

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 May 2024

Public Authority: Oxford Direct Services Limited
Address: St Aldates Chambers
109 St Aldates
Oxford
OX1 1DS

Decision (including any steps ordered)

1. The complainant submitted a three part request for information held by Oxford Direct Services Limited (ODSL) relating to low access shower adaptations completed over a 36 month time period.
2. ODSL provided the complainant with some information, and advised that it considered the remaining information relevant to the request to be exempt from disclosure under section 43(2) (commercial interests) of FOIA.
3. The Commissioner's decision is that, on the balance of probabilities, ODSL has not identified all of the information held that is relevant to all three parts of the complainant's request, and has therefore failed to comply with section 1 of FOIA.
4. Furthermore, the Commissioner has found that section 43(2) is not engaged in respect of the withheld information which ODSL has currently identified as being relevant to part 2 and part 3 of the request.
5. When relying on section 43(2) of FOIA, ODSL also failed to set out its consideration of the public interest test, both in its refusal notice to the complainant, and at the internal review stage. Therefore, the Commissioner has found a breach of section 17(3) of FOIA.

6. The Commissioner requires ODSL to take the following steps to ensure compliance with the legislation.
 - Carry out adequate searches to identify all of the information held that is relevant to the request, and issue a fresh response to all three parts of the request after consideration of that information. With regard to any additional information identified as being relevant to part 2 and part 3 of the request, ODSL should take into account the decision set out within paragraphs 25 - 48 of this decision notice.
 - With regard to the withheld information that has already been identified as relevant to part 2 and part 3 of the request, ODSL should now provide the total cost of each level access shower adaption, and the names of all contractors or subcontractors that carried out work on each adaption.
7. ODSL must take these steps within 30 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

8. On 19 November 2023, the complainant wrote to ODSL and requested information in the following terms:
 - “1. In the past 36 months how many bathroom adaptations into accessible shower rooms have Oxford Direct Services performed both in the private sector and council owned properties? Please distinguish between the two.
 - 2. Please provide the cost of each individual adaption listed above.
 - 3. Please provide the names of all contractors and sub contractors that were awarded each individual contract to perform adaption listed in (1) above.”
9. On 20 November 2023, ODSL provided its response, which included an excel spreadsheet which set out details of 90 level access shower “jobs” carried out in the last 36 months, broken down by both the type of funding used to carry out the work, and also by private and council owned properties. ODSL also provided the order numbers of 90 jobs, a description of the work carried out for each job, the completion date, and also the name of the contractor or subcontractors that carried out some of the jobs.

10. ODSL advised the complainant that the cost of each level access shower adaptation carried out, as requested in part 2 of the request, was being withheld under section 43(2) of FOIA. ODSL said that the disclosure of this information would reveal subcontractors' costs and charges, including the subcontractors' prices, which could cause damage to "companies involved".
11. ODSL also provided a link to the contracts register, and expenditure reports for costs exceeding £500, published on its website, stating that it was doing so "as this may provide some of the information" relevant to the request.
12. On 24 November 2023, the complainant requested an internal review, and on 28 November 2023, ODSL provided a response, maintaining its original position.

Scope of the case

13. The complainant has raised concerns about ODSL's decision to withhold some of the requested information under section 43(2) of FOIA.
14. The Commissioner will therefore consider whether ODSL was entitled to rely on section 43(2) of FOIA as its basis for withholding the information that was relevant to part 2 and part 3 of the request.
15. In addition, in the circumstances of this case, the Commissioner also considers it to be appropriate to make a decision as to whether, on the balance of probabilities, ODSL has currently identified all of the information held that is relevant to all three parts of the request.

Reasons for decision

Section 1 - Information held

16. Section 1 of FOIA states that a person making a request for information is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request and, if that is the case, to have that information communicated to them, if it is not exempt information.
17. ODSL has advised that, when conducting a review of its handling of the request in response to the Commissioner's investigation, it found that the original lists provided to the complainant was not based on a complete set of information. ODSL has said that it reviewed the data set and widened the search criteria, and this led to the identification of the

withheld information which it has recently provided for the Commissioner's consideration.

18. In this case there are significant differences between the information provided to the complainant in response to the request, and the withheld information provided to the Commissioner. The main points noted by the Commissioner are as follows:
 - Part 1 of the request asks for the number of bathroom adaptations to accessible shower rooms that had been completed in the last 36 months, and ODSL provided the complainant with a list of 90 'jobs' in response. The two lists setting out 'jobs' that ODSL has provided to the ICO as the withheld information is significantly larger than provided to the complainant.
 - The request was for 36 months of data, and therefore covered relevant information held for the period 19 November 2020, to 19 November 2023 (up to the date of the request). The list of jobs originally provided to the complainant covered the period 24 November 2020, to 1 November 2023. However, the list of jobs provided to the Commissioner covers the period 18 May 2021, to April 2024.
 - There is no obvious correlation between any of the works listed in the set of data provided to the complainant, and the withheld information provided to the Commissioner.
 - Descriptions of the 90 jobs described in the excel spreadsheet provided to the complainant include: "Decorate bathroom after level access shower install ", "level access shower-flooring", "level access – shower," and, "level access-electrics." This indicates that at least some of the 90 jobs listed are for only part of the work carried out on an adaptation.
19. As ODSL has confirmed that additional data was identified as part of its recent review of the request, the Commissioner considers that it is not unreasonable to conclude from this that ODSL's original response to part 1 of the request did not take into account all of the information held. Furthermore, it appears that ODSL provided the complainant with the number of jobs carried out in relation to the adaptations, rather than the actual number of adaptations.
20. It is also the Commissioner's view that, as the withheld information provided for his consideration only starts from 18 May 2021 (rather than November 2020, which is the start of the 36 month time period relevant to the request), it is unlikely that this is all of the information held by ODSL that is relevant to the request.

21. For the reasons set out above, it is the Commissioner's decision that, on the balance of probabilities, ODSL holds further information within the scope of the request, and has therefore failed to comply with its obligations under section 1 in respect of all three parts of the complainant's request.
22. The Commissioner requires ODSL to provide the complainant with a fresh response to the request, ensuring that it has conducted adequate searches and identified all of the information that is relevant to all three parts of the complainant's request.
23. If further information is located that is relevant to part 1 of the request, the fresh response should provide an accurate number of adaptations carried out in both council and private accommodation, for the relevant 36 month time period. Alternatively, an adequate refusal notice should be provided to the complainant in respect of part 1 of the request.
24. With regard to part 2 and 3 of the request, ODSL should confirm whether it holds any relevant information for the period 19 November 2020, to 17 May 2021, and, after taking into consideration the Commissioner's decision set out within paragraphs 25 – 48 of this decision notice, either release any additional information that is located, or issue a refusal notice to the complainant.

Section 43(2) – commercial interests

25. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
26. When relying upon the exemption at section 43(2) to withhold information, the public authority must be able to demonstrate a clear link between disclosure and the prejudice to the commercial interests of either itself, a third party, or both. The risk of the prejudice to commercial interests occurring must be real and significant for the exemption to be engaged.
27. The exemption is subject to the public interest test. This means that even if the exemption is engaged, the Commissioner will need to decide whether it is in the public interest to release the information.

The complainant's position

28. The complainant has said that they do not accept that ODSL is entitled to rely on section 43(2) of FOIA to withhold information that is relevant to their request. They have argued that the list of works that they received in response to their request is sufficiently vague that the disclosure of cost information, and the details of each relevant

contractor who completed the work on an adaption, would not compromise ODSL, or any third party.

ODSL's position

29. ODSL has advised the Commissioner that it referred the requester to the expenditure reports and contracts register on its website as it considered that some of this information "may relate" to the information that was being requested. However, ODSL said that this available information "may not fully show costs associated with cost of individual adaptations."
30. ODSL has argued that answering part 2 of the request in full would show individual subcontractor costs, revealing pricing methodology by giving "overall pricing of individual jobs." ODSL has said that the disclosure of such information could be damaging and cause prejudice to the subcontractors, as it would have an effect on their bargaining position in the marketplace. It says that subcontractors may not wish to work with ODSL, if they cannot be assured that their pricing will remain confidential.
31. ODSL has said that the disclosure of the withheld information would cause prejudice to its ability to compete for the best bids, if companies choose not to bid for its contracts. ODSL goes on to say that restricting or limiting the contracts and tenders it is able to be involved in, or bid on, could impact its growth targets in its business plans, which would ultimately affect the dividend paid back to Oxford City Council (the council) to be used for public services.
32. ODSL has explained that it is a contracting organisation, and that its work is part of a contract to the council, and external clients. ODSL advised that disclosing information against specific order numbers will reveal its job costs and that this would adversely affect its commercial position, not only by revealing its pricing but also because it may impact its ability to use certain subcontractors.
33. ODSL has also said that it believes that the disclosure of costs relevant to the request, along with specific order numbers/locations, would cause prejudice for ODSL as the public may be able to link this data to other publicly available information, and calculate its profit margins in respect of some of the work.

The Commissioner's analysis

34. The withheld information provided by ODSL to the Commissioner lists all of the jobs and costs associated with all the level access shower adaptations carried out since May 2021. In its current format, the withheld information does not set out the total cost for each adaption, as

requested in part 2 of the complainant's request, and it has not been possible for the Commissioner to link some of the jobs, costs and companies listed, to any one specific adaption in order to calculate a total cost.

35. However, the Commissioner, in the absence of any arguments from ODSL to the contrary, considers that it is not unreasonable to assume that the withheld information provided for his consideration will provide the "building blocks" to enable ODSL to calculate the total cost of each adaption in response to part 2 of the request, and will also allow ODSL to identify which contractors or subcontractors carried out work on each adaption, in response to part 3 of the request.
36. For section 43(2) to be engaged, the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed must relate to commercial interests;
 - Secondly, 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 to those commercial interests; and,
 - Thirdly, it is necessary to establish whether the alleged prejudice would, or would be likely to, occur.
37. The Commissioner accepts that the cost for work carried out by ODSL, or other contractors, for level access shower adaptations in residential homes are part of a commercial process. The Commissioner is therefore satisfied that the first criterion set out within paragraph 36 of this decision notice is met.
38. When considering the second criterion of the three-limb test, the Commissioner must decide whether there is a clear link between the prejudice that has been described by ODSL and the disclosure of the withheld information.
39. The Commissioner's published guidance on section 43 states that not all commercial information will be subject to the exemption. A public authority must show a causal link between the disclosure of the commercial information requested and prejudice to either its commercial interests, or the commercial interests of third parties.
40. The Commissioner considers it pertinent to note that part 2 of the complainant's request asks only for the cost of the adaption, rather than 'costs', or any breakdown of costs. The Commissioner therefore

considers an objective reading of part 2 of the request is for the total cost of each adaption.

41. In addition, the Commissioner considers that part 3 of the request asks only for the contractor or subcontractor that carried out the work on each adaption.
42. Given the above, in contrast to what ODSL appears to suggest, the Commissioner does not consider that job reference numbers, the date that each set of work was carried out, when work was completed, when payment was made, location, or similar, fall within the scope of the request. In addition, information about the type of work any company has carried out in relation to any one adaption also does not fall within the terms of the request.
43. As ODSL is only required to consider information held that is directly relevant to the request, any arguments it has presented about how the disclosure of the cost of each adaption and the name of the contractor(s), would cause harm if disclosed with additional information, carry little weight in this case.
44. ODSL already proactively publishes all individual expenditure that exceeds £500, and the Commissioner notes from the 2023-24 figures published that in some cases very specific details are disclosed about what work a cost relates to, and the contractor or subcontractor associated with that cost. The Commissioner has also found that ODSL has published some of the withheld information provided for his consideration.
45. The Commissioner considers it is not unreasonable to assume that the extent of the work, materials, and labour required to complete each adaption is likely to differ, and this will result in a variation in the total cost in each case. Given this, having considered the arguments presented by ODSL, the Commissioner has had difficulty establishing why the disclosure of the total cost of an adaption in isolation, even if carried out by one contractor, would provide an insight into the business model, or business strategy and pricing structure of any one company, including ODSL.
46. In the Commissioner's view, ODSL has failed to show how the release of the information that has been specifically requested (that is, without disclosure of additional information such as job reference numbers and similar, which do not form part of the request) would reveal any pricing structures, or could allow the public to link the requested information to any data that may already be available in order to calculate profit margins on work carried out.

47. The Commissioner therefore considers that the explanations and arguments presented by ODSL are not sufficient to persuade him that the disclosure of the specific information requested by the complainant in part 2 and part 3 of their request, that being the total cost of an adaption, and the contractors or subcontractors that carried out work on each adaption would, or would be likely to, cause harm to the commercial interests of any party.
48. Given the above, it is the Commissioner's view that ODSL has failed to demonstrate that the second criterion of the three-limb test set out within paragraph 36 of this decision notice is met in respect of the withheld information provided for his consideration that is relevant to part 2 and part 3 of the request for the period covering 18 May 2021 to 19 May 2023. The Commissioner therefore finds that the exemption at section 43(2) of FOIA is not engaged in respect of such information.

Procedural matters

49. The Commissioner regards it to be relevant to record that ODSL, when citing section 43 of FOIA, failed to refer to the public interest test either in its refusal notice, or its internal review response. The Commissioner therefore finds a breach of section 17(3) of FOIA.

Right of appeal

50. 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

51. 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.
52. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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