

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 February 2019

Public Authority: Isle of Axholme and North Nottinghamshire
Water Level Management Board

Address: Wellington House
Manby Park
Manby, Louth
Lincolnshire
LN11 8UU

Decision (including any steps ordered)

1. The complainant has requested information from the Isle of Axholme and North Nottinghamshire Water Level Management Board ("IOANNB") relating to minutes from a committee meeting of the Water Management Consortium. IOANNB refused to provide the requested information, stating that it was exempt from disclosure under section 42(1) of the FOIA – legal professional privilege – and under section 43(2) of the FOIA – disclosure prejudicial to commercial interests.
2. The Commissioner's decision is that the information is not exempt from disclosure under section 42(1); however, it is exempt from disclosure under section 43(2) of the FOIA as disclosure would prejudice the commercial interests of a third party.
3. The Commissioner does not require IOANNB to take any steps.

Background to the request

4. The Water Management Consortium ("the Consortium") is a management arrangement established in 2013 between three water

management and drainage boards, including IOANNB and Lindsey Marsh Drainage Board ("LMDB").

5. Mr Andrew McGill is Chief Executive of both IOANNB and LMDB.
6. The complainant was provided with some minutes of meetings of the Consortium committee, in response to an earlier information request. This included minutes of a meeting dated 24 May 2017 which was attended by representatives of the three boards and certain other individuals including Mr McGill.
7. The minutes referred to a confidential discussion on the "*Provision of Services*" which was recorded separately on pink paper to indicate that this should remain confidential. The notes of the discussion are therefore known as "*the pink papers*".

Request and response

8. On 15 July 2017, the complainant contacted IOANNB via the website What Do They Know to request information of the following description:

"The Consortium Minutes refer to pink papers; please provide copies."
9. On 17 August 2017, IOANNB responded and stated that the pink papers were exempt from disclosure due to legal professional privilege and commercial interest.
10. The complainant requested an internal review on 16 September 2017. IOANNB sent her the outcome of its internal review on 23 October 2017. It upheld its original position. Further correspondence followed, and on 11 January 2018, IOANNB confirmed its position, citing the exemptions at section 42 of the FOIA (legal professional privilege) and section 43(2) of the FOIA (prejudicial to commercial interests). Further correspondence followed, with IOANNB providing some further explanation and responses to additional requests on 13 April 2018.
11. The complainant subsequently asked for details of the public interest test which had been carried out, but this was not provided.

Scope of the case

12. The complainant contacted the Commissioner on 18 April 2018 to complain about the way her request for information had been handled.

13. The analysis which follows considers whether IOANNB has correctly withheld the confidential section of the minutes known as the pink papers under section 42(1) and/or section 43(2) of the FOIA.

Reasons for decision

Section 42 – Legal professional privilege

14. Section 42(1) of the FOIA states that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.
15. Legal professional privilege was defined by the Information Tribunal in *Bellamy v the Information Commissioner and the DTI* (EA/2005/0023)¹ (“Bellamy”) as:

“...a set of rules or principles which are designed to protect the confidentiality between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communication or exchanges come into being for the purpose of preparing for litigation.”
16. There are two types of legal professional privilege: litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege applies where no litigation is in progress or contemplated. In order to attract privilege, communications must be confidential, made between a client and legal adviser acting in a professional capacity, and for the sole or dominant purpose of obtaining legal advice.
17. In this case, IOANNB confirmed that it considers the withheld information to be subject to legal advice privilege.
18. IOANNB has explained that, at the date of the meeting, 24 May 2017, LMDB was proposing to enter into a contract for the provision of its services.

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http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf

19. It has explained that LMDB requested legal advice from its solicitors on how it should proceed with regard to a particular issue affecting the proposed contract. The advice was provided by email to LMDB.
20. IOANNB explained that Mr McGill then relayed this advice to the representatives of the other boards in the Consortium at the meeting, in order to agree a course of action. This part of the meeting was recorded in the 'confidential' pink papers.
21. The Commissioner has considered whether the contents of the pink papers are, therefore, covered by legal advice privilege.
22. IOANNB has provided the Commissioner with a copy of email correspondence between Mr McGill (in his capacity as Chief Executive of LMDB) and a firm of solicitors.
23. The Commissioner has determined that the email correspondence concerns a matter potentially affecting the contract to be entered into by LMDB. Mr McGill asked for advice on the specific matter, and in return was provided with advice from the solicitors.
24. The Commissioner is therefore satisfied that the contents of the *emails* themselves would have been confidential at the time of sending; that is, made between a client and legal adviser acting in a professional capacity, and for the sole or dominant purpose of obtaining legal advice. The emails themselves would therefore be covered by legal advice privilege.
25. The matter in question for the Commissioner is whether the contents of the *pink papers* are likewise covered by legal advice privilege. In her view, there are two factors in this case which must be satisfied in order for this to be so. If the contents of the pink papers (a) comprise the confidential legal advice and (b) have not been shared with anyone other than the legal adviser and the client, the pink papers may potentially be covered by legal advice privilege.
26. The Commissioner has determined that *part* of the pink papers comprises the contents of the legal advice. The legal advice, obtained by LMDB, was relayed by Mr McGill at the meeting, and recorded in the pink papers. This part of the pink papers is therefore potentially covered by legal advice privilege, subject to (b) above, and is covered further from paragraph 29 of this notice.
27. However, since a portion of the pink papers also records the discussion that took place around the issue in question, and the subsequent resolution which was taken by the Consortium as to how to proceed, this cannot be said to be part of the legal advice.

28. Therefore, the exemption at section 42(1) is not engaged in respect of the part of the withheld information which comprises a record of discussions around the contents of the legal advice.
29. Returning to the portion of the pink papers which comprises the relaying of the legal advice, and which may therefore potentially be covered by legal professional privilege, the Commissioner notes that the pink papers are a record of a committee meeting of the Consortium.
30. The question for the Commissioner to consider, therefore, is whether the legal privilege which potentially attached to this part of the withheld information has been lost due to the advice being shared in that meeting. In the event that legal privilege has been lost, the exemption cannot be said to be engaged.
31. Since by the very nature of the withheld information, it is the case that the contents of the legal advice were shared at a meeting, the Commissioner has considered who was present at the meeting.
32. For the exemption to be engaged; that is, for the privilege to have been maintained, it would be necessary for all parties at the meeting to have been representatives of 'the client' or 'the legal adviser' in this particular legal adviser/client relationship. In this case, since there were no representatives of the solicitors at the meeting, the Commissioner must consider whether all persons at the meeting were representatives of 'the client'.
33. The client in this case is LMDB. However, the meeting was of the Consortium, and was therefore attended by representatives of the other boards as well as LMDB.
34. IOANNB has been specific in this case that the legal advice was provided to LMDB. It has not provided evidence that the advice was provided to the Consortium as a whole; nor has it suggested that all boards in the Consortium have the same legal advisers. The legal advice pertained to a contract which was being entered into by LMDB, and not by the Consortium as a whole.
35. The Commissioner has therefore concluded that all persons at the meeting were not representatives of 'the client'. She has therefore determined that the contents of the legal advice provided by email were shared outside the legal adviser/client relationship at the meeting of 24 May 2017, and that the legal privilege which attached to the advice was accordingly lost.
36. The Commissioner's decision is that the exemption at section 42(1) of the FOIA is not engaged with regard to any part of the withheld

information, and she has gone on to consider whether the information is exempt under section 43(2).

Section 43(2) – prejudicial to commercial interests

37. Section 43(2) of the FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it. The exemption is subject to the public interest test, which means that if it is engaged, account must be taken of the public interest in releasing the information.
38. The exemption can be engaged on the basis that disclosing the information either 'would' prejudice someone's commercial interests, or, the lower threshold, that disclosure is only 'likely' to prejudice those interests. The term 'likely' is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice is more probable than not.
39. In this case, IOANNB has explained that it considers that "*there was a high likelihood*" that disclosure of the information would be likely to prejudice the commercial interests of the LMDB.
40. For section 43(2) to be engaged, the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which IOANNB alleges would be likely to occur if the withheld information was disclosed has to relate to commercial interests;
 - Secondly, IOANNB must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, meaning whether there is a real and significant risk of the prejudice occurring.

Commercial interests

41. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner has considered the meaning of the term in her guidance² on the application of Section 43. This explains that:

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."

42. IOANNB has explained that the withheld information in this case records a discussion around specific issues relevant to a contract which was being negotiated at the date of the request for the provision of services by LMDB.
43. IOANNB's position is that the details surrounding the negotiation of the contract – as recorded on the pink papers – have been withheld to avoid harm to LMDB's ability to participate competitively in a commercial environment, with regard to the commercial provision and expansion of services.
44. The potential harm which IOANNB alleges would occur is, therefore, to LMDB's commercial interests.
45. The Commissioner accepts that LMDB has a commercial interest in negotiating and securing contracts for the provision of its services, since, as IOANNB has explained, it may be competing with private companies which would also be interested in providing the services.
46. Having viewed the withheld information, the Commissioner accepts that the discussion recorded within is relevant to the prejudice envisaged by IOANNB.
47. The Commissioner also accepts that the harm which IOANNB alleges would be caused by the disclosure of the information relates to LMDB's commercial interests. For these reasons, she is satisfied that the reasoning of IOANNB relates to commercial interests.

Causal link

48. When investigating complaints which involve a consideration of prejudice arguments, the Commissioner considers that the relevant test

² <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

is not a weak one and a public authority must be able to point to prejudice which is "*real, actual or of substance*" and to show some causal link between the potential disclosure and the harm or prejudice which it is alleged may occur.

49. Arguments presented by a public authority about the likelihood of harm to the commercial interests of a third party should be based on its prior knowledge of the third party's concerns. In this case, since Mr McGill, who has presented arguments to the Commissioner, is the Chief Executive of both IOANNB and LMDB, the Commissioner accepts that the arguments he has advanced will be based on his explicit knowledge of LMDB's interests.
50. Mr McGill explained that he considered that disclosure of the information would "*invalidate*" the negotiations which were ongoing at the date of the request (and which had continued through to the date that the complainant's complaint was referred to the ICO).
51. The Commissioner is aware that by the date of the meeting at which the pink papers were recorded, LMDB was the preferred party to be awarded the contract, but that there had been a challenge to this decision from a third party. The challenge meant that LMDB was required to address specific concerns. These concerns were unresolved at the date of the request, and at the date that the internal review was carried out.
52. The Commissioner is satisfied that the discussion which was recorded on the pink papers took place in order to discuss the legal advice which had been provided to LMDB, and in order to determine the next steps to resolve the specific concerns.
53. The Commissioner accepts that disclosure of the information at the date of the request would have been likely to prejudice LMDB's ability to defend itself robustly against the legal challenge and would potentially therefore have affected whether or not it was awarded the contract.
54. She is therefore satisfied that IOANNB has demonstrated that there is a causal relationship between the potential disclosure of the withheld information and the prejudice to LMDB's commercial interests.

Likelihood of prejudice

55. IOANNB has explained that LMDB is in competition with commercial companies which are able to bid for work such as the provision of the services being negotiated in this case. It considers that the disclosure of the pink papers would have been likely to prejudice LMDB being able to secure the contract. The negotiations were, at the date of the request, still ongoing, and a legal issue had been put in from a third party which was aware that LMDB was likely to be awarded the contract. In

IOANNB's view the legal issue had been raised in order to undermine LMDB's position, and the Commissioner understands that it has at the date of this notice very recently been resolved.

56. IOANNB therefore considers that to have disclosed the pink papers at the date of the request would have created a real and significant risk of prejudice to LMDB's ability to secure the contract. This is because not only would the other party to the contract have been revealed (IOANNB advise that it considered redacting the information), but also aspects of LMDB's negotiating position, together with discussions around the legal issue and the best way to proceed.
57. IOANNB further considers that this risk of prejudice also extends to LMDB's position with regard to future negotiations, and that disclosing the information would therefore prejudice its ability to obtain similar contracts in future.
58. The Commissioner agrees with IOANNB's position and is satisfied that disclosure of the pink papers would have led to a real and significant risk of prejudice to the commercial interests identified in this case.
59. She is therefore satisfied that the exemption at section 43(2) is engaged. As it is a qualified exemption she has gone on to consider the balance of the public interest in the disclosure of the information.

Public interest test

IOANNB's position

60. While IOANNB did not apparently provide the complainant with details of the public interest test which it had carried out in seeking to apply exemptions under the FOIA, it subsequently provided evidence to the Commissioner of the tests which were carried out at the date of the request and also as part of the internal review.
61. In its considerations, IOANNB acknowledged that there is a public interest in increased accountability to enable the public to know how LMDB is both "*spending and saving money*". It also acknowledges that there is potentially a public interest in "*promoting competition by transparency*".
62. However, IOANNB concluded that the balance of the public interest lay in the exemption at section 42(1) and/or section 43(2) of the FOIA being maintained. This was because it considered that disclosing the information would prejudice LMDB's ability to generate income by competing effectively and successfully negotiating contracts, which would not be in the public interest.

63. It also considered that it had certain obligations under the terms of the contract being negotiated due to the presence of a confidentiality clause.
64. It considered that there may be data protection concerns owing to the nature of certain details in the withheld information.

The complainant's position

65. The complainant has explained that she has concerns that there may have been a misuse of public money. IOANNB's responses to her previous information requests left her with questions over payments to LMDB, including the payment of certain fees by IOANNB.
66. She is concerned at the lack of transparency surrounding the Consortium's financial arrangements and considered that the confidential section of the minutes may shed light on these matters.

The balance of the public interests: the Commissioner's decision

67. The Commissioner agrees with both parties that there is always a public interest in a public authority conducting its business in a transparent manner and in particular being accountable with regard to the spending of public money.
68. She has also noted that a small number of individual employees were potentially affected by the negotiation of the contract at the time of the request and response, which, in the Commissioner's view, may lend some additional weight to the balance of the public interest favouring disclosing the information.
69. However, in her guidance on section 43(2), referenced previously, the Commissioner notes that "*there is a public interest in allowing public authorities to withhold information which, if disclosed, would reduce its ability to negotiate or compete in a commercial environment.*"
70. With particular reference to the commercial interests of LMDB in this case, the Commissioner has considered the following extract from her guidance: "*it is not always in the public interest to place information which explains how.... income is generated [by public authorities] into the public domain. This could inform potential competitors and may lessen any competitive advantage held by the public authority. This may have a significant impact upon the ability of the public authority to operate in the relevant marketplace.*"
71. The Commissioner will consider whether there is a public interest in the disclosure of the specific information in a particular case, and, if so, whether it is strong enough to outweigh the public interest arguments for the exemption to be maintained.

72. In this case, the withheld information sheds light on how the Consortium agreed that LMDB should proceed with regard to a specific legal issue relevant to the negotiation of a contract.
73. The Commissioner is satisfied that, while the legal issue related partly to the impact of the contract on a small number of individual employees, there is not any significant public interest in this issue.
74. In her view, it is expected that public authorities are required to make decisions on such issues when negotiating for the provision of services, and in any event, she considers that LMDB was seeking to safeguard the position of the employees as well as itself and the other boards in the Consortium, going forward. She also considers that it is important to protect the privacy of those affected individuals.
75. She does not consider that the withheld information sheds light on any wider issues, such as those suggested by the complainant.
76. The Commissioner has decided that in all the circumstances of the case, the public interest in maintaining the section 43(2) exemption outweighs the public interest in disclosure.
77. She has therefore decided that IOANNB correctly withheld the pink papers under the exemption at section 43(2), and does not require IOANNB to take any steps.

Right of appeal

78. 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

79. 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.

80. 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

**Ben Tomes
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