

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 December 2015

Public Authority: Royal Borough of Kensington and Chelsea
Address: Town Hall
Hornton Street
W8 7NX

Decision (including any steps ordered)

1. The complainant has requested from the Royal Borough of Kensington and Chelsea (the Council) information relating to bus shelters carrying advertising. Only one request concerns this notice, which asked the Council to disclose the financial benefits it accrues from the advertising annually and over the life of its contract with a third party. The Council refused the request under the 'commercial interests' (section 43(2)) exemption in FOIA and later introduced the 'information provided in confidence' (section 41(1)) exemption as an additional ground for withholding the financial benefit information. The contractor has also raised the possibility that the 'prohibition on disclosure' (section 44(1)(b)) exemption would also be engaged. The Commissioner has determined that none of these exemptions are engaged. He therefore requires the Council to disclose the requested information to ensure compliance with the legislation.
2. The public authority must take this step 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 25 May 2015, the complainant wrote to the Council and made the following requests for information relating to the provisioning of bus shelters carrying advertising in the local area:

1. *What is the nature and length of any contract between the council with a named supplier of Bus Shelters carrying advertising*
 2. *What number of these shelters are owned by the advertising supplier and what number owned by the Council.*
 3. *What are the financial benefits to the Council annually and over the life of the contract*
 4. *Are these payments made on a regular basis and if so when*
 5. *Does the council receive any discounts on advertising it purchases and if so what percentage*
4. The Council responded on 19 June 2015. It provided information relevant to the requests with the exception of the financial benefit details specified at request 3. The Council explained these were commercially sensitive and should therefore be withheld, although no reference was made at this stage to the relevant provision in FOIA it was relying on.
5. The complainant contacted the Council on 24 June 2015 and asked it to reconsider the decision to withhold the requested information in light of the clear public interest arguments that existed in favour of disclosure. An internal review was therefore completed by the Council, the outcome of which was sent to the complainant on 10 August 2015. This upheld the original refusal, with the reviewer explaining that section 43(2) of FOIA applied and on balance the public interest favoured maintaining the exception.

Scope of the case

6. The complainant contacted the Commissioner on 11 August 2015 to complain about the Council and particularly its refusal to comply with part 3 of the original set of requests.
7. During the course of the Commissioner's investigation, the Council confirmed its reliance on section 43(2) of FOIA but additionally introduced section 41 as an additional basis for withholding the financial benefit information. It also became evident that Clear Channel United Kingdom (Clear Channel), the contractor in question, also considered that section 44(1)(b) covered the requested information. The Commissioner's analysis of the application of each of these exemptions is set out in the body of this notice.

Reasons for decision

Section 43(2) – commercial interests

8. 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.
9. 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.
10. The Council has claimed that both its own commercial interests, and those of the advertising contractor Clear Channel, are at stake. The Council has explained that it awarded a concessionary contract to Clear Channel in August 1998 for a 15 year term expiring in July 2013. The contract was subsequently extended on two occasions and is now due to expire on 31 January 2016. The Council is intending to invite tenders for a new 15 year term contract shortly. With regard to the disputed information, the Council asserts that the financial information remains current, commercially important, and is not widely known. Any financial benefits set out in the contract, the Council asserts, clearly relate to its own and Clear Channel's commercial activities and it considers there is a real risk of prejudice to the commercial interests of both parties should the information be disclosed.
11. With regard to the commercial interests of the Council, the Commissioner was initially referred to the First-tier Tribunal's decision on *John Connor Press Associates v The Information Commissioner* (EA/2005/0005, 25 January 2006)¹. In particular, the Council highlighted the Tribunal's acceptance that:

1

<http://www.informationtribunal.gov.uk/DBFiles/Decision/i89/John%20Connor.pdf>

"[...] the commercial interests of a public authority might be prejudiced if certain information in relation to one transaction were to become available to a counterparty in negotiations on a subsequent transactions. Whether they were or not would depend on the nature of the information and the degree of similarity between the two transactions [...]." (paragraph 15)

12. The Council considers that the financial benefit information could be used by bidders in any future procurement process to identify the payments received from Clear Channel. This, in the Council's view, would inevitably lead to the following three outcomes. First, it would damage the Council's negotiating position in any future procurement exercise, making it more difficult for the Council to negotiate the most favourable outcome with the bidders. Second, it would make any procurement process unfair, which could lead to challenges to the award of a new contract from any bidder who is not privy to the information. Third, it would permit another bidder in any future procurement exercise to have a better estimate of Clear Channel'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 Clear Channel's approach.
13. The Council has next gone on to address the prejudice to Clear Channel's 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 Clear Channel in respect of the potential release of the information.
14. It was reiterated that the financial information is commercially sensitive and its disclosure would be likely to cause substantial prejudice to Clear Channel's commercial interests. The argument as presented has two limbs. First, the highly competitive nature of the outdoor advertising market was emphasised. According to the argument, any advantage gained by one of Clear Channel's competitors would come as a significant disadvantage to Clear Channel and would distort the market in an unfair way. Second, the financial information would allow potential clients of Clear Channel to amend their offers in any subsequent tenders, again to Clear Channel's disadvantage.
15. 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)². 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.

16. 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 decision do have some traction 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.
17. 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

² https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560159/fs_50588962.pdf

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

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.

18. Like the *Brighton and Hove* case, the withheld information in the present case is of a significant age. Unlike that case, however, the Council has offered a view on why it considers that the age of the information does not prevent its ability to use section 43(2) of FOIA. It accepts that the financial information was agreed a significant time ago. However, the Council also maintains that the information essentially remains current and could still be used by a competitor to structure or adjust their bid. It is the Council's belief that the proximity of the request to the tender process raises the risk of prejudice to both Clear Channel's and the Council's commercial interests.
19. It is important that any tendering process is carried out on a fair platform and the Commissioner recognises that a disclosure under FOIA should not undermine this process to the detriment of a party, whether that is the public authority or a competitor entering into the tender competition. The Commissioner considers though that neither the Council's nor Clear Channel's arguments have 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 of substance. This is because they do not overcome the reservations expressed by the Commissioner on the *Brighton and Hove* case, in which he said that it seemed unlikely competing contractors would be unduly influenced by what was essentially historical financial information. On this analysis, the claim that disclosure would make the forthcoming tendering process unfair is not compelling.
20. For this reason, the Commissioner has likewise found that there are insufficient grounds for finding the information was exempt under section 43(2). As the Commissioner has determined that the exemption is not engaged, he is not required to go on to consider the public interest test. The Commissioner would, however, also echo the comments on the public interest that were made at paragraph 20 of the decision notice on the *Brighton and Hove* complaint.
21. 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

22. 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.
23. The Commissioner has initially considered whether the financial benefit information is information obtained by the Council from Clear Channel. 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.
24. The Commissioner suggested to the Council during the course of his investigation that the financial benefit information was more likely to be mutually agreed information rather than information obtained from Clear Channel and therefore section 41(1) was unlikely to apply. The Council

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)

has rejected this view, however. It explains that the Pricing Document incorporated into the contract was provided by Clear Channel during the tender process prior to the signature of the contract, under an expectation of confidentiality. It is asserted that this expectation was reinforced by a clause in the contract that states "Tenderers shall treat the details of the Contract Documents as Private and Confidential". According to the Council, the pricing figures in the Pricing Document represents Clear Channel's 'pre-contractual negotiating position' which it argues can be information obtained by another person. The Council considers this finds support in the Commissioner's guidance, which on the issue of pre-contractual information states the following:

21. If the contract contains information relating to the other party's pre-contractual negotiating position, then this could also qualify as information obtained from another person, although once again this will depend on the individual circumstances of the case.

25. 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."

26. 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 the Council and Clear Channel. Consequently, the Commissioner does not accept that the information was obtained by the Council from a third party and therefore the exemption cannot be engaged.

Section 44 – prohibitions on disclosure

27. Although not explicitly relied on by the Council, the Commissioner notes that the representations of Clear Channel cites section 44(1)(b) as an additional ground for withholding the requested information. For

completeness, the Commissioner has considered it appropriate to deal with this application as part of the decision notice.

28. 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
29. Clear Channel 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.
30. 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

31. 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

32. 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.
33. 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

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