

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 March 2024

Public Authority: Oxford Direct Services Limited (ODSL)
Address: St Aldates Chambers
109 St Aldates
Oxford
OX1 1DS

Decision (including any steps ordered)

1. The complainant has requested, from Oxford Direct Services Limited (ODSL'), information on investigations regarding its employees for accepting undeclared gratuities. ODSL applied section 30(3) to neither confirm nor deny whether it holds relevant information. During the course of the Commissioner's investigation ODSL amended its decision to apply section 31(3) to neither confirm nor deny whether relevant information is held.
2. The Commissioner's decision is that ODSL was correct to apply section 31(3) to refuse to confirm or deny whether it holds relevant information.
3. The Commissioner does not require further steps.

Request and response

4. On 4 October 2023, the complainant wrote to ODSL and requested information in the following terms:

"In the past three months how many Oxford Direct Services employees have been investigated by Oxford Investigation Services for accepting undeclared gratuities? Following the investigation was there any evidence to suggest that employees had acted improperly?"

5. ODSL responded on 13 October 2023. It refused to confirm or deny whether relevant information is held by it under section 30(3) of FOIA (Investigations and proceedings conducted by public authorities).
6. Following an internal review, on 17 November 2023, ODSL upheld its previous decision.

Scope of the case

7. The complainant contacted the Commissioner on 17 November 2023 to complain about the way their request for information had been handled. They argued that ODSL should disclose the information which it holds in response to their request.
8. During the course of the Commissioner's investigation ODSL amended its decision and applied section 31(3) to neither confirm nor deny whether it holds any relevant information.
9. As the response was to neither confirm nor deny ('NCND') whether information is held by it, the Commissioner must initially decide whether ODSL is entitled to NCND whether it holds any information of the type requested by the complainant under section 31(3) of FOIA.
10. If the Commissioner's decision is that it was not entitled to do so, then ODSL must reconsider its response under section 1 of FOIA and respond to the request again, without applying section 31(3).
11. However, if the Commissioner's decision was that it was correct to apply section 30(3), then ODSL does not need take any further action in response to the request.

Reasons for decision

Section 31 – Law enforcement

12. The following decision notice analyses whether ODSL was correct to apply section 31(3) to NCND whether any relevant information is held by it falling within the scope of the complainant's request for information.
13. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request. This is commonly known as "the duty to confirm or deny." However, there are exemptions to this duty whereby a public authority may NCND whether it holds requested information where doing so would in itself prejudice the functions which the relevant exemption is seeking to protect – in this case, the prevention and detection of crime under section 31(1)(a) of FOIA.
14. In broad terms, the exemption will apply where disclosing information would harm either the authority's ability, or the ability of another body, to enforce the law.
15. The decision to use an NCND response is not affected by whether a public authority does, or does not, in fact hold the requested information. The starting point, and main focus for NCND in most cases, is a theoretical consideration of the consequences of confirming or denying whether the requested information is held.
16. A public authority using the section will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held under a mosaic effect¹. For example, if a series of requests are responded to confirming that no information is held, a subsequent NCND response would indicate to the requestor that relevant information is likely to be held for that individual request.

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-31-law-enforcement/how-should-we-apply-the-prejudice-test/>

17. The Commissioner notes that the complainant's request can be broken down into two different items of information; the first is a number: how many of its employees have been investigated within the last 3 months.
18. The second is whether there was any evidence that any employees subject to those investigations had been found to have acted improperly.
19. ODSL said that it considers that accepting and failing to declare gratuities may amount to a case of fraud and/or potential bribery. It said that depending on the magnitude of the fraud, it may refer the issue to the police as a criminal offence for further investigation and potential prosecution.
20. It said that it has applied section 31(3) as it considers that confirming or denying whether it holds information falling within the scope of the request would be likely to prejudice the prevention or detection of crime under section 31(1)(a). It argues confirming or denying whether investigations are ongoing would be likely to alert those under investigation, and allow them to take action to prevent being caught.

The Commissioner's analysis

21. When considering the application of section 31(1)(a), the Commissioner has a three-part test:
 - a) Which law enforcement interest(s), protected by section 31, could be harmed by the disclosure?
 - b) Is the harm identified real, actual or of substance and is there a causal link between disclosure and that harm?
 - c) What is the likelihood of that harm actually occurring: would it occur, or is it only likely to occur?
22. Authorities don't have to demonstrate that they are holding the information for the purpose of preventing or detecting crime. They only have to demonstrate that whether confirming or denying whether information is held could harm efforts to prevent or detect crime.
23. In this case ODSL said that if it held relevant information, it would hold it as a result of Oxford Investigations providing it in respect of an investigation it is undertaking. Accepting undeclared gratuities may amount to a criminal offence, and ODSL has highlighted above that serious cases of fraud or bribery may be referred to the police for prosecution. The Commissioner therefore acknowledges that the interests raised by section 31(1)(a) are engaged.

24. The next question is whether there would be a causal link between confirming or denying whether relevant information is held and the prevention and detection of crime.
25. The Commissioner is satisfied that if ODSL discloses that investigations are ongoing then disclosing that fact may make perpetrators change their plans or conduct in order to avoid detection. This might involve a temporary cessation of their activities, taking action to hide past activities, or being more careful to ensure that any investigation does not uncover their activities.
26. The Commissioner therefore accepts that if criminal activities were ongoing, confirming that an investigation is under way would be likely to make the prevention and detection of crime more difficult.
27. The Commissioner is therefore satisfied that ODSL was correct to apply section 31(3) in order to refuse to confirm or deny whether it holds any information respect of *ongoing* investigations.
28. The Commissioner notes that the wording of the request implies that the requestor is seeking information on completed, rather than any ongoing investigations. The complainant specifically requests information on the findings of the relevant investigations, where held. In order to reach such a finding, the investigation would need to have been completed.
29. However, the Commissioner notes that the complainant has requested details of investigations undertaken in the last 3 months prior to the date of the request. If investigations had been undertaken by Oxford Investigations and found evidence of fraud etc, then details would presumably have been, or be in the process of being, passed on to the police. Police investigations would potentially still be ongoing at the time that the request was received.
30. Again, therefore, the Commissioner considers that in this hypothetical scenario, confirming or denying whether relevant information is held could undermine the prevention and detection of crime as it would highlight that such investigations occurred and subsequent investigations or proceedings may be ongoing. It may also prejudice the apprehension or prosecution of offenders, which falls under the exemption in section 31(1)(b), or the administration of justice under section 31(1)(c) of FOIA.
31. Where no misconduct or criminal offences have occurred, confirming, or denying that information is held might be disclosable without raising the issues raised by section 31(1)(a). However, as noted above, due to the mosaic effect, section 31(3) would still be applicable to such information.

32. The Commissioner is therefore satisfied that section 31(3) of the Act is engaged. He has therefore gone on to consider the public interest test required by section 2(1)(b) of FOIA. The test is whether, in all of the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information.

The public interest test

The public interest in confirming or denying whether information is held

33. ODSL took into account the public interest in it being transparent, accountable. It recognised that there is a public interest in it demonstrating that its employees and the company abide by the law, internal policies and relevant compliance obligations and best practice.

The public interest in the exemption being maintained

34. ODSL argued that the public interest in preventing prejudice to the prevention and detection of crime outweighs that in the information being disclosed. It argued that it is essential that it neither confirm or deny whether relevant information is held to ensure that any investigations and potential prosecutions are not prejudiced by the disclosure.

The Commissioner's conclusions of the public interest

35. The Commissioner recognises that there is a public interest in transparency and accountability on issues such as misconduct and offences being carried out within public authorities. The misuse of, or theft of public money, the acceptance of bribes, or the improper use of a public position to gain personal advantage, are issues which will affect communities and the public purse as a whole.
36. Whilst there is a strong argument in favour of the disclosure of information relating to such offences, if the result of confirming or denying whether relevant information is held would, in fact, be counter-productive to the prevention and detection of crime within authorities then the public interest rests in the exemption being maintained until such time as the danger of prejudice has passed.

37. The Commissioner is mindful of the fact that the requestor specifically requested information in relation to the three months prior to his request being received. Hypothetically, any investigations may be on hold awaiting further evidence, may still be ongoing, or may be completed but decisions being made as to whether to refer the findings to the police.
38. The Commissioner has therefore decided that the public interest in the exemption being maintained outweighs that in ODSL confirming or denying whether it holds relevant information.

Right of appeal

39. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

40. 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.
41. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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