation of confidence.
37. **Detriment to the confider:** The PCA says it looked at the test of confidence (set out by Judge Megarry at the High Court of Justice in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415). On balance it took the view that in the absence of parties agreeing to waive confidentiality about costs in a confidential arbitration, they would be likely to succeed in any court action. The PCA provided the

Commissioner with further supporting arguments which the Commissioner does not intend to reproduce in this notice. It is sufficient to say that the Commissioner agrees with the PCA that disclosing the information would constitute a breach of confidence which would cause a detriment to a party to any arbitration determined by an AA. This is because it would involve disclosing an award made in arbitration proceedings which the parties would have reasonably expected to be kept confidential unless they agreed otherwise.

Is there a public interest defence for disclosure?

38. As has been noted, section 41 of the FOIA is an absolute exemption and therefore not subject to the public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under the FOIA).
39. The PCA has confirmed that it is committed to being transparent in its operations as this helps people to understand the Pubs Code. It has acknowledged that transparency enables the industry to better understand previous decisions and consider how the Pubs Code is being applied in individual cases. The PCA notes, however, that Pubs Code arbitration proceedings are confidential unless such confidentiality is waived by the parties. Such disclosure would undermine the principle of confidentiality in arbitrations and the confidence of current and future parties to arbitration.
40. The Commissioner has not been made aware of any public interest arguments for disclosure that the complainant may have. She agrees that there is considerable public interest in the principle of confidentiality associated with arbitrations and there is public interest in parties being confident in those proceedings. As such, the Commissioner finds in this case that there is no public interest defence for disclosing the information.
41. The Commissioner is satisfied that disclosing the information would constitute an actionable breach of confidence and that there is insufficient public interest defence for disclosure. The condition under section 41(1)(b) has therefore been met.
42. The Commissioner has considered all the circumstances of this case and the information being withheld under section 41(1) of the FOIA. The Commissioner's decision is that the PCA correctly withheld the information requested in part 12 of the request under section 41(1) of the FOIA.

Other matters

43. In his correspondence to her the complainant asked whether the Commissioner would recommend an ex-gratia payment for his "doggedness in being forced to carry on". The Commissioner's role is to regulate the FOIA. Ex-gratia payments are not a feature of the FOIA and therefore the Commissioner will not make the recommendation the complainant has sought.

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@justice.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

Pamela Clements
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