

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 December 2017

Public Authority: Brighton and Hove City Council

Address: Kings House
Grand Avenue
Hove
BN3 2SR

Decision (including any steps ordered)

1. The complainant has requested information about an overcharge by a subcontractor to Brighton and Hove City Council ("the Council"). The Council disclosed some information but redacted the identity of the subcontractor under the exemptions provided by sections 40(2), 41(1), and 43(2) of the Freedom of Information Act ("the FOIA"). The complainant contested whether the information had been correctly withheld, that that further relevant information was held.
2. The Commissioner's decision is that the Council has correctly withheld some of the information under section 41(1). In respect of the first limb of the request, the Council has breached section 16 by failing to provide advice and assistance to clarify its scope. In respect of the second limb of the request, no further relevant information is held. The Council breached the requirements of sections 10(1) and 17(1) in responding to the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - In respect of the first limb of the request, provide advice and assistance to the complainant so as to enable him to submit a clarified request.

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.

Request and response

5. On 22 September 2016, the complainant wrote to the Council and requested information in the following terms:

My request is for any recorded information that shows how and why this "overcharge" is correct and who agreed it to be correct.

6. The Council responded on 24 October 2016. It stated that all held information was already in the public domain.
7. On 28 October 2016, the complainant wrote to the Council to request an internal review. This was on the basis that he disputed the Council's position that all held information was already in the public domain.
8. Following an internal review the Council wrote to the complainant on 21 November 2016. It maintained its original position.

Scope of the case

9. The complainant contacted the Commissioner on 22 November 2016 to complain about the way his request for information had been handled. The complainant specifically contested that the Council held information which was not already in the public domain.
10. The ICO subsequently wrote to the Council on 22 March 2017 to request it's submission under section 1(1) of the FOIA. Following a delay, the Council informed the ICO on 16 May 2017 that it had reconsidered the request and had identified held information that was not already in the public domain. The Council subsequently disclosed this held information to the complainant on 19 May 2017, with one aspect of it redacted under sections 40(2), 41(1), and 43(2).
11. The complainant subsequently informed the ICO that he contested the application of these exemptions, and also that the Council held further information besides that disclosed.
12. The Commissioner considers the scope of this case to be the determination of whether the Council has complied with sections 1(1),

10(1), 16, and 17(1), and whether it has correctly applied sections 40(2) and 41(1).

Reasons for decision

Section 40(2) – Personal information

13. Section 40(2) of the FOIA states that:

Any information to which a request for information relates is also exempt information if–

- (a) it constitutes personal data which do not fall within subsection (1), and*
- (b) either the first or the second condition below is satisfied.*

14. Section 40(3) states that:

The first condition is–

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene–*
 - (i) any of the data protection principles...*

Is the withheld information personal data?

15. Personal data is defined by section 1 of the Data Protection Act 1998 ("the DPA") as:

...data which relate to a living individual who can be identified–

- (a) from those data, or*
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the data controller or any person in respect of the individual..*

16. The information withheld under section 40(2) is the trading name of a subcontractor. The subcontractor is a limited company, and as such has publically listed directors. This subcontractor has been engaged by Mears Ltd, which itself is a contractor to the Council that provides repairs, maintenance and major works for the Council's housing stock.

17. The Council considers that the trading name of the subcontractor is the personal data of its directors, whose identities can be identified through

simple internet searches. Due to an overcharge by the subcontractor, future legal action may potentially be undertaken against the directors on the basis that they are liable for the subcontractor's actions.

18. The Commissioner's established position is that information about a limited company cannot represent personal data. A limited company is a separate legal entity to its shareholders and directors, and information about the limited company cannot be personal data because it does not relate to a living person. This is in direct contrast to businesses that are of a sole trader or partnership type, for which the owner and business are the same entity, and which means that information about the business will therefore be the personal data of the owner. This distinction between limited companies and sole traders/partnerships, and its relevance to section 40(2), is illustrated in decision notice FS50450700.
19. The Commissioner is aware that directors are legally responsible for the running of a limited company, and may be held personally responsible for the limited company's actions. However, whilst legal action may potentially be undertaken against a director, the Commissioner does not accept that this transforms information about a limited company, including its trading name, into personal data. On this basis the Commissioner does not consider that section 40(2) is engaged. The Commissioner will therefore proceed to consider the application of section 41(1).

Section 41(1) – Information provided in confidence

20. Section 41(1) of the FOIA states that:

Information is exempt information if–

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

Was the information obtained from another person?

21. The first step is for the Commissioner to consider whether the information was obtained by the Council from any other person in order to satisfy the requirement of section 41(1)(a).
22. In her enquiries to the Council, the Commissioner asked it to identify which third party provided it with the withheld information.

23. The Council confirmed that the withheld information was provided to it by Mears Ltd.
24. Having established that the withheld information was obtained from another person, the Commissioner must next consider whether or not its disclosure to the public (otherwise than under the FOIA), would constitute a breach of confidence 'actionable' by that or any other person.

Would disclosure constitute an actionable breach of confidence?

25. Whilst it is not the only test for establishing confidence, the Commissioner finds that the appropriate test for this case is that which is set out in the case of *Coco v Clark [1969] RPC 41*. According to the decision in this case a breach of confidence will be actionable if:
 - a. The information has the necessary quality of confidence;
 - b. The information was imparted in circumstances importing an obligation of confidence; and
 - c. There was an unauthorised use of the information to the detriment of the confider.
26. All three elements must be present for a claim to be made. However, for that claim to be 'actionable' within the meaning of section 41(1)(b) of the FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed. This requires consideration of whether or not there would be a public interest defence to such a claim.

The 'necessary quality of confidence' (a.)

27. Information will have the necessary quality of confidence if it is more than trivial and not otherwise accessible.
28. The Council has informed the Commissioner that the information is the trading name of a subcontractor that is understood to have overcharged for its services. The Commissioner is satisfied that such information is not trivial.
29. However, as stated above, this alone is not sufficient to indicate that the material has the necessary 'quality of confidence'. Therefore the Commissioner has considered whether the information is otherwise accessible.

30. The Council has informed the Commissioner that the information is not known to be readily available. The identity of the subcontractor was provided directly to the Council by Mears Ltd.
31. The Commissioner is aware that the details of the overcharge are already in the public domain through information disclosed by the Council in response to the information request (including a redacted copy of the letter in which the Council estimates the total value of the overcharge). However, the Commissioner accepts that the trading name of the subcontractor is not publically known.
32. The Commissioner is therefore satisfied that the withheld information in this case has the necessary quality of confidence required to sustain an action for breach of confidence, and as such considers that this limb of the confidence test is met.

The 'obligation of confidence' (b.)

33. Even if information is to be regarded as confidential, a breach of confidence will not be actionable if it was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.
34. The Council has informed the Commissioner that the information was communicated to it directly from Mears Ltd. At that time, Mears Ltd. explicitly stated that the information was provided in confidence. This was originally on the basis that Mears Ltd. was undertaking an investigation into the subcontractor, and subsequently that Mears Ltd was seeking to negotiate with the subcontractor to recover the overcharge.
35. Having considered the Council's explanation, and in particular the context in which the trading name of the subcontractor was provided to the Council, the Commissioner accepts that there is an obligation of confidence in the case.

The 'detriment of the confider' (c.)

36. Having concluded that the information withheld in this case has the necessary quality of confidence, and was imparted in circumstances giving rise to an obligation of confidence, the Commissioner has proceeded to consider whether unauthorised disclosure could cause detriment to the confider.
37. The Council has informed the Commissioner that it has consulted with Mears Ltd about the detriment that disclosure may cause. Mears Ltd has confirmed to the Council (and a copy of this statement has been

provided to the Commissioner) that it considers that the disclosure of the information would damage its ability to conclude negotiations with the subcontractor

38. Having considered the circumstances of the withheld information, the Commissioner accepts that its disclosure would cause detriment to the confider.

Is there a public interest defence?

39. Although section 41(1) is an absolute exemption, and does not need to be qualified by a public interest test under section 2 of the FOIA, case law suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence.
40. The Commissioner has therefore considered whether there is a public interest defence available should the Council disclose the information. The duty of confidence public interest defence assumes that the information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.
41. The Council considers that there is some public interest in disclosure. This is on the basis that the subcontractor is understood to have overcharged for services provided, and that disclosure would represent transparency on the part of the Council.
42. However, the Council considers that there is significant public interest in maintaining the exemption. The trading name of the subcontractor has been provided to the Council in the expectation of confidence by Mears Ltd, and disclosure by the Council would damage the business relationship between the Council and Mears Ltd, as well as the business relationships between Mears Ltd and its subcontractors. The Council has informed the Commissioner that the overcharge amount has since been refunded to the Council by Mears Ltd, and that Mears Ltd is now undertaking independent negotiations with the subcontractor to recover the overcharge.
43. The Commissioner has considered the Council's argument, in addition to the circumstances of the case. It is recognised that the trading name of the subcontractor has been provided to the Council in the clear expectation of confidence, and that its disclosure would be likely to cause damage the business relationships between the Council, Mears Ltd, and subcontractors engaged by Mears Ltd.
44. It is further understood by the Commissioner that there is no direct contractual relationship between the Council and the subcontractor, and

that Mears Ltd, as contractor to the Council, is responsible for services provided. As such, Mears Ltd has reimbursed the Council with the calculated total of the overcharge, and that no apparent cost to the public purse has been incurred.

45. Having considered the circumstances of this case, the Commissioner has concluded that there would be a limited public interest defence in disclosing the information. On this basis the Commissioner finds that section 41(1) has been correctly engaged. The Commissioner will not therefore proceed to consider the application of section 43(2).

Section 1(1) – General right of access to information
Section 16 – Duty to provide advice and assistance

46. Section 1(1) of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information relevant to the request, and if so, to have that information communicated to them. This is subject to any exclusions or exemptions that may apply.
47. Section 16 of the FOIA states that a public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.
48. Where there is a dispute between the information located by a public authority, and the information a complainant believes should be held, the Commissioner follows the lead of a number of First-tier Tribunal (Information Rights) decisions in applying the civil standard of the balance of probabilities.
49. In the circumstances of this case the Commissioner will determine whether, on the balance of probabilities, the Council holds further recorded information.

The Council's position

50. The Council has referred the Commissioner to the specific wording of the request, and in particular how the request is composed of two limbs.

The first limb

51. In respect of the first limb ("*any recorded information that shows how and why this "overcharge" is correct*") the Council has disclosed information that was recorded as part of the Council's investigation into the overcharge. This information included a series of tables that were used to calculate the estimated overcharge (and the final sum that Mears Ltd would repay the Council).

52. The Council has advised that during its investigation it referred to 'job sheets' when populating the series of tables. However, this information has not been provided, and the Council considers that to do so would exceed the appropriate limit in costs provided by section 12.
53. The Council has further advised that it has not provided wider contextual information, such as invoices from the subcontractor, and the information created by Audit during initial spot checks that were undertaken prior to the Council's investigation. This is because it does not consider that this information shows "*how and why*" the overcharge was decided to be correct, and, in particular, that the held invoices only show large figures that cannot be broken down into individual jobs.

The second limb

54. In respect of the second limb ("*who agreed it to be correct*"), the Council has disclosed emails between Council offices in which the calculated overcharge amount was agreed to be reasonable by the Head of Internal Audit, the Head of Housing Strategy Property & Investment, the Procurement Strategy Manager, and Mears Ltd.
55. The Council has informed the Commissioner that in searching for relevant information it consulted with all officers had were directly involved in, and had most knowledge of, the substantive matter. These officers were based in different teams, namely Internal Audit, Housing, Procurement and Legal. Each officer was referred to the parameters of the request, and was asked to search their emails, personal drives, shared drives and the Audit Management System by using the search terms "*Mears*", "*overcharge*" and "*payback*".
56. The Council has further confirmed that all information would be held electronically, and that in accordance with the Council's Records Management Policy, no relevant information has been deleted or destroyed.

The Commissioner's conclusion

57. In the circumstances of this case the Council has informed the Commissioner of the searches for relevant recorded information it has undertaken. These searches have spanned the resources used by Council officers with direct involvement in the substantive matter.
58. The Commissioner has noted that the Council has sought to clearly define the parameters of the request by treating it as two limbs.

The first limb

59. In respect of the first limb, the Commissioner understands that the Council has provided that information which it considers would fall within its parameters, i.e. information deriving from the Council's investigation that directly answers "*how and why*" the overcharge is correct.
60. However, the Commissioner understands that further information is held by the Council that may be relevant to the request, such as the 'job sheets' and wider contextual information, and that the complainant may have expected such information to have been disclosed in response to his request.
61. The Commissioner further understands that the Council has not sought to clarify the scope of the request with the complainant, and instead has seemingly applied its own interpretation of the request.
62. In circumstances where a request is ambiguous (and/or may exceed the appropriate limit for section 12), section 16 requires a public authority to provide appropriate advice and assistance to the requestor so as to enable them to clarify their request.
63. The Commissioner considers that such advice and assistance may include clarifying of the wording of the request, explaining what relevant information may be held that would fall within its parameters, and explaining how much of this can be provided within the appropriate limit in costs provided by section 12.
64. The Commissioner therefore finds that the Council has breached the requirement of section 16.

The second limb

65. In respect of the second limb, the Commissioner has considered the searches undertaken by the Council, and is not aware of any evidence that indicates these have been insufficient.
66. The Commissioner therefore finds it reasonable to conclude that this part of the request has been complied with.

Section 10(1) – Time for compliance with request

67. Section 10(1) of the FOIA states that, subject to subsections (2) and (3), a public authority must comply with section 1(1) by no later than the twentieth working date following the request's date of receipt.
68. In this case the Commissioner has identified that the Council disclosed held information outside the time for compliance, and therefore breached section 10(1).

Section 17(1) – Refusal of request

69. Section 17(1) of the FOIA states that any refusal of the request must be provided within the time for compliance provided for section 1(1).
70. In this case the Commissioner has identified that the Council refused to disclose held information outside of the time for compliance, and therefore breached section 17(1).

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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF