

Freedom of Information Act 2000 (Section 50)

Decision Notice

10 January 2007

Public Authority: Liverpool City Council
Address: Municipal Buildings
Dale Street
Liverpool L69 2DH

Summary

The complainant asked Liverpool City Council for notes, minutes, correspondence and reports etc regarding prostitution in the West Everton area.

The Council released several documents but withheld other information under sections 36 and 43 of the Act. The Commissioner decided that the information was not exempt from disclosure.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

The Request

2. On 10 January 2005 the complainant requested the following information from Liverpool City Council:

'Please send me notes, minutes, correspondence and reports etc between councillors, council officers internally and with external organisations regarding prostitution in the Everton/Netherfield Road/Shaw Street area'.

3. On 7 February 2005 the Council responded by releasing copies of correspondence and minutes of meetings concerning the matter. It informed the complainant that it had retained two reports relevant to the issue which it had commissioned from Liverpool John Moores University. The reports contained analysis of the suitability of various City locations to become managed zones for prostitution. The Council decided that the reports were exempt from disclosure on the grounds that release would inhibit free and frank provision of advice and prejudice the effective conduct of public affairs. The Council stated that it would

consider whether disclosure was in the public interest and advise the complainant of the outcome within two weeks.

4. The complainant wrote again to the Council on 14 February 2005 requesting disclosure of all the information that she had requested. On 25 February 2005 the Council reviewed its decision to withhold the two reports. It decided to agree their release but with two sections redacted. The Council considered that disclosure of information redacted from the first report could damage local regeneration and affect property values. It also considered that notes in the second report of a meeting held on a confidential basis contained commercially sensitive information. The Council did not specify the exemptions on which it based its arguments.
5. On 24 March 2005 the complainant wrote again regarding her request for information and attached a series of additional questions about the matter. The Council responded on 22 April 2005 and disclosed further papers on the issue. The Council informed the complainant that no decision had been made to move prostitution into the area cited in her request.

The Investigation

Scope and chronology of the case

6. The complainant contacted the Commissioner on 8 June 2005 to formally complain about the Council's withholding of information 'about the decision to move prostitution' into her neighbourhood. Her complaint referred to questions she had raised with the Council and which she considered had not been answered.
7. The Commissioner examined the correspondence in the matter and was satisfied that the Council had answered the questions posed by the complainant. He clarified that the only items of information that had been withheld by the Council under the Act were the two redacted sections of the reports commissioned from the university. His investigation therefore concentrated on whether the Council's withholding of that information was appropriate.
8. On 8 December 2005 the Commissioner asked the Council for a copy of the two reports together with an indication of the sections that had been redacted. The Council's subsequent handling of the matter gave the Commissioner cause for concern. His concern is formally noted in the penultimate section of this Decision Notice.
9. The Council failed to respond to the Commissioner's request and on 23 February 2006 he issued an Information Notice under section 51 of the Act requiring the Council to provide him with the information within 30 days.
10. On 31 March 2006 the Commissioner wrote again to the chief executive requiring a response within 14 days as failure to comply with the Information Notice risked the commencement of proceedings against the Council in the High Court pursuant to section 54 of the Act

11. On 23 May 2006 the Council faxed two documents to the Commissioner but neither were the ones that had been requested. The Council also informed the Commissioner that it could not find the redacted version that had been sent to the complainant. It was therefore unable to indicate the information which had been exempted from disclosure. Consequently, the Commissioner had to obtain a copy of the redacted version directly from the complainant. On 22 June 2006 the Council forwarded two more documents to the Commissioner. Only one of these was relevant.
12. Owing to continuing problems on the part of the Council in recognising and acquiring the correct documentation, members of the Commissioner's Investigations Department travelled to Liverpool to interview staff and expedite the matter.
13. The Council's continued non-compliance with the requirements of the Information Notice necessitated a further letter on 11 July 2006 warning that the Commissioner may make written certification of that fact to the High Court pursuant to section 54 of the Act and that it may be dealt with as a contempt of court.
14. At the Commissioner's suggestion the Council eventually obtained a copy of the documents from the university that had carried out the original analysis. From these documents, he was able to identify the missing report on 18 October 2006.
15. The Commissioner examined the information that had been redacted from the two reports. The first report is entitled, '*Potential sites for the location of a managed zone for sex trade workers in Liverpool*'. It sets out the criteria for selecting sites for managed prostitution in the City and identifies and ranks nineteen locations which might meet the criteria. Fourteen of the locations did not meet the criteria and information identifying these areas was redacted.
16. The second report is entitled, '*Consultation on a managed zone for sex trade workers in Liverpool. Views from businesses in Kempston Street L3, Jamaica Street L1 and surrounding areas*'. It contains a detailed analysis of consultation with businesses and lists those which responded. Notes of a meeting between the Council and other agencies on redevelopment options and proposals were redacted from this report.

Background Findings

17. Liverpool's plan for a managed zone for prostitutes was based on the Dutch model used in Utrecht. The Council's intention was for the zone to operate at night and be situated in an industrial area of the inner city away from homes and night-time businesses.
18. The Council's plan was eventually shelved after the government published its long-term 'Prostitution Strategy' in January 2006 in which it ruled out the idea of managed zones for prostitutes.

Analysis

Procedural breach

19. Section 17(1) of the Act requires that when a public authority relies on a claim that information is exempt, it must state that an exemption applies, specify the exemption in question and state why the exemption applies.
20. In this case, the Council did not specify the exemption(s) on which it relied to withhold the information.

Exemptions

21. The Council's refusal notice implied that the information was exempt under section 36 whereas its review letter implied exemption under section 43. (Neither letter was specific on this point.) On 8 December 2005 the Commissioner asked the Council to clarify whether it was reliant on section 43 or whether both s43 and s36 applied. The Council did not respond to his letter neither did it respond to further communications from him about the matter.
22. In December 2006 in order that he might complete his Decision Notice the Commissioner again asked the Council to confirm the exemption(s) on which it relied to withhold the information. The Council stated that it was unsure what the relevant exemptions were. The reason for the Council's lack of confidence in this respect was attributed to the fact that the City Solicitor who had originally dealt with the case had left the Council's employ. Since his departure the Council maintained that it was unable to locate any record made in respect of the matter. In light of the Commissioner's assumptions about the case, the Council said that it would deem the relevant exemptions to be sections 36 and 43. At the Commissioner's request, the Council eventually agreed to put in writing that it was reliant on sections 36 and 43 in order to withhold the information. A letter to this effect was received from the Council on 9 January 2007.

Section 36 (Prejudice to effective conduct of public affairs)

23. The Council's refusal letter of 7 February 2006 maintained that release of the reports would be likely to inhibit free and frank provision of advice (an allusion to section 36 of the Act although the exemption itself was unspecified). It appears (though is not certain) that the departed City Solicitor was the qualified person whose opinion invoked section 36.
24. The Commissioner recognises that the prospect of disclosing information which reveals internal thinking processes could in some circumstances lead to less candid discussions in the future and so may be detrimental to the future quality of decision making within a public authority. However, the Commissioner would normally expect to see some clear, specific and credible evidence that the substance or quality of advice would be detrimentally affected by the threat of disclosure. In this case no such evidence was provided by the Council.

25. Having decided to release both reports (apart from two redacted sections) as a result of its internal review, the Council's review letter no longer referred to the inhibition of free and frank advice as a reason for non-disclosure. Instead, the Council's argument for withholding the redacted information became focused only on the issue of commercial sensitivity.
26. In the absence of any clear indication from the Council as to its reasoning in respect of section 36, the Commissioner could simply have assumed that the exemption no longer applied. However, he is prepared to assume that the exemption was engaged and has proceeded below to consider public interest arguments in respect of section 36.

Section 43 (Commercial interests)

27. The Council relied on section 43 of the Act to withhold information from both reports. From the report entitled, *'Potential sites for location of a managed zone for sex trade workers in Liverpool'*, the Council redacted details of fourteen areas which did not meet the criteria for selection. (Information regarding five areas which met the criteria was disclosed.)
28. Section 43 is a prejudice-based exemption and as such it is necessary to establish the nature of the prejudice that might result from disclosure of the information requested.
29. The fourteen locations in question were not considered to be traditional areas for street prostitution. In the Council's view, the fact that the areas had been considered in the report might be misunderstood by the public if the information was disclosed and in its view this could result in a damaging impact on property values and regeneration. The Council did not provide a detailed explanation of how the prejudice might be caused and neither did it provide any determination as to the likelihood of its occurrence.
30. Section 43(2) of the Act provides that information is exempt if its disclosure *'would, or would be likely to'* prejudice commercial interests. In respect of the meaning of *'likely to prejudice'* the Commissioner is mindful of the Tribunal's confirmation that the *'chance of prejudice being suffered should be more than a hypothetical possibility; there must be a real and significant risk'*. (John Connor Press Associates Limited v The Information Commissioner). This interpretation follows the judgment of Mr Justice Munby in *R (on the application of Lord) v Secretary of State for the Home Office [2003]* where the view was expressed that, *"'Likely' connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not"*.
31. The study of the fourteen locations by John Moores University was considered by the Council to be a hypothetical exercise and the Council's refusal letter of 7 February 2005 described the survey in these terms. The Council clearly stated in its correspondence with the complainant that there was no intention of bringing

any of these areas into managed zones for prostitution even if primary legislation were to allow this. (It later transpired that the government decided against the enactment of such legislation in any case).

32. The Commissioner has carefully considered whether prejudice might result from disclosure of the requested information and he has concluded that the Council failed to demonstrate any real or significant risk in this respect.
33. The Commissioner is, in any case, not persuaded by the Council's argument that information should be withheld if it might be misunderstood by the public. In his view, if an authority fears that disclosure of information may be misleading, the solution is either to provide some explanation or to put the information into a proper context rather than withhold it.
34. From the report entitled, '*Consultation on a managed zone for sex trade workers in Liverpool. Views from businesses in Kempston Street L3, Jamaica Street L1 and surrounding areas*', the Council redacted notes of a meeting as in its view they included commercially sensitive information which could prejudice local regeneration if disclosed. Again, the Council did not give any detailed explanation as to how prejudice might be caused by this disclosure and neither did it provide any determination as to the likelihood of it occurring.
35. The Commissioner has examined all the information and is satisfied that the exemption at section 43 of the Act is not engaged. There is no requirement therefore to consider the public interest arguments in this respect but for completeness he has set out his consideration below.

Public interest test

36. Both section 36 and 43 are qualified exemptions and therefore subject to the public interest test. However, the Council did not show that it had considered the public interest test in relation to section 36 and it failed to provide any evidence (or indeed any argument) to support its view that the balance favoured non-disclosure.
37. Despite this lack of evidence, the Commissioner recognises the public interest arguments that might be deployed in favour of maintaining the section 36 exemption. In some circumstances, the release of information which reveals internal thinking processes may lead to less candid or robust discussions in the future. The prospect of disclosure may lead to the avoidance of difficult choices being made and may encourage the creation of insufficient records. In this way, the future quality of decision making by a public authority may be impaired. This is however a general argument, which appears to have little or no application to the circumstances of this case.
38. In respect of section 43 the Council took the view that disclosure of the information might have a damaging effect on property values and regeneration in the areas. This is actually a prejudice argument although it appears to have been invoked by the Council as a public interest argument.

39. The Council's argument for withholding the information rests on the supposition that disclosure might mislead individuals into drawing the wrong conclusions. In the Commissioner's opinion, this is an inappropriate reason for a public authority to refuse a request for information (see paragraph 33).
40. The Commissioner's consideration of the public interest arguments in favour of disclosure (which apply to both sections 36 and 43) can be stated together and are set out below.
41. There are strong public interest arguments in favour of disclosure which include the following:
- Disclosure allows individuals a more informed debate on important issues which may affect their neighbourhoods.
 - Disclosure promotes accountability and transparency by the Council for the decisions it takes.
 - The obligation on Council officials to provide reasoned explanation for decisions it makes will improve the quality of its decisions and administration.
 - It allows individuals to understand decisions made by the Council which affect their lives and it assists individuals in challenging those decisions should this be necessary.
42. The Commissioner has weighed the competing public interest arguments and has concluded that, in all the circumstances of this case and in relation to both exemptions, the public interest in disclosing the information outweighs the public interest in withholding it.

The Decision

43. The Commissioner's decision is that:
- (i) Liverpool City Council did not deal with the request for information in accordance with Part 1 of the Act in that it failed to comply with its obligations under section 1(1).
 - (ii) Exemptions from disclosure under sections 36 and 43 of the Act were incorrectly applied by the Council.
 - (iii) The Commissioner also finds that the Council failed to comply with section 17 of the Act by not issuing an adequate refusal notice.

Steps Required

44. The Commissioner requires that the Council shall provide the complainant with the information it had redacted within 35 calendar days of the date of this notice.

Failure to comply

45. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Matters of concern

46. The Commissioner finds Liverpool City Council's response to his enquiries to have been seriously deficient throughout the course of his investigation.
- The ICO wrote to the Council on several occasions. The Council did not respond.
 - The Commissioner issued an Information Notice by recorded delivery requiring a response within 30 days. The Council did not recognise the statutory nature of the Notice and did not respond appropriately.
 - The ICO wrote to the chief executive giving the authority 14 days in which to comply to avoid proceedings in the High Court pursuant to section 54 of the Act.
 - The Council ultimately proved unable to locate records, original documents or redacted documents that related to the case.
47. The breakdown in the Council's procedures, as summarised above, emphasises the need to ensure staff are trained in the requirements of the Freedom of Information Act 2000.
48. It also highlights the need to ensure that an adequate records retention policy is in place.
49. In light of the serious nature of these failings, this case will be referred to the Commissioner's Good Practice and Enforcement Team who will consider whether any further action is appropriate in the context of the FOI Enforcement Strategy he published in October 2006. The Commissioner will examine Liverpool City Council's record in handling requests under the Act and closely monitor its future performance against statutory obligations.

Right of Appeal

50. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 10th day of January 2007

Signed

**Richard Thomas
Information Commissioner**

**Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Relevant Statutory Obligations and Provisions under the Act

Section 1(1) states 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.”

Section 36(1) states that –

“This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

Section 36(2) states that –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Section 43(1) states that –

“Information is exempt information if it constitutes a trade secret.”

Section 43(2) states that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”