

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 April 2015

Public Authority: Borough Council of King's Lynn & West Norfolk
Address: Kings Court
Chapel Street
King's Lynn
PE30 1EX

Decision (including any steps ordered)

1. The complainant has requested information relating to costs for Building Control and Land Charges information. The Commissioner's decision is that the Borough Council of King's Lynn & West Norfolk has as not provided sufficient evidence to apply the exemption where disclosure would prejudice the commercial interests of any person at section 43(2) of the FOIA. He has also decided that, on the balance of probabilities, the Borough Council of King's Lynn & West Norfolk has does not hold any further information in relation to the request.
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Disclose the information withheld under section 43(2).
3. The public authority must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 9 October 2014, the complainant wrote to the Borough Council of King's Lynn & West Norfolk ('the council') and requested information in the following terms:

"Following on from our conversation this morning the reason for the call is firstly to clarify how Kings Lynn & West Norfolk council obtain and pay for the building control information from CNC to be able to fulfil their obligations to complete their Con29(R) searches for the property market. If indeed there is a cost cross charged I would like under the F.O.I Act to obtain the evidence of this accountancy trail to prove so.

If the charge is then the same as we are being charged which is currently £10 to obtain this information then it begs the question that how has the charge of £52 been reached for a complete search. In addition to the first foi request I would also like to ascertain the workings of the council as to how the price was agreed of £52 for the council search."

5. The council responded on 4 November 2015. It informed the complainant that Building Control information is obtained from CNC Building Control under a Service Level Agreement ('SLA') but said that it would not release financial details of that agreement under s.43(2) of the FOIA. It also provided guidance from the DCLG regarding costing and charging with regards to the provision of property search services and said that it is this guidance which was used when costing the provision of such services.
6. The complainant requested an internal review on 4 November 2014. The council provided its internal review response on 18 November 2014. It said that it pays an amount over the course of the year under the SLA for all services provided which includes the information that the council obtains in order to fulfil its obligations to complete the Con29(R) searches but is not exclusive to that information and therefore the council does not hold the information requested. The internal review did not specifically refer to the request for '...the workings of the council as to how the price was agreed of £52 for the council search'.
7. The complainant wrote to the council again on the 19 November 2014 asking for a copy of the SLA and for the council to clarify the workings that it has gone through to achieve the price of £52 for an official search at the Land Charges department and the date that this was last reviewed.

8. In its response to the Commissioner on a separate complaint (case reference FS50568516), the council said that it sent a reply to the complainant on 20 January 2015 with the majority of the information requested. It also said that it was awaiting some confirmation relating to costings from its accountants which would be forwarded to the complainant as soon as is received.

Scope of the case

9. The complainant contacted the Commissioner on 20 January 2015 to complain about the way his request for information had been handled.
10. The Commissioner understands that since the internal review the complainant has been provided with a copy of the SLA with financial details redacted from parts 3.1 and 7.1 of Schedule 3 under section 43(2) of the FOIA.
11. Therefore the Commissioner has considered whether the exemption at section 43(2) of the FOIA applies to the information redacted from parts 3.1 and 7.1 of Schedule 3 of the SLA.
12. During the investigation, the council confirmed that no information relating to costings has been provided to the complainant from its accountants. Therefore the Commissioner has also considered whether the council holds information, other than the guidance from the DCLG regarding costing and charging with regards to the provision of property search services, in relation to the request for the workings of the council as to how the price was agreed of £52 for the council search.

Reasons for decision

Section 43(2) – Prejudice to Commercial Interests

13. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.

14. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43¹. This comments 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."

15. In this instance the council has applied section 43(2) to information redacted from a SLA with CNC Building Control who provide Building Control services to five councils. The Commissioner considers that the information relates to participation in the purchase and sale of a service and therefore the requested information does fall within the remit of section 43(2) FOIA.

16. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.

17. In its submission to the Commissioner, the council on the one hand said that release of the information "would be likely to" have a prejudicial effect but on the other hand said that "...there is the likelihood of the council suffering a prejudicial effect as being at the higher threshold if financial were disclosed...". Given the conflicting nature of these positions, the Commissioner considers that it is appropriate in this case to apply the lesser test of "would be likely to" occur.

18. The council said that both it and other participants in the SLA would suffer a prejudicial effect.

19. The Commissioner has considered how any prejudice to commercial interests would be likely to be caused by the disclosure of the redacted information. This includes consideration of whether the prejudice claimed is "real, actual or of substance" and whether there is a causal link between disclosure and the prejudice occurring.

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.ashx

20. The council said that to release financial details of the existing or future agreements would erode its ability to negotiate on a cost-effective basis and could hamper the cost-effective use of money from the public purse. It said that this is particularly so if the information was made available to direct competitors, companies who provide Personal Searches of the Land Charges register on behalf of clients. It also said that participants in the SLA would suffer.
21. When claiming that disclosure would prejudice the commercial interests of a third party, the Commissioner expects a public authority to obtain arguments from the third parties themselves. In his enquiries to the council, the Commissioner asked the council to clarify on what basis it has established that disclosure of a third party's interests may occur and to provide copies of any correspondence the council has had with third parties in relation to this request. The council has not confirmed that it has consulted with the other participants in the SLA regarding whether disclosure of the redacted information would prejudice their commercial interests. Neither has the council said that its submission represents its prior knowledge of the other participants concerns. The Commissioner's aforementioned guidance on section 43 states the following:

"It is important to note that in claiming the exemption on the basis of prejudice to the commercial interests of a third party, the public authority must have evidence that this does in fact represent or reflect the view of the third party. The public authority cannot speculate in this respect; the prejudice must be based on evidence provided by the third party, whether during the time for compliance with a specific request or as a result of prior consultation. This approach has been confirmed by the Information Tribunal²."

22. The Commissioner's guidance on 'The Prejudice Test'³ states that;

"If an authority claims that prejudice would be likely to occur they need to establish that

- there is a plausible causal link between the disclosure of the information in question and the argued prejudice; and

² Derry City Council v Information Commissioner (EA/2006/0014; 11 December 2006)

³

http://ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/the_prejudice_test.ashx

- there is a real possibility that the circumstances giving rise to prejudice would occur, ie the causal link must not be purely hypothetical; and
 - the opportunity for prejudice to arise is not so limited that the chance of prejudice is in fact remote.”
23. The Commissioner does not consider that the explanation given by the council (at paragraph 20) sufficiently demonstrates a causal link between the disclosure of the redacted information and the prejudice to commercial interests. This was despite the council being informed by the Commissioner that it must justify its position and being provided with the Commissioner’s guidance on how he deals with complaints⁴ which clearly states that it is the public authorities’ responsibility to satisfy the Commissioner that information should not be disclosed and that it has complied with the law.
24. It is not for the Commissioner to speculate as to how the prejudice would be likely to occur. The lack of sufficient arguments from the council, coupled with the lack of confirmation that the other participants in the SLA would consider disclosure would be prejudicial to their commercial interests, has led the Commissioner to the conclusion that section 43(2) of the FOIA is not correctly engaged in this case.

Section 1 – is further information held?

25. Section 1 of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds the information and if so, to have that information communicated to him.
26. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant’s evidence and argument. He will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held, he is only

⁴ http://www.ico.org.uk/for_organisations/freedom_of_information/guide.aspx

required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.

27. The complainant appears to consider that the council must have some 'workings' that it has gone through in order to achieve the price of £52 for a 'Local Search'.
28. The Commissioner enquired as to whether the information has ever been held, the scope, quality, thoroughness and results of the searches carried out by the council, whether information had ever been held but deleted and whether copies of information may have been made and held in other locations.
29. The council said that the DCLG's 'Local Authority Property Search Services – Costing and Charging Guidance' was used to cost out the charges for a Land Charges search and the elements of it. It confirmed that no further information in this regard is held.
30. In relation to what searches were carried out for information, the council said that its Land Charges Team Leader was consulted who would have known, in detail, the whole process of the provision of information under a Local Land Charge search. It also said that no information had ever been held which had since been deleted or destroyed and that Local Land Charge information is usually retained for 6 years.
31. In reaching a decision as to whether the requested information is held, the Commissioner also enquired whether there was any legal requirement or business need for the council to hold the information. The council said that there is no business purpose for which the information is held and that there are no statutory requirements to hold the information although a statement in relation to Local Land Charges forms part of the Annual Accounts and is publically available.
32. The Commissioner also considered whether the council had any reason or motive to conceal the requested information. He appreciates that the complainant has said that he wants to ensure that both members of the public are being charged the correct and fair price and that tax payers within the borough are not subsidising the council land charges department but does not consider that this equates to a reason for concealing the information and has not identified any other reason or motive to conceal the requested information.
33. In the circumstances, the Commissioner does not consider that there is any evidence that would justify refusing to accept the council's position that it does not hold any further information relevant to this request. The Commissioner is therefore satisfied that on the balance of probabilities, the information is not held by the council. Accordingly, he

Reference: FS50568430

does not consider that there was any evidence of a breach of section 1 of the FOIA.

Right of appeal

34. 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

35. 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.
36. 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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