

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 October 2012

Public Authority: London Borough of Barnet
Address: North London Business Park
Oakleigh Road
South London
N11 1NP

Decision (including any steps ordered)

1. The complainant has requested a copy of the One Barnet programme risk register. London Borough of Barnet (the "council") provided a redacted version of the requested document and withheld the remaining information under the commercial interests and personal data exemptions.
2. The Commissioner's decision is that the council has wrongly defined the scope of the request, that it has correctly withheld the personal information of third parties and that it has failed to demonstrate that the exemption for commercial interests is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with the "issues" elements of the risk register or issue a refusal notice;
 - Disclose the information from the risk register that it withheld under section 43(2) of the FOIA.
4. 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.

Background

5. The council's website describes the "One Barnet" programme:

"One Barnet is the overall name for the major change projects running across the council. It aims to make sure that the council can continue to provide high quality and efficient services over the next 10 to 15 years..."

"The One Barnet programme is working to reduce costs, while retaining the quality of services, which in many cases means changing the way in which that service is delivered. The One Barnet programme seeks the best solution for the needs and requirements of the users of each service."¹

6. The programme was approved by the council in November 2010 and has been the subject of public debate and concern. The focus of these concerns has been on the extent to which the programme will rely on the outsourcing of public services to private sector partners and the value of the contracts involved². It is within this context that the request appears.

Request and response

7. On 16 August 2011, the complainant wrote to the council and requested information in the following terms:

"Please provide a copy of the One Barnet programme risk register..."

8. The council responded on 12 September 2011 and provided the complainant with a link to a report on its website which contains some of the major risks extracted from the risk register.
9. The complainant wrote to the council on 15 September 2011, reiterating their original request and asking to be provided with the "entire register."

¹

http://www.barnet.gov.uk/info/920056/one_barnet_transformation_programme/904/one_barnet_transformation_programme

² See, for example: http://www.times-series.co.uk/news/9831768.Hundreds_march_against_One_Barnet/

10. The council responded on 21 September 2011 and stated that it was withholding the information under the exemption for prejudice to commercial interests.
11. Following an internal review the council wrote to the complainant on 8 May 2012. It disclosed to the complainant a redacted copy of the risk register. The council stated that it considered that some of the redacted information fell outside the scope of the request and that the remainder was being withheld under the exemptions for personal data and prejudice to commercial interests.

Scope of the case

12. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
13. During the course of the Commissioner's investigation, the council disclosed further information to the complainant which it had previously withheld under the commercial interests exemption.
14. The Commissioner's investigation has looked at whether the council correctly defined the scope of the request and whether it was entitled to rely on exemptions to withhold the remaining requested information.

Reasons for decision

Section 1 – scope of the request

15. In its internal review response the council explained that, due to a technical constraint on the council's risk management system, the risk register report includes project issues as well as risks. It confirmed that these project issues had been redacted from the version of the register disclosed to the complainant because they did not fall within the scope of the request.
16. In order to understand why the redacted information had been deemed not to fall within the scope of the request, the Commissioner approached the council for further explanation.
17. The council explained that the risk assessment methodology uses "risks" and "issues". Risks are defined as pre-emptive problems that have been identified and are being pro-actively managed; issues are actual problems that have occurred and which are being managed.

18. Whilst the Commissioner understands the distinction between risks and issues, he does not see that this is relevant to a determination of the scope of the request. The Commissioner is not satisfied that the explanation provided by the council justifies the exclusion of the 'issues' sections of the risk register from the scope of the request.
19. The Commissioner considers that, in making the request, the complainant could not have been expected to understand the intricacies of the distinction between 'issues' and 'risks' made by the council. By the same token, the Commissioner considers that the council is not entitled to speculate about what elements of the risk register the complainant was interested in receiving. He finds that an objective reading of the request, which explicitly asks for a copy of the "entire register" does not allow for a distinction to be drawn between the different elements of the register as the council has defined them.
20. The Commissioner has determined that the council has wrongly interpreted the scope of the request. He requires the council to either provide the complainant with the "issues" sections of the risk register or issue a refusal notice in accordance with section 17 of the FOIA.

Section 40 – personal information

21. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the FOIA would breach any of the data protection principles or section 10 of the Data Protection Act 1998 (DPA).
22. In this case the council has argued that the withheld information comprises the names of junior council staff and non-council employees. The council confirmed that the employees are junior officers, i.e., those below Assistant Director level and stated that it considers that disclosure of the information would be unfair and would breach the first data protection principle.

Is the requested information personal data?

23. In order to rely on the exemption provided by section 40, the information being requested must constitute personal data as defined by section 1 of the DPA. It defines personal information as data which relates to a living individual who can be identified:
 - from that data,
 - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

24. Having viewed the withheld information, which consists of individuals' names, the Commissioner accepts that the requested information constitutes personal data, within the definition at section 1(1) of the DPA.

Would disclosure breach one of the data protection principles?

25. Having accepted that the information requested constitutes the personal data of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach the first data protection principle. The first data protection principle has two components:

- personal data shall be processed fairly and lawfully; and
- personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

Would disclosure be fair?

26. In considering whether disclosure of the information requested would comply with the first data protection principle, the Commissioner has first considered whether disclosure would be fair. In assessing fairness, the Commissioner has considered the reasonable expectations of the individuals concerned, the nature of those expectations and the consequences of disclosure to the individual. He has then balanced against these the general principles of accountability, transparency as well as any legitimate interests which arise from the specific circumstances of the case.

Expectations of the individuals concerned

27. The Commissioner has considered the reasonable expectations of the individuals in terms of what would happen to their personal data. These expectations can be shaped by factors such as an individual's general expectation of privacy and also the purpose for which they provided their personal data.
28. The council explained that its Redaction Policy defines when to withhold names in response to information requests. This states that names, contact details and job titles or other information which could identify junior officers should be redacted. The council has defined junior officers as persons below assistant director level. The council clarified that its policy was developed in line with ICO guidance and the policy has been consistently applied to all information requests.
29. The Commissioner has referred to his own guidance which states:

*"It is reasonable to expect that a public authority would disclose more information relating to senior employees than more junior ones. Senior employees should expect their posts to carry a greater level of accountability, since they are likely to be responsible for major policy decisions and the expenditure of public funds."*³

30. The Commissioner's guidance does go on to qualify that the terms 'senior' and 'junior' are relative and that it is not possible to set an absolute level across the public sector below which personal information will not be released. The Commissioner considers that it is always necessary to consider the nature of the information and the responsibilities of the employees in question when considering whether it would be fair to disclose personal data.
31. The council has acknowledged that its employees are aware that if their personal data is relevant to a request it may be subject to disclosure. The council explained that its redaction policy does provide for instances where the names of employees would be disclosed in response to requests for information. However, in this instance, given the junior level of the employees and the fact that their roles are not public-facing, the council decided that it would not be fair to disclose their personal data in response to the request.
32. In relation to non-council employees, the council confirmed that it had sought their consent for the disclosure of their names. This consent was refused.
33. When considering what information third parties should expect to have disclosed about them, the Commissioner considers that a distinction should be drawn as to whether the information relates to the third party's public or private life. However, although the personal data of council employees in this context does relate to their public life, the Commissioner accepts that, as a result of the consistent use of the redaction policy, the employees identified in the withheld information would have a reasonable expectation that their names would not be disclosed. Similarly, in relation to non-council employees, an explicit refusal of consent heightens the probability of disclosure being contrary to expectations.

³ ICO guidance is published here:
http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Environmental_info_reg/Practical_application/section_40_requests_for_personal_data_about_employees.ashx

Consequences of disclosure

34. In light of the reasonable expectations of the individuals concerned, the Commissioner is satisfied that release of the withheld information would be an intrusion of privacy and could potentially cause unnecessary and unjustified distress to the individuals in this case.

General principles of accountability and transparency

35. Notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if there is a more compelling public interest in disclosure. The complainant has argued that there is a public interest in knowing who is carrying out the work which will result in significant effects on public services and which involves considerable public expenditure.
36. The council has argued in its submissions to the Commissioner that disclosure of the names of data subjects identified in the withheld information would not add anything to the public understanding of the substantive issue.
37. The council has further argued that the One Barnet is a highly sensitive issue and that public opposition to the outsourcing puts council staff working on the project at higher risk of abuse and harassment. The council has stated that it is, therefore, particularly cautious about disclosing the names of these officers in order to reduce the likelihood of them being identified by members of the public.

The council provided the Commissioner with an example of a specific 'threat' made to persons working on the One Barnet Project and highlighted its duty of care to its employees. It stated that it has reasonable evidence to believe that the disclosure of the withheld information would result in identification of individuals working on the One Barnet Project and would result in them being targeted, abused and harassed.

38. In reaching his decision in this case, the Commissioner has set the public interest in disclosure against the data subjects' reasonable expectations that their names would not be disclosed in response to requests for information and the evidence which points to the likelihood of the data subjects becoming the focus of harassment.

39. In considering the above, the Commissioner has also referred to the parallels with a previous decision he has made which identifies an equivalent scenario⁴.
40. Having considered the relevant facts the Commissioner has concluded that the withheld information is personal data and that disclosure would breach the first data protection principle as it would be unfair to the individuals concerned.
41. As the Commissioner has determined that it would be unfair to disclose the requested information, it has not been necessary to go on to consider whether disclosure is lawful or whether one of the conditions in Schedule 2 of the DPA is met. The Commissioner therefore upholds the Council's application of the exemption provided at section 40(2) of the FOIA.

Section 43 – commercial interests

42. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.
43. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness 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."*⁵
44. As this information relates to the council's ability to negotiate contracts in respect of the delivery of public services, the Commissioner has concluded that it falls within the scope of the exemption.

⁴ DN issued to the Home Office (ICO reference: FS50401773) in February 2012. Published on the ICO website here:

http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs_50401773.ashx

⁵ See here:

http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.ashx

45. Having concluded that the withheld information falls within the scope of the exemption the Commissioner has gone onto consider the prejudice which disclosure would cause and the relevant party or parties which would be affected.

Whose commercial interests and the likelihood of prejudice

46. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.
47. The council has stated that, in withholding the information it considers that disclosure of the information would be likely to prejudice its own commercial interests.

The nature of the prejudice

48. The council confirmed that, at the time of the request, it was involved in contract negotiation with a number of potential outsourcing partners.
49. The council has stated that disclosure of the information would reveal the council's assessment of its own risks and weaknesses in the context of active negotiations with third parties. According to the argument proposed, this would be likely to result in prejudice to the council's ability to achieve best value for money contracts with the most favourable terms and conditions. Before considering the council's arguments in this regard, the Commissioner has first considered another argument submitted by the council, namely that the nature of the risk register is such that it is open to misinterpretation.

Potential for the information to be misinterpreted

50. The council has argued that there is potential for disclosure of the information to cause harm because the risk register document does not contextualise the risks.
51. The council explained that the purpose of the register is to document all risks that have been identified and recorded. What it does not do is indicate the likelihood of the risks occurring. Whilst the document identifies risks with a high risk rating, this is only in relation to the perceived severity of the effects of the risk occurring. It is possible, therefore, that an issue with a high risk rating may carry a very low probability of it actually occurring.

52. The council has argued that the disclosure of the information might lead to a misperception which in turn might provide bidders with an incentive to treat the risks as if they were expected to occur and use the associated severity rating as a tool to improve their bargaining position. This would directly and negatively impact the council's negotiations and, by extension, its commercial interests.
53. In considering this argument, the Commissioner notes that the FOIA only provides a right to information already held by authorities and that there is no requirement for this to be accurate, complete, up to date or easily comprehensible.
54. In considering this point, the Commissioner has referred to the Information Tribunal decision in the case of the Home *Office* (EA/2008/0027 – 15 August 2008). In this case the complainant asked for the number of work permits obtained in 2005 and 2006, the Home Office argued that the information produced from its database might be inaccurate as the details are not always entered consistently or correctly by employees. In addition, the public authority argued that it could not be said that the information extracted from the database would be completely accurate as the search terms used may pull up records which are irrelevant to the request. At paragraph 15 the Tribunal found that:
- "...if the records are faulty or inadequate and the information therefore turns out to be inaccurate that is irrelevant: the right under the Act is to information which is held, not information which is accurate"*⁶.
55. In the Commissioner's view, where authorities have concerns about the accuracy of information or the potential for misinterpretation, rather than withholding the information, one option is to provide an explanation or other background information to set the disclosure in context.
56. The Commissioner notes that, in a case involving the Scotland Office (ICO reference: FS50142678 – 17 March 2008), it was argued that as much of the information contained within the requested reports was out of date and potentially inaccurate; the disclosure of the information could be misleading. The Commissioner commented at paragraph 44 of his decision notice that *"...the accuracy of the data may be questionable*

⁶ See:

http://www.informationtribunal.gov.uk/DBFiles/Decision/i203/homeOffice_webDecision_15Aug08.pdf

however; the Scotland Office can place this in context by explaining this to the complainant when disclosing the information”⁷.

57. Whilst he accepts that there is potential for the withheld information to be misinterpreted, the Commissioner does not accept that this in itself is a valid argument for withholding information. In the particular context of the council’s application of section 43(2), he also does not consider that the council has demonstrated exactly how, with reference to the specific withheld information, the possibility of the information being misread would be likely to result in prejudice to its commercial interests and what precise form this prejudice would take. Having reached this conclusion the Commissioner has gone on to consider the council’s other arguments in support of the engagement of the exemption.

Negotiation position, bargaining strengths and ability to achieve value for money

58. The council has confirmed that, at the time the request was received, negotiations with potential contractors were in train. Disclosure of the withheld information whilst these negotiations were ongoing would, according to the argument presented, expose the council’s perceived weaknesses and provide third parties involved in negotiations with an advantage which would undermine the council’s position. This, in turn, would be likely prejudice the council’s ability to obtain best value for money contracts.
59. The Commissioner’s guidance and many previous decision notices have accepted the general principles that information relating to a commercial activity is more likely to be sensitive when the activity in question, in this instance, contractual negotiations, is live⁸.
60. However, the Commissioner considers that arguments which identify this generic scenario alone are not sufficient to engage the exemption. The Commissioner considers that the prejudice test is not a weak test, and a public authority must be able to point to prejudice which is “real,

⁷ Published on the ICO website here:
http://www.ico.gov.uk/~media/documents/decisionnotices/2008/FS_50142678.ashx

⁸ See, for example, this decision notice relating to the London Borough of Newham:
http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs_50431421.ashx

actual or of substance" and to show some causal link between the potential disclosure of specific withheld information and the prejudice.

61. The Commissioner considers that an evidential burden rests with public authorities to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, real, actual or of substance. In the Commissioner's view, if a public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected.
62. The Commissioner notes that the One Barnet programme involves the potential expenditure of £1 billion of public money in contracts for the provision of public services.
63. Given the sum of money involved and the accompanying transformation of the way in which public services are delivered, the Commissioner considers that the council should expect that the programme would be subjected to a high level of scrutiny. This is essentially a public interest observation which the Commissioner accepts cannot be transposed into a consideration of whether the exemption is engaged. However, the Commissioner considers that arguments in relation to the likelihood of prejudice occurring should be specific to the information in question and proportionate to the facts of any case.
64. In this case, the council has argued that disclosure of the information would be likely to result in prejudice to its contractual negotiations. However, the Commissioner considers that the council has failed to identify precisely what form the prejudice would take and failed to clarify how this would be caused by the disclosure of the specific withheld information.
65. Having considered the council's submissions, the Commissioner finds that no reference has been made to the specific content of the withheld information: the council has simply stated that disclosure would be likely to have an effect on negotiations. The Commissioner considers that the fact that a risk register will identify potential weaknesses within an authority does not inevitably lead to a conclusion that its disclosure will have an impact on commercial interests. In failing to explain precisely how the disclosure of those specific, withheld elements of the register would be likely to result in prejudice, the Commissioner considers that the council has failed to demonstrate a necessary causal link.
66. In light of this failure, whilst he has not reached a conclusion in this regard, the Commissioner has concerns that the council may have applied the exemption in blanket manner without proper consideration for the specific information which is being withheld.

67. In cases where an authority has failed to explain the nature of an implied prejudice and failed to demonstrate the causal link between any such prejudice and the disclosure of information, the Commissioner is not obliged to generate relevant arguments on an authority's behalf.
68. In this instance, the Commissioner considers that the council has failed to explain the nature of the prejudice which would be likely to result from disclosure of the requested information. He has, therefore, concluded that the council has failed to demonstrate that the exemption is engaged. As he does not consider that the exemption applies, the Commissioner has not gone on to consider the public interest arguments.

Other matters

69. Although they do not form part of this notice the Commissioner would like to note the following matters of concern.
70. The code of practice issued under section 45 of the FOIA (the "code") recommends that complaints procedures provided by public authorities in relation to requests for information ('internal reviews') should encourage a "...prompt determination of the complaint."⁹
71. The Commissioner's guidance interprets promptness as a standard target of 20 working days for the completion of internal reviews¹⁰.
72. In this case, the Commissioner notes that the council's internal review took over 150 working days to complete – well in excess of the recommended timescales. In its future handling of internal reviews the Commissioner expects that the council will have regard for the recommendations of the code and his own guidance and will ensure that responses are issued promptly.

⁹ Paragraph 39 of the code, published online here:

<http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

¹⁰ The ICO guidance is published here:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/internal%20reviewsv1.pdf

Right of appeal

73. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

74. 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.
75. 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

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