

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 February 2016

Public Authority: Merseytravel

Address: PO Box 1976
Liverpool
L69 3HN

Decision (including any steps ordered)

1. The complainant has requested information relating to bus shelters carrying advertising. Merseytravel provided answers to all but the request concerning financial benefits it accrues from the advertising. This information was refused on the basis of section 43 (commercial interests). Later, Merseytravel also sought to rely on section 41 (information provided in confidence) and section 44 (prohibitions on disclosure). The Commissioner has found that none of these exemptions are engaged. He therefore requires Merseytravel to take the following steps to ensure compliance with the legislation.
 - Disclose the information on finance and financial benefits in the contract between CCUK and Merseytravel – namely sections 5, 6, 7, 12, 22, 24 and 25.
2. The public authority 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

3. On 1 June 2015, the complainant wrote to Merseytravel and requested information in the following terms:
 - *What is the nature and length of any contract between the council with a named supplier of Bus Shelters carrying advertising?*

- *What number of these shelters are owned by the advertising supplier and what number owned by the Council/public authority?*
 - *What are the financial benefits to the Council/public authority annually and over the life of the contract?*
 - *Are these payments made on a regular basis and if so when?*
 - *Does the council/public body receive any discounts on advertising it purchases and if so what percentage?*
4. Merseytravel responded on 30 June 2015. For the first part of the request it stated that it had a 15 year agreement with Clear Channel UK Limited (CCUK) which started in January 2008 for the supply installation and maintenance of bus shelters including advertising shelters. For the second part of the request Merseytravel provided the number of shelters it owned and the number owned by CCUK.
5. For the third part of the request Merseytravel stated it did hold information on the amount it received each year under the terms of its agreement with CCUK but considered this information to be exempt on the basis of section 43(2) of the FOIA.
6. Finally, for the fourth and fifth parts of the request Merseytravel explained that it invoices CCUK on a quarterly basis and that it does not purchase advertising from CCUK.
7. Following an internal review Merseytravel wrote to the complainant on 21 July 2015. It stated that it had reconsidered its decision to withhold information on any financial benefits and maintained that any information should be withheld on the basis of section 43(2) but additionally it considered sections 41 and 44 of the FOIA were also engaged and provided a basis for withholding the information.

Scope of the case

8. The complainant contacted the Commissioner on 26 July 2015 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of his investigation to be to determine if Merseytravel has correctly applied any of the exemptions cited – sections 41, 43 and 44 – to withhold information on the financial benefits it receives from its contract with CCUK.

Reasons for decision

Section 43(2)

10. Section 43(2) of FOIA states that information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any party (including the public authority holding it). Section 43(2) is a qualified exemption which means that, if a public authority is able to satisfy the test of prejudice, it must then go on to consider the balance of the public interest in disclosure.
11. The successful application of section 43(2) is dependent on a public authority's ability to demonstrate a clear link between disclosure and the commercial interests of a party. The test of prejudice is not a weak test; there must be a significant risk of the prejudice described in the exemption occurring and the prejudice must be real, actual or of substance and therefore capable of harming the interest.
12. Merseytravel has claimed that both its own commercial interests and those of CCUK would be likely to be prejudiced by disclosure of this information. Merseytravel had explained it entered into a contract with CCUK in January 2008 for a 15 year term so the Commissioner notes that the contract is currently mid-way through. Merseytravel maintains the financial information remains current and commercially important and is not widely known.
13. Merseytravel considers that the financial benefit information would be likely to cause substantial prejudice to its own commercial interests by damaging its negotiating position in any future procurement process, making it more difficult for Merseytravel to negotiate the most favourable outcome with bidders. It also argues that it would make any procurement process unfair, which could lead to challenges to the awarding of a new contract from any bidder in any future procurement exercise.
14. Merseytravel argues that disclosure would permit another bidder in any future procurement exercise to have a better estimate of CCUK's bid and allow it to change the formulation of its own bid as a result. Specifically, the bidder could reduce its bid at the best and final offer stage in the knowledge of CCUK's approach.
15. Lastly, Merseytravel has argued that disclosure could lead to a loss of trust between it and other public bodies and its contractors (both current and prospective), having the potential to result in contractors being reluctant to enter into procurement processes with Merseytravel.

16. Merseytravel has next gone on to address the prejudice to CCUKs commercial interests. Where the prejudice being claimed relates to the interests of a third party, a public authority should not speculate on the nature and severity of this prejudice but must instead take steps to ensure that the arguments advanced genuinely reflect the position of the third party. To evidence the fulfilment of this requirement, the Commissioner has been provided with copies of emails that document the fact that a consultation between the parties took place and record the concerns of CCUK in respect of the potential release of the information.
17. It was reiterated that the financial information is commercially sensitive and its disclosure would be likely to cause substantial prejudice to CCUKs commercial interests. The argument as presented has two limbs. First, the highly competitive nature of the outdoor advertising market was emphasised. Therefore, any advantage gained by one of CCUKs competitors would come as a significant disadvantage to CCUK and would distort the market in an unfair way. Second, the financial information would allow potential clients of CCUK to amend their offers in any subsequent tenders, again to CCUKs disadvantage.
18. This case is one of a series in which the Commissioner has been asked to consider a public authority's refusal to provide information relating to outdoor advertising. On 2 November 2015 the Commissioner served a decision notice arising from a complaint made against Brighton and Hove City Council (FS50588962)¹. This covered, among other things, the same request under consideration here and the application of section 43(2) to the financial benefit information held by Brighton and Hove. In addition to this the Commissioner then served another decision notice against Royal Borough of Kensington and Chelsea (FS50592940)² on 9 December 2015.
19. It must be stressed that a decision notice is not precedent-setting and the Commissioner is obliged to consider the application of an exemption on a case-by-case basis. That being said, the Commissioner will be guided by previous findings where the same or substantially similar issues have been considered. The Commissioner considers that the principles underpinning the aforementioned decisions do have some

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560159/fs_50588962.pdf

² https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560473/fs_50592940.pdf

bearing here, although it remains for the Commissioner to determine whether the nature and severity of the harm cited varies in the present case which may mean that a different finding can and should be reached.

20. The Commissioner considered on FS50588962 that the age of the withheld information was an important factor. This was discussed at paragraph 17 of the decision notice:

17. The Commissioner's published guidance [³] explains that in general, commercial sensitivity is likely to diminish over time. In this case, the council's current contract has been in existence since 1999. The Commissioner's view is that the market conditions, as well as the council's expectations, are likely to have changed considerably since then. The Commissioner explained to the council that it was difficult to see precisely how information that is of such a significant age would be likely to influence bids of contractors bidding for a contract in 2015 to any significant extent. The Commissioner also said that his assumption was that there would be a healthy amount of competition for the contract (an assumption which Clear Channel subsequently confirmed) and this would be likely to encourage the best value. In view of the level of completion, it seems unlikely to the Commissioner that contractors would be unduly influenced by information dating back nearly 17 years and that any future tender process would be unfair as a result. Clear Channel asserted that the information was "current" but presented no justification or evidence to support this statement, and the council declined to engage with the Commissioner's comments about the age of the information.

21. This was also the case in the *Kensington and Chelsea* decision. However, here the information goes back to 2008 so is not as old as in the other cases. Nevertheless the Commissioner does still consider the age of the information to be a factor worth considering. The contract with CCUK is approximately half-way through its term – Merseytravel therefore argues this means that the information is still current and could be used by a competitor to structure or adjust their bid.
22. In the *Kensington and Chelsea* case, it was argued that the proximity of the request to the tender process raised the risk of prejudice to both

³ https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

CCUK and the public authority's commercial interests as the contract was nearing its end. In that case the Commissioner did not accept this argument and he commented that there was importance placed on ensuring any tendering process was conducted on a fair platform but he had not been convinced that either the public authority or CCUK had demonstrated a link between the disclosure of the financial benefit information and a prejudice to the commercial interests of a party that is real, actual and of substance.

23. This position was reached on the basis that the argument did not overcome the reservations expressed by the Commissioner on the *Brighton and Hove* case where he found that it was unlikely competing contractors would be unduly influenced by what was essentially historical financial information.
24. Although the information is not as old in this case the Commissioner would still echo the position in these previous decisions. He does not accept the argument that proximity to the next tender process has any influence here as the contract still has some time left to run. He therefore can only consider if the age of the financial information is sufficient to be seen as historical financial information. As the contract began in 2008 it is reasonable to consider that this information will no longer be relevant to the extent that it would influence competing contractors as it is highly likely that bids in 2015 (at the time of the request) or in 2023 (at the end of the contract) would be based on different terms than in 2008 as situations and financial positions change.
25. For this reason, the Commissioner does not consider disclosure of this financial benefit information would influence competing contractors and he does not find that there are sufficient grounds for finding the information was exempt under section 43(2). As the Commissioner has determined the exemption is not engaged, he is not required to consider the public interest test. However, as in the other previous decisions mentioned he considers it prudent to highlight the comments on the public interest that were made at paragraph 20 of the *Brighton and Hove* complaint.
26. With regard to outdoor advertising contracts, the Commissioner stressed the importance of public authorities being as transparent and accountable as possible in relation to contracts entered into with third parties, particularly in the current economic climate and restricted budgets. He went on to say that the transparency is even more important where the contract which was entered into by the public

authority was for such a lengthy term and the Office of Fair Trading had previously expressed concerns about the competitiveness of long term contracts in this area⁴. The Commissioner considers that the weight of the public interest arguments in disclosure is similarly reflected in this case.

Section 41(1) – information provided in confidence

27. Section 41(1) of FOIA provides that information is exempt information if it was provided to a public authority in confidence. The construction of the exemption means that information will be covered by section 41 if:

- it was obtained by the authority from any other person,
- its disclosure would constitute a breach of confidence,
- a legal person could bring a court action for that breach of confidence, and
- that court action would be likely to succeed.

28. The Commissioner has initially considered whether the financial benefit information is information obtained by Merseytravel from CCUK. In his guidance on section 41⁵, under the heading 'Information relating to contracts', the Commissioner advises that the contents of a contract between a public authority and a third party will not generally fulfil this condition. This is because the terms of the contract will have been mutually agreed by the respective parties, rather than provided by one party to another. This follows the approach of the First-tier Tribunal in *Department of Health v Information Commissioner* (EA/2008/0018, 18 November 2008)⁶.

29. The information that is being withheld relates to CCUKs pricing structure and is part of the contract between CCUK and Merseytravel. The Commissioner believes this financial benefit information is more likely to

⁴ <https://www.gov.uk/cma-cases/street-furniture-outdoor-advertising-contracts-between-media-owners-and-local-authorities>

⁵ <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

⁶ [http://www.informationtribunal.gov.uk/DBFiles/Decision/i272/Dept%20of%20Health%20v%20IC%20\(EA-2008-0018\)%20Decision%2018-11-08.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i272/Dept%20of%20Health%20v%20IC%20(EA-2008-0018)%20Decision%2018-11-08.pdf)

be mutually agreed information rather than information obtained from CCUK. Merseytravel has stated the information was communicated to Merseytravel during contract negotiations and although it forms part of the contract it was information obtained from CCUK in circumstances importing an obligation of confidence.

30. CCUK has explained the information on its pricing which was incorporated into the contract was provided during the tender process prior to the signing of the contract, with an expectation of confidentiality.
31. In the previous cases, the Commissioner considered whether this information could represent CCUKs 'pre-contractual negotiating position' which can be argued as being information obtained by another person.
32. The Commissioner recognises that pre-contractual negotiating information, like some kinds of technical information, may attract different considerations than the terms and conditions set out in a contract. However, the Commissioner does not agree that the withheld financial information falls into this category. Instead, he considers that the information is captured by the description of mutually agreed information set out by the First-tier Tribunal on the *DoH* case:

"34. If the contract signifies one party stating: 'these are the terms upon which we are prepared to enter into a contract with you' by the acceptance of that contract the other party is simultaneously stating 'and these are the terms upon which we are prepared to enter into a contract with you'. Consequently the contract terms were mutually agreed and therefore not obtained by either party."

33. The Commissioner considers that it is artificial to claim that the financial benefit information, which will form a critical part of the agreed contract, does not represent the settlement of terms between Merseytravel and CCUK. Consequently, the Commissioner does not accept that the information was obtained by Merseytravel from a third party and therefore the exemption cannot be engaged.

Section 44 – prohibitions on disclosure

34. Merseytravel has also cited section 44(1) (b) as an additional ground for withholding the requested information.
35. The relevant part of section 44(1) of FOIA states that information is exempt information if its disclosure (otherwise than under FOIA) by the public authority holding it (b) is incompatible with any obligation

36. CCUK has argued that the disclosure of the financial information is prohibited under EU and UK competition law (Article 101 Treaty on the Functioning of the European Union and section 2) and is consequently exempt under section 44(1)(b) of FOIA.
37. This exact same argument was analysed by the Commissioner at paragraphs 27 – 32 of his decision notice produced on the *Brighton and Hove* case. The Commissioner similarly finds in this case that he is unable to uphold the application of the exemption based on the limited arguments presented.

Right of appeal

38. 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

39. 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.
40. 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

Jill Hulley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF