

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 September 2017

Public Authority: Peterborough City Council
Address: Town Hall
Peterborough
PE1 1HG

Decision (including any steps ordered)

1. The complainant has requested risk assessments carried out by Whirlpool relating to a modification programme of tumble dryers that have been shared with Peterborough Trading Standards. The Commissioner's decision is that Peterborough City Council has incorrectly applied the exemption for information provided in confidence at section 41 of the FOIA. She has also decided that Peterborough City Council has incorrectly applied the exemption for commercial interests at section 43(2) of the FOIA and the exemption for the law enforcement at section 31(1)(g) of the FOIA.
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Disclose the requested information.
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 14 October 2016, the complainant wrote to Peterborough City Council ('the council') and requested information in the following terms:

"I would like to request (as a Freedom of Information Request) a copy of the risk assessment or risk assessments carried out by Whirlpool (or Indesit) relating to the current modification programme of Hotpoint

Indesit, Creda, Proline and Swan tumble dryers, that have been shared with Peterborough Trading Standards."

5. The council responded on 27 October 2016 refusing the request under section 14(2) of the FOIA stating that it is identical or substantially similar to a recent request and providing a link to the response previously issued. It pointed out that redactions had been applied to the previous response under sections 40, 41, 31(1)(g) and 43 of the FOIA.
6. On 22 December 2016 the complainant requested an internal review. He specifically mentioned that the risk assessment and how it is done is critical to the action taken regarding recall or safety action.
7. The council responded on 23 January 2017 and said that, as a result of a complaint to the ICO, a complete review was undertaken and further information released (a link to this was provided). The council also explained that an independent review is currently taking place involving experts in fire safety, product safety and product risk assessment and therefore no further review of the released documentation will be undertaken at this time. In addition, the council provided links to other information requests received in relation to Whirlpool.

Scope of the case

8. The complainant contacted the Commissioner on 3 February 2017 to complain about the way his request for information had been handled.
 9. In its response to the Commissioner's enquiries in this case, the council sought to rely primarily on section 41 of the FOIA, as well as sections 43(2) and 31(1)(g).
 10. Therefore, the Commissioner has first considered the application of the exemption at section 41 for information provided in confidence to the requested information.
 11. Given that the Commissioner has found that section 41 does not apply in this case, she has also considered the application of the exemption for commercial interests at section 43(2) of the FOIA and the application of the law enforcement exemption at section 31(1)(g) of the FOIA.
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Reasons for decision

Section 41(1) Information Provided in Confidence

12. This exemption provides that information is exempt if it was obtained by the public authority from any other person and the disclosure would constitute an actionable breach of confidence.

Was the information obtained from another person?

13. The first step is for the Commissioner to consider whether the information was obtained by the council from any other person in order to satisfy the requirement of section 41(1)(a).
14. In her enquiries to the council, the Commissioner asked it to identify which third party provided it with the withheld information.
15. The council confirmed that the withheld information, which constitutes one risk assessment, was provided to it by Whirlpool.
16. Having established that the withheld information was obtained from another person, the Commissioner must next consider whether or not its disclosure to the public (otherwise than under the FOIA), would constitute a breach of confidence 'actionable' by that or any other person.

Actionable claim for breach of confidence

17. Whilst it is not the only test for establishing confidence, the Commissioner finds that the appropriate test for this case is that which is set out in the case of *Coco v Clark* [1969] RPC 41. According to the decision in this case a breach of confidence will be actionable if:
 - the information has the necessary quality of confidence;
 - the information was imparted in circumstances importing an obligation of confidence; and
 - there was an unauthorised use of the information to the detriment of the confider.
18. All three elements must be present for a claim to be made. However, for that claim to be 'actionable' within the meaning of section 41(1)(b) of the FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed. This requires consideration of whether or not there would be a public interest defence to such a claim.

Necessary quality of confidence

19. For information to have the necessary quality of confidence it must be more than trivial and not otherwise accessible.
20. The council said that Whirlpool views the information as being of great importance on the grounds that it is confidential and commercially sensitive.
21. The Commissioner is satisfied that the information in this case, that being the risk assessment of tumble dryers, is not trivial.
22. However, as stated above, this alone is not sufficient to indicate that the material has the necessary 'quality of confidence'. Therefore the Commissioner has considered whether the information is otherwise accessible.
23. The council said that the risk assessment is not readily available by other means or otherwise accessible. It explained that the information has not entered the public domain and cannot be said to be so readily accessible that it could no longer be regarded as confidential.
24. The Commissioner is aware that the overall level of the risk assessment is in the public domain as a response to a previous information request on the council's Freedom of Information Portal¹ confirms that the risk assessment was classed as low:

"As the risk assessment determined using the appropriate risk model was low, the actions taken by the company are not inconsistent with their obligations under the regulations and as such the above bodies have no legal grounds to take action....The company are required to take a proportionate response to the level of risk, therefore if the risk level which is currently low increases Whirlpool would have to review their current stance and modify it appropriately in line with their legal responsibilities under the above regulations."
25. However, the Commissioner accepts that the actual detail of the risk assessment is not otherwise accessible and therefore accepts that the withheld information in this case has the necessary quality of confidence.

¹ <https://pcc.secure.force.com/SitePublishedDetailStyled?id=CRN1702198327>

Obligation of confidence

26. Even if information is to be 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.
27. The council said that the primary obligation of confidence on which it relies is the explicit agreement reached between Indesit/Whirlpool and the council when they each agreed to be bound by the terms of a Primary Authority Partnership Agreement and, more particularly, its provisions concerning Confidential Information. It said that there is both a contractual and statutory obligation of confidence.
28. The council explained that it has a Primary Authority Partnership agreement in place with Indesit (now acquired by Whirlpool) under the national Primary Authority Scheme. The Primary Authority Scheme is a statutory scheme established by the Regulatory Enforcement and Sanctions Act 2008 ('RESA') which allows an eligible business to form a legally recognised partnership with a local authority in relation to regulatory compliance. The scheme is administered by the Better Regulation Delivery Office (BRDO) part of Regulatory Delivery Directorate of the Department for Business Innovation and Skills. Under the terms of the scheme, Regulatory Delivery and the primary authority (the council) are required to treat all Confidential Information (defined below) as confidential and safeguard it accordingly. Regulatory Delivery and the primary authority may need to disclose Confidential Information to other government departments and local authorities. This information will only be disclosed for the purposes of facilitating the operation of the Primary Authority. Regulatory Delivery and the primary authority may also need to disclose Confidential Information if legally obliged to do so, for example, by court order or in accordance with the Freedom of Information Act 2000 (FOIA). The Primary Authority Partnership Agreement includes a broad definition of Confidential Information and Commercially Sensitive Information:

"Commercially Sensitive Information means the subset of Confidential Information:

- (a) which is provided by the Regulated Person to the Authority and is marked confidential; and/or
- (b) that constitutes a trade secret; and

Confidential Information means any information which has been designated as confidential by either party in writing or that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) including information which relates to the business, affairs, properties, assets, trading practices, Services, developments, trade secrets, intellectual property rights, know-how, personnel,

customers and suppliers of either Party, all personal data and sensitive personal data within the meaning of the Data Protection Act 1998 and the Commercially Sensitive Information."

Under the Primary Authority Partnership Agreement, Indesit/Whirlpool and the council have each agreed that they:

"shall treat all Confidential Information belonging to the other party as confidential and safeguard it accordingly; and

shall not disclose any Confidential Information belonging to the other party to any other person without the prior written consent of the other party, except to such persons and to such extent as may be necessary for the performance of the Agreement or except where disclosure is otherwise expressly permitted by the provisions of the Agreement."

The council explained that the limited exception provides for information that *must* be disclosed pursuant to the provisions of the FOIA.

29. Given the council's detailed explanation, the Commissioner accepts that there is an obligation of confidence in this case.

Detriment to confider

30. Having considered whether the information in this case was imparted in circumstances giving rise to a duty of confidentiality and had the necessary quality of confidence, the Commissioner must also consider whether unauthorised disclosure could cause detriment to the confider.
31. The council said that Indesit/Whirlpool has not authorised the onward disclosure of the withheld information it has provided to the council. It said that Whirlpool has in the past expressed its view, which has again been recently reaffirmed, that disclosure of the withheld information would not only be a breach of confidentiality but also harm would be inevitable to its commercial interests. It said that the release of the risk assessment, if not interpreted correctly, could cause detriment to Whirlpool's reputational and commercial interests.
32. The specific detriment of an unauthorised disclosure was described as follows:

"The Risk Assessments are highly technical documents and deal with sensitive matters which are not capable of being fully understood by untrained readers who are not experienced in dealing with this type of data. As such, Risk Assessments are very susceptible to misinterpretation by an unqualified recipient.

If there is confusion and misinformed information publicised in relation to the ongoing corrective action programme, it could adversely affect

the success of that programme as well as adversely affecting the reputation and business interests of those who have been involved in planning and executing the actions that have been taken to date.”

33. Having considered the withheld information in this case, the Commissioner cannot identify how its release could possibly harm Whirlpool. She considers that it is widely expected that electrical items such as tumble dryers would have a corresponding risk assessment, and, as detailed in paragraph 24, it is already in the public domain that the assessed risk was 'low'. The Commissioner considers the risk assessment to be a factual, anodyne document and cannot establish how its release would cause detriment to Whirlpool. She deems the arguments presented to be lacking in precision and it appears that a blanket approach has been taken to the application of the exemption.
34. It is not for the Commissioner to apply arguments on behalf of the council or to speculate further as to what the detriment would be. The council was informed by the Commissioner that it must justify its position and was provided with the Commissioner's guidance on how she deals with complaints² which clearly states that it is the responsibility of the public authority to satisfy the Commissioner that information should not be disclosed and that it has complied with the law.
35. The Commissioner considers that the council has been provided with sufficient opportunity to provide its detailed rationale for withholding the risk assessment. The rationale should have been in place since the request was refused and therefore opportunities for providing this existed when responding to the request and when requested by the Commissioner.
36. She has therefore concluded that the council has not sufficiently demonstrated that there would be detriment to the confider. Therefore, the Commissioner considers that the test of confidence fails on this limb and section 41 does not apply in this case.

Section 43(2) – Commercial interests

37. 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

² http://www.ico.org.uk/for_organisations/freedom_of_information/guide.aspx

a qualified exemption and is, therefore, subject to the public interest test.

38. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered her awareness guidance on the application of section 43³. This comments that:

"A commercial interest relates to a person's ability to participate competitively in a commercial activity."

39. In this instance the council has applied section 43(2) to Whirlpool's risk assessment of tumble dryers. The Commissioner considers that this relates to the commercial activity of selling goods and therefore the requested information does fall within the remit of section 43(2) FOIA.
40. 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.
41. In this case the Commissioner notes that the council said that release of the risk assessment 'could' cause detriment to Whirlpool's reputational and commercial interests and Whirlpool said that disclosure 'would' cause significant detriment to its commercial interests.
42. The Commissioner needs to consider how any prejudice to commercial interests would be likely to be caused by the disclosure of the withheld 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.
43. The arguments submitted regarding the prejudice to Whirlpool's commercial interests are described at paragraphs 31 and 32 above. To summarise, the argument is that the information would be misinterpreted which would prejudice Whirlpool's commercial interests.
44. When claiming that disclosure would prejudice the commercial interests of a third party, the Commissioner expects a public authority to obtain

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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

arguments from the third parties themselves. She is satisfied that this has occurred in this case.

45. The Commissioner's guidance on 'The Prejudice Test'⁴ 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
- 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."

46. The Commissioner does not consider that the explanation given by the council sufficiently demonstrates a causal link between the disclosure of the withheld information and the stated prejudice to commercial interests. The explanation is couched in very general terms. As stated above in relation to the application of section 41 of the FOIA, 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 she deals with complaints 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.

47. It is not for the Commissioner to speculate as to how the prejudice would be likely to occur. In relation to the argument that the risk assessment would be susceptible to misinterpretation, the Commissioner considers that it may be possible to mitigate the prejudice by providing an explanation of the information at the time of disclosure.

48. The lack of sufficient arguments from the council has led the Commissioner to the conclusion that section 43(2) of the FOIA is not correctly engaged in this case.

⁴ https://ico.org.uk/media/for-organisations/documents/1214/the_prejudice_test.pdf

Section 31(1) – Law enforcement

49. Section 31(1)(g) provides that information is exempt if disclosure would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in section 31(2).
50. The purposes specified in section 31(2) are as follows:
- (a) the purpose of ascertaining whether any person has failed to comply with the law,
 - (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
 - (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
 - (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
 - (e) the purpose of ascertaining the cause of an accident,
 - (f) the purpose of protecting charities against misconduct or management (whether by trustees or other persons) in their administration,
 - (g) the purpose of protecting the property of charities from loss or misapplication,
 - (h) the purpose of recovering the property of charities,
 - (i) the purpose of securing the health, safety and welfare of persons at work, and
 - (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with actions of persons at work."

51. As stated in the Commissioner's guidance on section 31 of the FOIA⁵, to engage the exemption a public authority must:
- "identify the public authority that has been entrusted with a function to fulfil one of the purposes listed in subsection (2);
 - confirm that the function has been specifically designed to fulfil that purpose, and
 - explain how the disclosure would prejudice that function."
52. In this case, the council has said that disclosure of the risk assessment would prejudice Trading Standards ability to carry its law enforcement functions. It said that it would prejudice Trading Standards ability to perform its functions effectively, including in respect of consumer safety, currently in respect of the modification campaign and more generally in respect of its future dealings with Whirlpool and other companies. It has not specified which sub sections of section 31(2) are relevant and therefore not confirmed that its Trading Standards function has been specifically designed to fulfil one of the purposes listed in subsection (2).
53. As sections 31(2)(f) – (h) relate to charities and sections 31(2)(i) and (j) relate to health and safety at work, the Commissioner does not consider that such sections would be relevant in this case.
54. In relation to the remaining sections – i.e. sections 31(2)(a) – (e), the Commissioner finds that the use of the word "ascertaining", i.e. determining definitely or with certainty, limits the application of the exemption to those cases where the public authority in relation to whom the prejudice is being claimed, has the power to formally ascertain compliance with the law, and judge whether any person's conduct is improper etc.
55. Therefore, for section 31(1)(g) to be engaged via sections 31(2)(a) – (e), the Commissioner requires identification of the function for the purposes of section 31(1)(g) to be a function which is:
- (i) designed to fulfil the purposes specified in section 31(2)(a) – (e);
 - (ii) imposed by statute; and
 - (iii) specifically entrusted to the public authority to fulfil.

⁵ <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

56. The council has only identified that prejudice would occur to its Trading Standards function, but not how that function fulfils points (i) to (iii) in the preceding paragraph.
57. It is not for the Commissioner to apply arguments on behalf of the council or to speculate as to which sub section of 31(2) is applicable. As stated in relation to sections 41 and 43(2), the council was informed by the Commissioner that it must justify its position and was provided with the Commissioner's guidance on how she deals with complaints which clearly states that it is the responsibility of the public authority to satisfy the Commissioner that information should not be disclosed and that it has complied with the law.
58. The Commissioner considers that the council has been provided with sufficient opportunity to provide its detailed rationale for withholding the risk assessment. The rationale should have been in place since the request was refused and therefore opportunities for providing this existed when responding to the request and when requested by the Commissioner.
59. She has therefore concluded that the council has not sufficiently demonstrated that section 31(1)(g) is engaged in this case.

Right of appeal

60. 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

61. 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.

62. 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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