Freedom of Information Act 2000 (FOIA)

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **29 November 2018**

Public Authority: **Department for Housing, Communities and Local Government**

Address: **2 Marsham Street**
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested information relating to due diligence correspondence in respect of the Palestine Expo 2017: Generation Palestine event at the Queen Elizabeth II Conference Centre. The public authority refused to provide this citing section 36 (prejudice to the effective conduct of public affairs) and section 43 (prejudice to commercial interests) as its basis for doing so. It upheld this at internal review. During the course of the Commissioner's investigation, it also introduced reliance on section 40 (unfair disclosure of personal data).

2. The Commissioner's decision is that the public authority is entitled to rely on the exemptions it has cited as its basis for refusing to provide the requested information.

3. No steps are required.

Request and response

4. On 17 July 2017, the complainant requested information of the following description from the Queen Elizabeth II Conference Centre (QEII CC)

which is an executive agency of the Department for Housing, Communities and Local Government[1]:

"1. All the documents which comprised the due diligence referred to in your e-mail of the 26th May 2017[2];

2. Communications between you and all third parties in relation to this event including but not limited to those with Friends of Al'Aqsa Limited;

3. Communications between you and all Government departments and officials."

5. For ease of future reference, this notice will refer to them as Request 1, Request 2 and Request 3.

6. On 24 August 2017, QEII CC responded. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:

- section 36(2)(b)(ii) (inhibition of free and frank exchange of views); and
- section 43(2) (prejudice to commercial interests).

7. The complainant requested an internal review on 19 September 2017. On 16 October 2017, QEII CC sent them the outcome of its internal review. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 18 December 2017 to complain about the way his requests for information had been handled.

9. As noted above, QEII CC is an executive agency of the Department for Housing, Communities and Local Government ("DHCLG"). This decision notice is served on DHCLG as the sponsor body for QEII CC.

[1] https://www.gov.uk/government/organisations/queen-elizabeth-ii-conference-centre

[2] on 26 May 2017, QEII CC had said "As you know, the QEII Centre has undertaken further due diligence and remains content for 'Palestine Expo 2017: Generation Palestine' to proceed".

10. The remainder of this decision notice will refer to the "public authority". While the Commissioner corresponded with QEII CC on this matter, the public authority for the purposes of this decision notice is DHCLG.

11. In the course of correspondence, the public authority supplied the complainant with a series of weblinks which, it conceded, also formed part of the information within the scope of Request 1. It also added reliance upon section 40(2) (unfair disclosure of personal data) as its basis for withholding some of the requested information.

12. The Commissioner has considered whether the public authority is entitled to rely on section 36, section 43 and section 40 as its basis for withholding the requested information.

13. The Commissioner has not included the weblinks as part of her deliberations given that these have now been supplied to the complainant. The complainant has raised concerns about the relevance and the age of these links. In the Commissioner's view, these links form part of the information within the scope of request 1 and their relevance or age is not a consideration that she can look at. The Commissioner has no reason to dispute that these are links which the public authority looked at that are within the scope of request 1. Whether they are old, relevant, accurate or appropriate to the matter referred to in request 1, is not a point within the remit of the Commissioner to consider in the circumstances of this case.

Reasons for decision

Background

14. Palestine Expo 2017: Generation Palestine, organised by Friends of Al-Aqsa[3], was an event which took place at the Queen Elizabeth II Conference Centre on 8 and 9 July 2017. There was considerable controversy prior to, during and after this event about the event itself as well as about attendees and participants[4].

[3] https://www.foa.org.uk/

[4] https://www.theguardian.com/world/2017/jun/25/palestinian-event-in-london-faces-ban-over-hamas-links

Section 36

15. The Commissioner has first considered the application of the exemption at section 36(2)(b)(ii).

16. The relevant provision in section 36 states[5]:

> "Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—
>
> b) would, or would be likely to, inhibit-
> …
> ii) the free and frank exchange of views for the purposes of deliberation"

17. This exemption can only be engaged on the basis of the reasonable opinion of a qualified person. The qualified person who issued the opinion in this case was the Secretary of State for Communities and Local Government. At the time, this was Rt Hon Sajid Javid MP. The Commissioner is satisfied that the Secretary of State is a qualified person by virtue of section 36(5)(a) FOIA.[6]

18. The opinion of the qualified person was sought by officials on 7 August 2017 and provided by the qualified person on 16 August 2017. The Commissioner has summarised the opinion below being careful to exclude parts which reveal withheld information. It should be pointed out for the avoidance of doubt that the Commissioner has considered the opinion in full including those parts she has chosen not to reveal in this notice.

19. The qualified person was of the opinion that disclosure of the withheld information would inhibit the free and frank exchange of views in relation to due diligence activities and in relation to the preparation of briefing materials for ministerial consideration. Officials expressing candid views on this matter assumed that they were doing so in a confidential safe space.

---

[5] The full text of section 36 can be found here: http://www.legislation.gov.uk/ukpga/2000/36/section/36

[6] Section 36(5)(a) states that a qualified person in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown.

20. It expanded upon a point made directly to the complainant where it had said:

    "The information requested included discussions between the QEII Centre and officials from central government departments and other third parties such as [sic] Metropolitan Police".

Was the qualified person's opinion reasonable?

21. In determining whether the exemptions are engaged, the Commissioner must consider whether the qualified person's opinion was a reasonable one. In doing so, the Commissioner has considered all of the relevant factors including:

    - Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection, the opinion is unlikely to be reasonable.

    - The nature of the information. Whether it concerns an important issue which there needs to be a free and frank exchange of views or provision of advice.

    - The qualified person's knowledge of, or involvement in, the issue.

22. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

23. Although it appears that the qualified person did not inspect all the withheld information, he did view a sample. The Commissioner does not consider this approach to be incorrect in the circumstances of this case, given the volume of information under consideration.

24. The Commissioner has been guided on the interpretation of the phrase 'would prejudice' or 'would be likely to prejudice' 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; ie either prejudice 'would' occur or prejudice 'would be likely to' occur.

25. 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".

26. 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", and the occurrence of the prejudice claimed "is more probable than not".

27. The qualified person's opinion states that such inhibition would occur. The public authority's letter of internal review dated 16 October 2017 takes the same position. However, the public authority's submissions to the Commissioner rely on the lower threshold of "would be likely to" occur. The Commissioner does not think that this fatally damages the public authority's position on section 36 and has therefore considered the matter to the lower threshold of "would be likely".

28. The Commissioner accepts as reasonable the opinion that there was a substantially more than remote likelihood of inhibition to the free and frank exchange of views between officials on subjects of a similar nature. Similarly, the Commissioner accepts as reasonable, the opinion that this would have a knock-on negative effect to the quality of information provided for ministerial deliberation. Again, it is important to stress that the Commissioner is not seeking "the most reasonable" opinion.

29. In reaching this view, the Commissioner has had specific regard to the withheld information.

30. In light of the above, the Commissioner has concluded that the public authority was entitled to engage the exemption at section 36(2)(b)(ii).

Public interest test

31. This exemption is subject to the public interest test set out in section 2(2)(b) FOIA. Therefore, the Commissioner must also consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the withheld information.

32. The public authority acknowledged a general public interest in disclosure in order to increase public participation in decision making. It also acknowledged that transparency "increased public trust and confidence in good governance". It also said:

"As this particular event was subject to a high degree of scrutiny the release of the requested information would demonstrate that all views put forward were considered."

33. The complainant raised concerns that the event ran contrary to the public authority's obligations under the Equality Act. They drew attention to two incidents where two attendees at the event were asked to leave and explained why they were concerned that both decisions were racially motivated. There were also concerns that participants at the conference were openly against the existence of the state of Israel. This added weight to the public interest in disclosure in order to understand more clearly what the public authority's approach had been regarding these concerns.

34. The complainant did not advance any arguments in favour of maintaining this exemption nor did the Commissioner require them to.

35. Arguing in support of maintaining the exemption in the public interest, the public authority submitted that it is in the public interest for it to benefit from due diligence exercises which required it to work with key partners. Disclosure would be likely to harm the candour with which key partners expressed themselves.

36. It also stressed the importance of maintaining a safe space for free and frank exchanges of views between senior officials to ensure effective briefing when it was required to deliberate on key issues and concerns, including intelligence gathering.

37. It acknowledged that the public interest in maintaining the exemption for information of this nature weakens over time but observed that the events and correspondence in question was fairly recent. As such the public interest in maintaining the exemption was still compelling.

38. It made specific reference to the withheld information in support of this argument.

39. It acknowledged that it had not been as clear with the complainant on which exemption it was citing in its initial refusal. It apologised for this error and said that it had sought to rectify this at internal review.

Balance of public interest test

40. While the Commissioner gives weight to the view of the qualified person it is not the single most compelling argument in favour of maintaining the exemption.

41. If the Commissioner finds that the qualified person's opinion was reasonable, she will consider the weight of that opinion in the public interest test. This means that the Commissioner accepts that a

reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to occur, but she will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming her own assessment of whether the public interest test dictates disclosure.

42. It is important to note that the Commissioner's role, in determining a complaint made to her under section 50 of FOIA, is limited to considering the circumstances as they existed at the point that a request is submitted rather than at the point she is making a decision on that complaint.

43. In the Commissioner's view, timing is key here. The request was made shortly after the event in question – within the same month. While the Commissioner agrees that such information should not be withheld indefinitely, she accepts that there is a stronger likelihood of inhibition if the requested information is disclosed shortly after the event under discussion in the requested information. If a person contributing to the correspondence knows that their comments on a controversial topic will be made publically available shortly after they have made them, this would inhibit such contribution in the future. The Commissioner thinks that this is contrary to the public interest in ensuring good decision making by public authorities.

44. The Commissioner has therefore concluded that, on balance, the public authority is entitled to rely on section 36 for the information to which it has applied this exemption. In reaching this view, the Commissioner has had particular regard for the timing of the request.

Section 43 – Prejudice to commercial interests

45. Section 43(2) of the FOIA states that information is exempt from disclosure if its disclosure would or would be likely to prejudice the commercial interests of the public authority or a third party. The exemption is subject to the public interest test which means that even if it is engaged account must be taken of the public interest in releasing the information.

46. The exemption can be engaged on the basis that disclosing the information either 'would' prejudice someone's commercial interests, or, the lower threshold, that disclosure is only 'likely' to prejudice those interests. As above, the term 'likely' is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice is more probable than not.

47. In this case the public authority has argued that disclosure of the withheld information would be likely to damage its own commercial interests – specifically, those of the QEII CC.

48. 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 be likely to occur if the withheld information was disclosed has to relate to the 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 level of likelihood of prejudice being relied upon by the public authority is met, ie whether there is a real and significant risk of the prejudice occurring.

Commercial interests

49. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner has considered the meaning of the term in her guidance on the application of section 43. This comments 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."[7]

50. The public authority has argued that disclosure of the requested information would be likely prejudice its commercial interests. It explained that competitors would be able to extract details about its business operations from the withheld information including its costs and conditions. It argued also that disclosure would be likely to undermine customer confidence in its ability to keep information confidential. It recognised that any person who undertakes a business transaction with a public authority must be mindful of that public authority's transparency obligations but that this should not be used to undermine its commercial interests.

51. The Commissioner is satisfied that the actual harm alleged by the public authority relates to its commercial interests. Accordingly, she is satisfied that the first criterion is met.

Causal link

52. When investigating complaints which involve a consideration of prejudice arguments, the Commissioner considers that the relevant test

[7] https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf

is not a weak one and a public authority must be able to point to prejudice which is "real, actual or of substance" and to show some *causal* link between the potential disclosure and the prejudice. As long as the prejudice is real and not trivial, its severity is not relevant to engaging the exemption – this will be factored in at the public interest test stage.

53. The public authority explained a causal link between disclosure and prejudice where competitors could refine their business models and costs or conditions "to undermine the QEII Centre's unique position in the market place".

54. Having read the withheld information, the Commissioner is satisfied that the public authority has provided a reasonable argument to suggest that there is a causal link between the requested information and its commercial interests

Likelihood of prejudice

55. In considering likelihood of prejudice, the Commissioner looked at the factors set out in paragraph 25 above.

56. In this case, as noted above, the public authority has argued that disclosure would be likely to prejudice its commercial interests. It explained that disclosure would put it at a disadvantage in a competitive market place and that other businesses could learn more about its costs and pricing structure. Implicitly, it would be unable to learn equivalent information about its competitors.

57. The Commissioner has reviewed the withheld information to which the exemption has been applied (and which is not otherwise exempt under section 36 for reasons outlined above) and agrees that prejudice to the public authority's commercial interests would be likely following disclosure.

58. In light of the above, the Commissioner is satisfied that withheld information which is not exempt from disclosure under section 36 is exempt from disclosure under section 43(2). However, the Commissioner has gone on to consider whether the public interest favours maintaining this exemption.

Public interest test

59. Section 43(2) is a qualified exemption which means that even where the exemption is engaged, information can only be withheld where the

public interest in maintaining that exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

60. The public authority acknowledged a public interest in understanding more about the booking process that it uses and in the due diligence it undertook in this particular case.

Public interest arguments in favour of maintaining the exemption

61. With specific reference to an element of the withheld information, the public authority explained how a competitor could gain "unfair insight" into its commercial activities contrary to the public interest. It acknowledged that the balance was "fine" but that there was a stronger public interest in protecting its competitive market position.

Balance of public interest test

62. The Commissioner agrees that the public interest here is finely balanced. She also notes that given that the event in question had taken place at the time of the request, the public interest in avoiding prejudice to the public authority's commercial interests is somewhat lessened. However, the request was made shortly after the event in question and therefore any commercial information was still fairly current. The public interest is therefore not markedly lessened.

63. Given that the public authority is a public body, there is a strong public interest in learning more about how it conducts itself financially in respect of a controversial booking such as the one in question. This would be served by disclosure in this case.

64. However, the Commissioner has concluded that the public interest favours maintaining the exemption here. In reaching this view, she has had particular regard for the timing of the request.

Section 40(2) – unfair disclosure of personal data

65. This exemption applies to the unfair disclosure of personal data. Personal data is information about a living identifiable individual that is biographically significant about them. Consideration as to whether disclosure of personal data would be unfair requires consideration of the data protection principles of the Data Protection Act 1998 ("DPA98"). This legislation has recently been superseded by the General Data Protection Regulation ("GDPR") and (where applicable) by the Data Protection Act 2018. However, at the time this request was made and at

the time for response to it, DPA98 was still in force and is therefore the application of that earlier legislation is applicable here.

66. The first data protection principle of DPA98 required personal data to be processed fairly and lawfully and in accordance with certain conditions. The key issue was the reasonable expectations of the subject of those personal data (the data subject) and whether there was a necessary and legitimate interest in disclosure under FOIA that was more compelling than the data subject's legitimate interest in their personal data not being disclosed under FOIA. If the personal data is sensitive personal data as defined in DPA98, certain additional conditions for processing must also be satisfied. Sensitive personal data includes a person's ethnicity, religion, sexual orientation, conviction information or allegations of criminality for example.

67. It is generally the case that the more senior an individual's role, the less reasonable is their expectation of privacy. The information in question here is generally officials' names. The public authority has acknowledged this point but has argued that a great deal depends on context. A great deal also depends on what they were told would happen to their personal data. The Commissioner agrees that these are relevant factors for consideration here.

68. Having read the information to which this exemption has been applied, the Commissioner is satisfied that the individuals in question have a reasonable expectation that their information would not be disclosed under FOIA. Furthermore, while there may be a legitimate interest in making their personal data public, disclosure would not provide meaningful information about decision making at the public authority given that the rest of the requested information is exempt from disclosure for the reasons outlined above.

69. The Commissioner agrees that the public authority can rely on section 40(2) where it has applied this exemption.

Other matters

70. An individual is not entitled to access their own personal data under FOIA. It is automatically exempt from disclosure under FOIA by virtue of section 40(1). The Commissioner would urge the public authority to consider whether and to what extent any information within the scope of the request constitutes the personal data of the requester.

Right of appeal

71. 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

72. 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.

73. 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 .....

Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF