

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 November 2015

Public Authority: Portsmouth City Council

Address: Civic Offices
Guildhall Square
Portsmouth
Hampshire
PO1 2AL

Decision (including any steps ordered)

1. The complainant has requested information from Portsmouth City Council (the 'Council') relating to bus shelters carrying advertising. This notice concerns one part of the request, where the Council was asked 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.
2. The Commissioner determined that section 43(2) is not engaged. He therefore requires the public authority to take the following steps to ensure compliance with the legislation:
 - disclose the financial benefits it accrues from advertising annually and over the life of its contract with Clear Channel.
3. The Council 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.
4. In addition, the Council failed to provide its response within the statutory 20 working days framework and thereby breached section 17(1) of FOIA.

Request and response

5. On 2 June 2015 the complainant wrote to the Council and requested information in the following terms:

"This request relates to the provisioning of Bus Shelters carrying out Advertising in your Council area

- What is the nature and length of any contract between the council with a named supplier if Bus Shelters carrying advertising*
- What number of these shelters are owned by the advertising supplier and what number owned by the Council*
- What are the financial benefits to the Council annually and over the life of the contract*
- Are these payments made on a regular basis and if so when*
- Does the council receive any discounts on advertising it purchases and if so what percentage*

Please answer by email to [address redacted]."

6. The Council responded on 9 July 2015. It confirmed that it held the requested information and disclosed information in full relevant to each part of the request save for the third and fourth bullet points, which were withheld in reliance on the exemption at section 43(2) FOIA.
7. Following an internal review the Council wrote to the complainant on 31 July 2015. It upheld the original refusal, explaining that section 43(2) of FOIA applied and on balance the public interest favoured maintaining the exemption.

Scope of the case

8. The complainant contacted the Commissioner on 3 August 2015 to complain about the way his request for information had been handled. The complainant asked the Commissioner to consider whether the Council had correctly withheld the information using the exemption under section 43(2) to the third bullet point of his request only.
9. The scope of the Commissioner's investigation therefore was to determine whether the Council was entitled to withhold *'the financial benefits to the Council annually and over the life of the contract'* (for

provisioning of bus shelters carrying advertising in Portsmouth) in reliance on the exemption at section 43(2).

Reasons for decision

Section 43(2) – commercial interests

10. 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.
11. 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.
12. 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 2007. It has provided the Commissioner with details of the income it has received from 2007 to 2015, and details of the projected income over the term of the contract, which is for a 23½ year term expiring in March 2030.
13. 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 both 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.
14. With regard to the commercial interests of the Council, the Commissioner is mindful of the First-tier Tribunal's decision in *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:

"[...] 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 transaction. Whether they were or not would depend on the nature of the information and the degree of similarity between the two transactions [...]." (paragraph 15)

15. 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 outcomes.
16. 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. Further, 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.
17. In addition, the Council is concerned that the potential for other bidders to amend their offers in light of disclosure of the financial benefit, could result in financial detriment to Clear Channel which could in turn impact upon the Council's commercial interests.
18. The Council also advised the Commissioner that disclosure: *"would be likely to impact on Clear Channel's ability to maintain its contract at the current level and lead to them requesting it be renegotiated at a lower level"*.
19. 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

¹<http://www.informationtribunal.gov.uk/DBFiles/Decision/i89/John%20Connor.pdf>

place and record the concerns of Clear Channel in respect of the potential release of the information.

20. 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 is presented with two limbs. First, the highly competitive nature of the outdoor advertising market was emphasised. According to this 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.
21. 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 decision notice *FS50588962*² arising from a complaint made against Brighton and Hove City Council. 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.
22. It must be stressed that a decision notice is not necessarily 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.
23. The Commissioner considered in *FS50588962* that the age of the withheld information was an important factor. This was discussed at paragraph 17 of the decision notice as follows:

17. The Commissioner's published guidance [³] explains that in general, commercial sensitivity is likely to diminish over time. In

² [tps://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560159/fs_50588962.pdf](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

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 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".

24. Like the *Brighton and Hove* case above, the withheld information in the present case is of a significant age, ie 2007. The Council, however, also maintains that the information remains 'current' and could still be used by a competitor to structure or adjust their bid.
25. 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. However, the Commissioner considers 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 their commercial interests that is real, actual or of substance. This is because, in the same vein as the *Brighton and Hove* case, they do not overcome the reservations expressed by the Commissioner 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 any forthcoming tendering process unfair is not compelling. The contract is not due to expire until 2030 and the Commissioner is not convinced that figures which were arrived at in 2007 will be of relevance to a re-negotiated contract over 20 years later. For this reason, the Commissioner has found that there is a lack of basis for arguing that the exemption is engaged.
26. 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 that were made at paragraph 20 of the decision notice in the *Brighton and Hove* case.

27. 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 entered into by the public authority is for such a lengthy term.

Procedural issues

Section 17(1) – Refusal of request

28. Section 1(1) of FOIA states:

(1) 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.

29. Section 10 of FOIA states:

(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

...

(3) If, and to the extent that –

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

30. Section 17(1) of FOIA states:

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.

31. If, as in this case, the Council decides that some information should be withheld it has an obligation to provide the requester with a refusal notice within 20 working days of receipt of the request. The Council failed to issue its refusal notice within the statutory timeframe, thereby breaching section 17(1) of FOIA.

Other matters

32. Although not relied on by the Council, the Commissioner notes that the representations of Clear Channel cites sections 41, information provided in confidence, and 44(1)(b) as additional grounds for withholding the requested information. 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 community obligation.

33. However, as the Council has only relied on section 43(2) in this case, the Commissioner has not considered Clear Channel's application of sections 41 and 44 further. Additionally, in his decision notice *FS50588962* the Commissioner has considered similar arguments from Clear Channel in relation to both sections 41 and 44 and did not find them to be engaged.

34. As well as finding above that the Council is in breach of the FOIA, the Commissioner has also made a record of the delay in this case. This may form evidence in future enforcement action against the Council should evidence from other cases suggest that there are systemic issues within the Council that are causing delays.

Right of appeal

35. 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

36. 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.
37. 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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