

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 September 2014

Public Authority: London Councils
Address: 59½ Southwark Street
London
SE1 0AL

Decision (including any steps ordered)

1. The complainant has requested information in relation to Parking on Private Land Appeals. London Councils explained that it did not hold some of the information for the purposes of the FOIA (section 3(2)) and that in relation to the information it did hold, it was applying sections 40(2) (personal information) and 41(1) (information provided in confidence).
2. The Commissioner's decision is that London Councils does hold the information for the purposes of the FOIA. The Commissioner also considers that section 40(2) and section 41(1) were applied appropriately.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response regarding the information it stated it did not hold for the purposes of the FOIA.
4. The public authority 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.

Background

5. The Protection of Freedoms Act 2012 deals with a wide range of issues including a ban on immobilising ('clamping') or removing ('towing-away') vehicles that are parked on private land, without lawful authority.
6. The Act also introduced the concept of 'keeper liability' for vehicles parked on private land, for which there had to be an independent appeals service, provided by funding from the parking industry.
7. That independent service is known as Parking on Private Land Appeals (POPLA).

Request and response

8. On 7 December 2013, the complainant wrote to London Councils (LC) and requested information in the following terms:

"1) Request #1 I refer you to the following Freedom of Information (FoI) request (link below) to which you assigned the reference #170856. Within FoI request #170856 there is a reference to an earlier FoI request, reference #S-2013-15 that were not provided pursuant to FoI request reference #170856. Please provide the missing correspondence/documents (listed below for ease of reference), together with an updated "Final Spreadsheet BPA correspondence" as provided with replies to FoI request reference #S-2013-15.

Missing documents/correspondence

E42

E45 + enclosure

N3

N4

N12

N20

N21 + enclosure

N54

N59

N71.

Request #2

Please provide copies of all correspondence between London Councils' officers and representatives, both internal and with any other party (including the BPA Ltd., Patas, Popla and other BPA Ltd. members) regarding exclusion of the above named missing documents/correspondence."

9. LC responded on 18 December 2013. With regard to the first request, LC explained that it did not hold all of the requested information for the purposes for the FOIA. It went on to confirm that it only held one document for the purposes of FOIA: N12. LC explained that it was withholding this document under section 40(2). With regard to the second request, LC provided a copy of the internal review of the previous request S-2013-15, withholding the personal details of both the requester and the reviewer under section 40(2).
10. Following an internal review LC wrote to the complainant on 16 January 2014, upholding its original decision.

Scope of the case

11. The complainant contacted the Commissioner on 29 January 2014 to complain about the way his request for information had been handled. He complained about the exemptions applied, and that LC had said that it held some information not on its own behalf but for the British Parking Association (BPA). As the BPA is a private company it is not subject to the FOIA.
12. The Commissioner notes that in response to a separate, earlier request, LC disclosed the requested information. However, in the internal review in the present case, LC confirmed to the complainant that this had been done in error and did not set a precedent for disclosure.
13. During the Commissioner's investigation the complainant confirmed that he was only pursuing request 1, therefore the Commissioner will not consider request 2 any further. The complainant also confirmed that he was not pursuing the addressee details included in document N12, therefore the Commissioner will not be considering these details any further.
14. During the Commissioner's investigation, he asked LC about the spreadsheet requested by the complainant. LC explained that the spreadsheet in question had not been updated and that the complainant

had confirmed that he already had access to it. The Commissioner notes that the complainant has not complained about this and he will therefore not be considering it any further.

15. LC also confirmed that it was withholding the first email in the email chain contained in N12 under section 40(2), but was now also applying section 41 to the second email in the chain. The Commissioner informed LC that it had to let the complainant know about the application of section 41 to the second email contained in document N12.

Reasons for decision

16. The Commissioner will consider whether LC is correct to say that it does not hold the information contained in E42, E45 + enclosure, N3, N4, N20, N21 + enclosure, N54, N59, N71 for the purposes of FOIA and whether it has applied sections 40(2) and 41 to the information contained within the content of N12 appropriately.

Section 3(2) – information held by a public authority

17. Section 1 of the FOIA states that any person making a request for information is entitled to be told whether the public authority holds the information requested and, if held, to be provided with it.

18. Section 3(2) provides –

"For the purposes of this Act, information is held by a public authority if-

a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority."

19. The Commissioner's position on the interpretation of "held" for the purposes of the FOIA is that when information is solely held by a public authority on behalf of another person, it is not held by the public authority for the purposes of the FOIA. However, the information will be held by that public authority for the purposes of the FOIA if it is holding the information for someone else, and also holding it to any extent for its own purposes.

20. LC explained that it has a contract with the BPA to carry out POPLA on its behalf. LC also confirmed that it is responsible for setting up the appeals process, including its administration. LC also pays the staff who

administer and hear the appeals, from monies provided under its contract with the BPA.

21. LC explained that there was a clause in the contract which clarified that information produced as a result of this contract is held by the BPA and not by LC and therefore the information in question was not subject to the FOIA. LC also explained that the information was subject to a duty of confidence; therefore if it was disclosed, it would constitute a breach of that confidence.
22. Furthermore, LC explained that the emails were exchanged between officers from LC and the BPA solely in the context of correspondence between an agent (LC) and a contracting party (the BPA). It confirmed that the information was produced under the contract for the purposes of delivering the POPLA service and was therefore held solely by LC on behalf of the BPA, which is not subject to the FOIA.
23. The Commissioner has produced guidance on information held by public authorities for the purposes of the FOIA¹. In this guidance, the Commissioner points to factors that would indicate that information would be held solely on behalf of another person, including:
 - the authority has no access to, use for, or interest in the information;
 - access to the information is controlled by the other person;
 - the authority does not provide any direct assistance at its own discretion in creating, recording, filing or removing the information; or
 - the authority is merely providing storage facilities, whether physical or electronic.
24. When deciding whether the requested information was “held” for the purposes of FOIA, the Commissioner also considered the case of the *University of Newcastle upon Tyne v the Information Commissioner and the British Union for the Abolition of Vivisection* [2011] UKUT 185 (AAC) 1 May 2011, (“BUAV”). This case looked at whether information contained in project licences issued under the Animals (Scientific

¹http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/information_held_by_a_public_authority_for_purposes_of_foia.ashx

Procedures) Act 1986 was held by the University or by individual members of staff.

25. The Upper Tribunal accepted the First-tier tribunal's finding that "*hold' is an ordinary English word*" and "*is not used in some technical sense in the Act*", but at the same time it "*is not a purely physical concept and has to be understood with the purpose of the Act in mind*". This means that information may be kept on an authority's premises (or even on its IT network) but not held by the authority for the purposes of the FOIA. To be considered as held, there has to be "*an appropriate connection between the information and the authority*"².
26. The Commissioner also notes the First-tier tribunal (Information Rights) (the tribunal) decision in *Digby-Cameron v Information Commissioner* (EA/2008/0010, 16 October 2008). This concerned a request to a local authority for a transcript of a Coroner's hearing. Although the council provided funding and administrative support for the Coroner's Service, the tribunal found that the council held the information solely on behalf of the Coroner. This was because the Coroner had sole control of the information, having a statutory authority (via the Coroner's Rules 1984) to determine who had access to it. The tribunal concluded that "*the decision whether or not to disclose information was for the Coroner, not the Council.*" The tribunal also pointed out that the "*ownership' of and control over this information lay both in fact and law with the Coroner*".
27. The Commissioner notes that in the present case, LC is a public authority which has chosen to tender for the contract to deliver POPLA on behalf of the BPA. Although LC does provide administrative support in that it runs POPLA, the Commissioner notes that LC is able to access the information and in this instance, is actively taking part in discussions contained within some of the emails. He therefore considers that the BPA does not have sole control of some of the information contained in these emails.
28. LC explained that in its contract with the BPA, there is a clause regarding confidentiality. The Commissioner notes that the contract acknowledges that LC is subject to the requirements of the FOIA, therefore he is satisfied that the BPA was aware of this when it entered into the contract with LC. With regard to confidentiality clauses in contracts, the Commissioner considers that whilst public authorities can use confidentiality clauses to identify information that may be exempt,

² The First-tier tribunal's comments are quoted at paragraph 23 of *BUAV*.

they should carefully consider the compatibility of such clauses with their obligations under the FOIA.

29. The Commissioner also considers that these clauses may help identify occasions where the other party to a contract should be consulted before disclosure. However, such clauses cannot prevent disclosure under the FOIA if the information is not confidential.
30. The Commissioner notes that LC refers to its relationship with the BPA as that of agent (LC) and a contracting party (the BPA). The Commissioner considers agency arrangements to include anyone acting in a professional field who is recognised as acting as their client's agent. The Commissioner considers that where such an arrangement exists, information held by the agents on behalf of the public authority client is similar to that between solicitor and client. Although in the present case it is LC which holds the information in question, the Commissioner does not consider this to be similar to that between solicitor and client.
31. Taking all of the above into account, the Commissioner considers that as LC is providing input into issues regarding POPLA, has access to the withheld information, is not only providing clerical or administrative services to the BPA and is not merely providing storage facilities for the information, it holds the following information in its own right for the purposes of the FOIA.
 - E42: all of the emails in this email chain. The Commissioner notes that the third email in this email chain is between a private parking company and the BPA. However, he notes that this email is copied to LC for its input into the issue contained within it.
 - E45 + enclosure.
 - N3: all of the emails in this chain. The Commissioner notes that the first three emails in this email chain are between the BPA and other private parking companies. However, he notes that these emails are included in an email from the BPA to LC asking for its input into the issues contained in the emails.
 - N20: all of the emails in this email chain.
 - N21: all of the emails in this email chain.
 - N54: all of the emails in this email chain. The Commissioner notes that the first email in this chain is from the BPA to its Board Members. However, as this email is forwarded to LC in advance of a meeting, the Commissioner is satisfied that this email is held by LC on its own behalf.

- N59: all of the emails in this email chain.
 - N71: all of the emails in this email chain. The Commissioner notes that the second, third and fourth emails in this email chain are between the BPA staff. However, these emails are included in an email sent from the BPA to LC, which goes on to discuss them and provide information to the BPA relating to the issues contained in the emails in question.
 - N4: all of the emails in this email chain. The Commissioner notes that the first three emails are between the BPA and other private companies. However, he notes that these emails are included in an email from the BPA to LC which discusses them and asks LC for its input.
32. The Commissioner will now go on to consider the application of section 40(2) (personal information) and 41 (confidentiality) to N12.

Document N12

33. N12 is an email chain which contains two emails. LC has applied section 40(2) (personal information) to the first email and section 41 (information provided in confidence) to the second email.

Section 40(2) – personal information

34. Section 40(2) provides an exemption from disclosure of personal data where the information is the personal information of a third party and is disclosure would breach one of the data protection principles of the Data Protection Act 1998 (DPA).
35. Section 40(2) is an absolute exemption which is therefore not subject to a public interest test. It relates to the personal information of anybody other than the requester. Information is exempt if disclosure would breach any of the data protection principles. Personal data is defined by the Data Protect Act 1998 (DPA) section 1(1) as:

"data which relates to a living individual who can be identified

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."

36. The Commissioner will now consider whether the withheld information under section 40(2) is the personal data of a third party.

Is the requested information personal data?

37. The two main elements of personal data as defined in section 1(1) of the DPA are that the information must relate to a living individual and that the individual must be identifiable. Information will relate to a living individual if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus, or impacts on them in any way. The information can be in any form, including electronic data, images and paper files or documents.
38. In the present case, the withheld information is related to a named individual. The Commissioner considers that this constitutes the named individual's personal data. The complainant informed the Commissioner that he believes he knows the individual concerned and asked the Commissioner to consider whether the information could be anonymised. Given that the complainant has explained that he believes he already knows the individual concerned, the Commissioner does not consider that the information could be successfully anonymised.

Will disclosure breach one of the data protection principles?

39. The Commissioner has considered whether disclosure of the requested information would breach any of the data protection principles as set out in Schedule 1 of the DPA. LC explained that it considered that disclosure would breach the first data protection principle, which provides:

"Personal data shall be processed fairly and lawfully and, in particular shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met."

Would it be fair to disclose the requested information?

40. Regarding fairness, the Commissioner recognises the importance of considering whether the data subject has consented to disclosure and/or whether the data subject has actively put some or all of the requested information into the public domain. The Commissioner will also consider the consequences of any disclosure and the reasonable expectations of the data subject.

Has the data subject consented to the disclosure?

41. The Commissioner asked LC whether it had asked the named individual whether he would consent to the disclosure of his personal information. LC explained that it had not sought the named individual's consent, as it considered that the individual in question would have an expectation that his personal data would not be disclosed. As this party's contact with LC has been in a personal capacity the Commissioner accepts that he would have this expectation.

Has the data subject actively put some or all of the requested information into the public domain?

42. Where a data subject has put out some or all of the requested information into the public domain, the Commissioner considers that this weakens the argument that disclosure would be unfair.
43. In the present case, the Commissioner notes that the email in question is related to a named individual. Although the Commissioner notes that the email was mistakenly disclosed in response to an earlier FOI request, LC has confirmed that this was an error. LC provided the Commissioner with a copy of the redacted information it sent out in error and he notes that in that instance, the data subject's name had been redacted under section 40(2). However, this does not demonstrate that the data subject himself has actively put his data into the public domain.

Reasonable expectations

44. When considering compliance with the first data protection principle, the Commissioner considers that it is necessary to consider what the reasonable expectations of the data subject would be in relation to how his information would be used and to whom it may be disclosed.
45. LC explained that the data subject would hold a reasonable expectation that it would hold his personal information in confidence. The Commissioner also notes that disclosure under the FOIA is disclosure to the world at large.
46. Taking the above into account, the Commissioner is satisfied that the individual in question would have an expectation that his personal data would not be released into the public domain. The Commissioner will now consider whether the disclosure would cause any unnecessary damage or distress to the data subject.

47. The Commissioner notes that LC did not provide any explanation as to why disclosure would cause the person in question any damage or distress.
48. The Commissioner's guidance on section 40 differentiates between information concerning an individual's private and public lives. His guidance requires that information about individuals acting in an official or work capacity should be supplied on request unless there is a risk to the individuals concerned. Whilst it is right to take into account any damage or distress that may be caused to a third party by the disclosure of personal information, the focus should be on the damage or distress that may be caused to an individual acting in a personal or private capacity. The exemption should not be used, for example, as a means of sparing official embarrassment.
49. The Commissioner is satisfied that in the present case, the information relates to the individual's private life and that disclosure would cause some distress.

Balancing the rights and freedoms of the data subject with legitimate interests

50. Despite the reasonable expectations of an individual and that damage or distress could result from disclosure, it may still be fair to disclose personal data if it can be argued that there is a compelling public interest in disclosure, that is, if there is any legitimate public interest in disclosure.
51. Legitimate interests can include interests such as accountability and transparency as well as specific interests. When balancing legitimate interests with the rights of the data subject, the Commissioner's view is that a proportionate approach should be taken.
52. In this case, the Commissioner notes that issues regarding parking are issues of public interest. However, in this case the Commissioner does not consider that disclosure of the information in question would add anything to the public interest.
53. Having decided that disclosure of the information would not be fair the Commissioner has not gone on to consider whether disclosure would meet any Schedule 2 conditions of the DPA are met. He finds that LC was correct in engaging section 40(2).
54. The Commissioner will now go on to consider LC's application of section 41 to the second email in the email chain.

Section 41 – in confidence

55. Section 41(1) of the FOIA states that:

"Information is exempt information if

a) it was obtained by the public authority from any other person (including another public authority), and

b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

56. For this exemption to be engaged two criteria have to be met: the public authority has to have obtained the information from a third party and the disclosure of that information has to constitute an actionable breach of confidence.

Was the information obtained from another person?

57. The information in question constitutes information sent by a third party (the BPA) to LC. Therefore the Commissioner accepts that the first criterion of section 41 is met.

Would disclosure constitute an actionable breach of confidence?

58. With regard to section 41(1)(b), in most cases the approach adopted by the Commissioner in assessing whether disclosure would constitute an actionable breach of confidence is to follow the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgement suggested that the following test should be considered when determining if information is confidential:

- whether the information had the necessary quality of confidence;
- whether the information was imparted in circumstances importing an obligation of confidence; and
- whether an unauthorised use of the information would result in detriment to the confider.

Necessary quality of confidence

59. Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.

60. The Commissioner has considered the information. He is satisfied that it was received by LC in its role as the body conducting POPLA.

61. The Commissioner accepts that the information cannot be said to be publicly available and as such it cannot be considered to be otherwise accessible. LC also argued that the information could not be said to be trivial in nature. The Commissioner has viewed the information and is satisfied that the information is not trivial in nature. He is also satisfied that it has the necessary quality of confidence.

Obligation of confidence

62. The Commissioner has gone on to consider whether the information was imparted in circumstances importing an obligation of confidence. LC explained that the email had been sent to it and others involved with parking, in the expectation that it would only be used or disclosed in accordance with the wishes of the confider.
63. However, even if information is regarded as confidential, a breach of confidence will not be actionable if it was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.
64. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the Commissioner notes that in *Coco v Clark*, the judge suggested that the 'reasonable person' test may be a useful one. The test was described as follows:

"If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence."

65. The Commissioner notes that a confidentiality clause in a contract is not enough in itself to prevent disclosure; there must be an actionable breach of confidence for the exemption to be engaged. Nonetheless, having viewed the clause within the contract in this case, the Commissioner accepts that the requested information has been provided in circumstances importing an obligation of confidence.

Detriment to confider

66. The Commissioner must also consider whether unauthorised disclosure could cause detriment to the confider. It may be difficult to argue that disclosure will result in the confider suffering a detriment in terms of any tangible loss. The real consequence of disclosing information provided in confidence is sometimes simply an infringement of the confider's privacy and there is a public interest in the protection of privacy.

67. The case of *Pauline Bluck v IC & Epsom & St Helier University NHS Trust* EA/2006/0090, which dealt with the confidentiality of a deceased person's medical records, quotes from the *Attorney General v Guardian Newspaper* [1990] 1 AC 109 case, in which Lord Goff agreed that it was appropriate "to keep open the question of whether detriment to the plaintiff is an essential ingredient of an action for breach of confidence ..."; and Lord Keith of Kinkel found that it would be a sufficient detriment to the confider if information given in confidence were disclosed to persons whom he "would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way".
68. Therefore there are two ways of looking at the issue of detriment in relation to information provided in confidence. One is that it is not necessary for the confider to suffer a detriment as a result of disclosure. The other is that the loss of privacy is a detriment in its own right, as the Tribunal did in the *Bluck* case. The Commissioner accepts that the BPA (the confider) would not have expected the contents of the email to be disclosed, as it relates to its own staff and parking campaigners.
69. LC explained that disclosure may lead to distressing, offensive or insulting remarks being made by parking campaigners online about members of staff of the BPA, which may cause this person distress. LC also stated that there is ample evidence of parking campaigners writing personal attacks about officers of the BPA online. However, the Commissioner does not consider that this is a "tangible loss" for the purposes of detriment. Therefore, the Commissioner has adopted the first approach, that is, that detriment is not a prerequisite of an actionable breach, and he is satisfied that the absence of detriment would not defeat a cause of action.

Would a public interest defence be available?

70. As section 41(1) is an absolute exemption, it is not subject to the public interest test under the FOIA. However, there is an inherent public interest consideration when considering confidentiality, which is whether the public interest in the maintenance of confidence is outweighed by the public interest in disclosing the confidential information, as opposed to the approach taken under FOIA which is in favour of disclosure unless this is outweighed by the public interest in maintaining an applied exemption.
71. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong, since the duty of confidence is not one which should be overridden lightly. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure of the requested information against the wider public interest in

preserving the principle of confidentiality and the impact that disclosure would have on the interests of the confider.

72. As decisions taken by courts have shown, very serious public interest matters must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality.
73. As mentioned above, the Commissioner recognises the wider public interest in preserving the principle of confidentiality. The Commissioner accepts that if information provided in confidence is disclosed, this would undermine LC's confidentiality obligations.
74. The Commissioner accepts that there is a general public interest in transparency. However, he considers that this has to be weighed against the potential damage which disclosure in any particular instance might cause to a public authority's ability to carry out its role.
75. The Commissioner has seen no evidence of illegality, misconduct or gross immorality which would warrant the disclosure of the information or which could form the basis of a public interest defence against a breach of confidentiality. He therefore considers that the public interest in maintaining the duty of confidence outweighs the public interest in disclosure in this case.
76. The Commissioner considers that LC has applied section 41 appropriately.

Right of appeal

77. 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

78. 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.
79. 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

Jon Manners
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