

The Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 January 2024

Public Authority: London Borough of Havering

Address: Town Hall
Main Road
Romford
RM1 3BB

Decision (including any steps ordered)

1. The complainant has requested, from the London Borough of Havering (the Council), the make and model of a CCTV camera at a specified location. The Council told the complainant that it doesn't hold the information. However, during the Commissioner's investigation, the Council's position changed. The Council is now relying on section 43(2) of FOIA (the commercial interests exemption) to withhold the requested information.
2. The Commissioner's decision is that the Council has failed to demonstrate that section 43(2) is engaged, and that consequently the Council isn't entitled to withhold the requested information.
3. The Commissioner therefore requires the Council to disclose the requested information, to ensure compliance with the legislation.

4. The Council must take this step 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 FOIA, and may be dealt with as a contempt of court.

Request and response

5. On 1 August 2023, the complainant wrote to the Council and requested information about the make and model of a CCTV camera at a specified location.
6. The Council responded on 30 August 2023. It said "... Make and model of this camera is not held".
7. The complainant, in their internal review request, disputed the Council's response and asked it to "carry out a proper search". Following an internal review, the Council wrote to the complainant on 27 September 2023. Its substantive comments were brief. It said "VCA [Vehicle Certification Agency] has web pages which deals [sic] with approved devices in England ... This page has a link to the certifications issued in England, where Certification Letters can be downloaded", and it provided two links.

Scope of the case

8. The complainant contacted the Commissioner on 27 September 2023 to complain about the way their request for information had been handled.
9. They disagreed with the Council's stated position of 30 August 2023 that it doesn't hold the requested information.
10. They considered the Council hadn't properly searched its records.
11. Regarding the Council's internal review response and its reference to approval certificates, the complainant said such information is "useless" as it doesn't provide the information requested about the specified CCTV camera.
12. They wanted the Council to:

"... carry out a proper search of all its records to establish the exact make and model of the camera concerned ... I cannot accept that [the Council] would install a camera device on its highways and retain absolutely no records ... [the Council's] position is not credible".

13. The Commissioner wrote to the Council on 30 November 2023, with some initial comments and a request for submissions. He expressed concerns about how the request had been handled. He asked the Council to answer his 'information not held' key questions¹, and in sufficient detail. He also noted the links the Council had provided at internal review stage, and asked the Council to confirm whether the requested information could be found via those links. He said he'd checked the links himself and hadn't been able to locate the requested information.
14. He stated that based on the information available to him so far, he wasn't convinced the Council doesn't hold the requested information.
15. He asked the Council to provide its response by 15 December 2023, setting out its final position. However, disappointingly, the Council didn't respond by that deadline.
16. Having received no response at all from the Council, on 19 January 2024 he wrote to the Council again, asking the Council to contact him as a matter of urgency. He also highlighted to the Council that he had recently issued a decision notice in a similar case (the case was IC-258168-C5N2²) involving the Council and a request for information of the same type as the information the complainant had requested in the present case (namely information about the make and model of a specified CCTV camera). The Commissioner advised the Council to take that decision notice into consideration, when finalising and explaining its position in the present case.
17. In IC-258168-C5N2, the Council had originally denied holding the requested information, before revising its position twice, ultimately relying on section 43(2) of FOIA to withhold it. The Commissioner's

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/key-questions-for-public-authorities-foi-act-2000/#1>

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4028108/ic-258168-c5n2.pdf>

decision notice in IC-258168-C5N2 found that section 43(2) of FOIA wasn't engaged, and the Commissioner ordered the Council to disclose the requested information.

18. To return to the present case, the Council then contacted the Commissioner. Its response was extremely brief, citing section 43(2) of FOIA to withhold the requested information.
19. The Commissioner therefore considers that the scope of the present case is to decide whether the Council is entitled to rely on section 43(2) of FOIA to withhold the make and model of the CCTV camera at the location that the complainant specified in the request of 1 August 2023.

Reasons for decision

20. Section 43(2) of FOIA provides that information is exempt if its disclosure would, or would be likely to, prejudice (harm) the commercial interests of any person, including the public authority holding it.
21. The exemption, if engaged, is subject to the public interest test.
22. To engage section 43(2), three criteria must be met:
 - The harm the public authority envisages must relate to someone's commercial interests.
 - There must be a causal link between disclosure and the envisaged harm. The harm must be real, actual or of substance.
 - The public authority must show that disclosure would, or would be likely to, cause the envisaged harm.
23. The Council's submissions are simply that:

"The third party maintains that this is commercially sensitive information and **does not** give consent to release into the public domain ... It is not in the public interest to put information into the public domain whereby consent has not been given by the third party. Should the information be released, it would break trust between the third party and the Council, as well as hinder the working relationship [and] cause reputational damage".

24. Whilst the Council didn't specify what third party it was referring to in the comments quoted above, the Commissioner's understanding is that the Council means the manufacturer of the CCTV camera in question.
25. The Council hasn't made it clear whose commercial interests are at stake. Presumably, the third party, if it has refused to consent to disclosure, has its own commercial interests in mind; and the Council's comments about disclosure breaking trust, hindering the working relationship, and causing reputational damage perhaps suggest the Council too has its own commercial interests in mind. However, it's not clear.
26. Whilst the Council's comments refer to the withheld information being "commercially sensitive", the Council doesn't explain why.
27. Although the Council envisages harm to the relationship between the (unspecified) third party and the Council, and reputational damage (it's not clear whose reputation), the Council hasn't clearly explained how those things relate to commercial interests (its own or the third party's) in this instance.
28. The Commissioner therefore considers that the Council's submissions don't clearly set out the commercial interests involved.
29. Nor, in the Commissioner's view, do they show a causal link between disclosure and the envisaged harm to the (unclear) commercial interests; or show that disclosure would, or would be likely to, cause the envisaged harm.
30. He therefore considers that the Council has failed to demonstrate that section 43(2) is engaged.
31. He also highlights the previous decision notice he cited earlier (paragraphs 16-17), in which he made the same finding and ordered the Council to disclose the same type of information.
32. The Commissioner emphasises that his correspondence of 30 November 2023 made it clear to the Council that if the Council failed to explain its position adequately, he'd be more likely to uphold a complaint against it.
33. He also emphasises his disappointment with the quality of the Council's submissions, especially given that on 19 January 2024 the Commissioner highlighted that he had recently issued a decision notice

in a similar case and advised the Council to take that decision notice into consideration.

Right of appeal

34. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. 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.
36. 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

Daniel Kennedy
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF