

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 September 2018

Public Authority: Adur & Worthing Councils
Address: Worthing Town Hall
Chapel Road
Worthing
West Sussex
BN11 1HA

Decision (including any steps ordered)

1. The complainant has requested information relating to the outcome of arbitration between the council and a private company. The council applied section 32(2) (court records) and withheld the information.
2. The Commissioner's decision is that the council was correct to apply section 32(2) to some information held in respect of arbitration proceedings. She has also decided that whilst the council was not correct to apply section 32(2) to one document, section 32(1) was applicable to this information. Further to this she has decided that the council was not correct to consider that one document does not fall within the scope of the complainant's request, and so it has failed to comply with the requirements of section 1 of the Act in respect of this document. She has also noted that other, similar information may be held which the council has not identified or considered. She has also decided that the council failed to comply with section 10(2) in that it did not provide its response to the complainant within 20 working days of receiving the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To issue a fresh response to the complainant's request as regards the Adjudicator's decision of 23 October 2013 without relying upon section 32(2), and

- to consider whether it holds the Adjudicators' decisions dated 25 May 2012 and 1 August 2013 as referred to in the above document and respond to the complainant as required by section 1 of the Act.
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 28 February 2017, the complainant wrote to council and requested information in the following terms:
- "May I request under the Freedom of Information Act, that you and therefore the Council, kindly furnish us with documents in respect of the outcome of the arbitration sitting on the refurbishment contract."*
6. The council initially responded on 8 March 2017 asking the complainant to clarify the information he was referring to.
7. This request was clarified by the complainant on 16 May 2017, when he said:
- "My request specifically relates to the Refurbishment Contract — Fishersgate External and communal Way Repairs...Please send me documents (records) on the outcome of the litigation referred to above, irrespective of whether the dispute (claims and counter) arising from the Refurbishment Contract in Adur District Council v Bramber Construction Ltd was eventually decided by the law court or by arbitration or through other means".*
8. The council responded on 30 June 2017. It withheld the information and applied the exemption in section 32(2)(b) of the Act (court proceedings etc).
9. Following an internal review the council wrote to the complainant on 11 August 2017. It upheld its position that section 32(2)(b) applies to the information.

Scope of the case

10. The complainant contacted the Commissioner on 14 May 2017 to complain about the way that his request for information had been handled. Initially his complaint was that the council had not responded to his request for information. Once the council had responded and carried out a review of its decision he confirmed that he did not accept the application of the exemption to withhold the requested information.
11. During the course of the Commissioner's investigation she wrote to the council asking for further details regarding one of the documents which the council had initially provided to her as forming the withheld information. She pointed out that one document is an Adjudicator's decision, and asked the council to provide further information clarifying why it believes that this information falls within the scope of the exemption in section 32(2) of the Act, which relates to information relating to inquiries and to arbitration.
12. The council responded stating that having reconsidered its position it accepted that the document did not fall within the scope of the exemption in section 32(2), however on reflection it also considered that the document does not fall within the scope of the complainant's request. It therefore argued that this should be excluded from consideration by the Commissioner on this basis. The Commissioner has therefore considered this further below.
13. The Commissioner considers that the complaint includes whether the council was wrong to withhold the information under section 32(2) of the Act.
14. She also considers that the complaint includes whether the time that the council took to respond to his request for information is in accordance with the requirements of the Act.

Reasons for decision

Section 1(1)

Does the Adjudicator's decision fall within the scope of the complainant's request

15. Section 1 of the act provides that

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

16. Following initial correspondence between the council and the Commissioner regarding the application of section 32(2) to one document, the council argues that it was mistaken to initially include an Adjudicator's decision as falling within the scope of the complainant's request.
17. The council noted that the complainant's request of 28 February 2017 was for: *"Furnish us with documents in respect of the Arbitration sitting on the refurbishment contract"*. It argues that the Adjudicator's decision does not fit within the scope of the wording of this request.
18. Further to this the council points out that this request was clarified by the complainant on 16 May 2017 when he wrote:

"My request specifically relates to the Refurbishment Contract — Fishersgate External and communal Way Repairs...Please send me documents (records) on the outcome of the litigation referred to above, irrespective of whether the dispute (claims and counter) arising from the Refurbishment Contract in Adur District Council v Bramber Construction Ltd was eventually decided by the law court or by arbitration or through other means".
19. The council argues that the complainant specifically asked for documents relating to the outcome of the litigation, referring to the earlier request regarding the *'arbitration sitting on the refurbishment contract'*. It argues therefore that the Adjudicator's decision does not fall within the scope of this request.
20. The contractual dispute was decided by an Arbitrator, and subsequently by the High Court. The council points out that in its first award the Arbitrator confirmed that the adjudication decision did not form part of the arbitration process within his decision. The council provided the Commissioner with a direct reference to the Arbitrator's decision confirming this detail from the withheld information. Ultimately all parties during the arbitration agreed that the adjudication decision was irrelevant to the matters being considered by the Arbitrator, who then excluded it from his considerations.

21. Having considered the council's arguments, the Commissioner is satisfied that the Adjudicator's decision occurred prior to the arbitration and related to interim matters, however those matters still relate to the outcome of the litigation between the parties as described by the complainant in the clarification of his request. The complainant sought information on the outcome of the litigation, and the adjudication process represented the initial steps taken by the parties to resolving the issues which subsequently led on to further litigation occurring between the parties.
22. The council's arguments regarding the exclusion are correct to the extent that the complainant's initial request only referred to matters relating to the arbitration which occurred. However, his subsequent clarification of the request included all information relating to the outcome of the dispute between the parties, "*irrespective of whether the dispute (claims and counter) arising from the Refurbishment Contract in Adur District Council v Bramber Construction Ltd was eventually decided by the law court or by arbitration or through other means*". The Commissioner notes that part of the resolution of the issues between the parties was through the adjudication process, and she therefore considers that the Adjudicator's decision falls within the scope of this request.
23. Additionally, the Commissioner notes that within the Adjudicator's decision he refers to two previous adjudication decisions relating to the same parties and the same contract. The council has not provided this information to the Commissioner, nor, insofar as she is able to tell, has it considered this information for disclosure to the complainant in response to his request.
24. From the description of the issues considered by these adjudication decisions these appear to potentially consider matters relating to the outcome of the litigation between the parties, namely the resolution of payment disagreements between the parties. The Commissioner considers that an objective reading of the request would include matters relating to the details surrounding the final payments made or owed following the termination of the contract within the scope of the complainant's request for the 'outcome' of the litigation between the parties.
25. Having considered this, the Commissioner is not satisfied that if the council retains this information it would be correct to exclude these adjudication decisions from the scope of the complainant's request for information (as clarified in his email of 16 May 2017).

26. The Commissioner considers that the council has not fully identified and confirmed to the complainant a) whether all of the information falling within the scope of the request is held, and b) whether this information should be disclosed to the complainant in response to his request, (as clarified in his email of 16 May 2017), as required by section 1 of the Act.
27. The Commissioner has therefore decided that the council has not fully complied with the requirements of section 1 of the Act in respect of the Adjudicator's decision. Its decision to withdraw reliance upon the exemption in section 32(2) and to exclude this information from the scope of the request was not correct. Additionally, it is unclear whether all of the information falling within the scope of the request has been identified and considered for disclosure to the complainant.
28. The Commissioner recognises that the council has not fully considered all of this information previously, and that although she has decided that the council was not correct to consider the Adjudicator's decision as falling outside the scope of the request other exemptions may be applicable to this information.
29. She therefore considers it fair to require the council to reconsider its position with regards to this specific information and, having done that, to respond again to the complainant's request regarding these issues.

Section 32 – court records

30. Section 32(2) states that information held by a public authority is exempt information if it is held only by virtue of being contained in:

(a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of arbitration, or

(b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.

31. The Commissioner's has issued guidance on section 32 entitled 'Court, inquiry or arbitration records (section 32)' which is available at https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKewj9yqTHzIbYAhWILIAKHdU5DkQQFgg_uMAA&url=https%3A%2F%2Fico.org.uk%2Fmedia%2Ffor-organisations%2Fdocuments%2F2014222%2Fsection-32-court-inquiry-arbitration-records.pdf&usg=AOvVaw2AIZfAXjTHVFLmcM56oJjo

32. The guidance on section 32(2) states at paragraph 11 that:

"Section 32(2) covers inquiry and arbitration records. It provides an exemption for information held only by virtue of being recorded in a document that has been:

- filed or placed in the custody of a person conducting an inquiry or arbitration; or*
- created by the individual or body conducting the inquiry or arbitration."*

33. At paragraph 18 of the guidance the Commissioner also states that *"'Arbitration' should be interpreted to mean any statutory arbitration that is governed by Part I of the Arbitration Act 1996 (and thus subject to a written arbitration agreement)."*

34. There are two main tests in considering whether information falls within this exemption. First, is the requested information contained within a relevant document – for example one filed with a court in relation to a particular cause or matter? Secondly, is this information held by the relevant public authority only by virtue of being held in such a document?

35. In the Commissioner's view, the phrase 'only by virtue of' implies that if the public authority also holds the information elsewhere it may not rely upon the exemption. The council explained that it only holds these document by virtue of it being a party to the proceedings.

36. The council has identified these documents as falling within the scope of the request. Given the specific wording of the requests it is clear that the complainant was seeking the outcome documents (records) –i.e. decisions taken by the Arbitrator or the court relating to the litigation in this case. The Commissioner therefore accepts that, subject to the other information identified within the notice, the withheld information is the information which was being requested in this case.

37. The council argues that the award decisions made by the Arbitrator are, by their very nature, documents created by a person conducting an inquiry or arbitration. Chiefly, they contain the findings and reasoning of the Arbitrator and relate to the determination of the dispute between the parties. It therefore argues that the information falls within the exemption in section 32(2)(b).

38. The request is effectively asking for a copy of the decisions or orders ('the outcome') of the arbitration following the involvement of the Arbitrator in the case. The decision of an Arbitrator will fall within the scope of the exemption in section 32(2) of the Act.

39. The Commissioner agrees with this argument and has therefore decided that the council was correct to apply section 32(2) to this information.
40. Sections 32(1) and (2) are class based exemptions. This means that any information falling within the category described is not subject to a prejudice test and is automatically exempt from disclosure. It is therefore conceivable that the exemption could apply to information which may otherwise be available to an applicant via other means or to information which is already widely available.
41. Sections 32(1) and (2) are also absolute exemptions and are therefore not subject to any public interest considerations.

The Court Draft Decision/Order

42. The Commissioner considers that the record of the court's decision falls within the scope of the clarification of the request issued by the complainant on 16 May 2017. This specifically included the outcome of the litigation through either arbitration or the courts. The court decision covers the eventual outcome of the litigation between the parties.
43. The withheld document is a draft decision of the Queen's Bench Division of the High Court. Having considered the withheld information the Commissioner is satisfied that it does not fall within the scope of the exemption in section 32(2) as it is not information held only by virtue of being recorded in a document that has been filed or placed in the custody of a person conducting an inquiry or arbitration or created by the individual or body conducting the inquiry or arbitration."
44. However section 32(1) provides that

"32.—(1) Information held by a public authority is exempt information if it is held only by virtue of being contained in—

(c) any document created by—

(i) a court, or

(ii) a member of the administrative staff of a court,

for the purposes of proceedings in a particular cause or matter."
45. The Commissioner is satisfied that as a draft decision/order of the Queen's Bench Division of the High Court, the information falls within the scope of section 32(1)(c)(i). It is the draft decision of a court and so any information on the outcome of the litigation falling within the scope

of the request held within the document falls within the scope of the exemption. Again the council only holds this document as a result of being a party to the proceedings.

46. The information is therefore exempt under section 32(1)(c)(i). Again there is no requirement for the council to carry out either a prejudice test or a public interest test where section 32(1) is applicable.
47. The Commissioner has decided that the council was therefore correct to withhold the information.

Section 10(1)

48. The council admitted to the complainant in its response to his request for review that it had failed to comply with the requirements of section 10(2) when responding to his request.
49. The request for information was made by the complainant on 28 February 2017.
50. The council sought clarification of the request on 8 March 2017, during which time the deadline of 20 working days to respond was halted under section 1(3).
51. The complainant then provided clarification on 16 May 2017. The council responded to the request on 30 June 2017.
52. This falls outside of the period of 20 working days provided by section 10(1) of the Act. The Commissioner's decision is that the council therefore did not comply with the requirements of section 10(1) of the Act.

Right of appeal

53. 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

54. 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.
55. 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
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