

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 January 2021

Public Authority: The Pubs Code Adjudicator
Address: Lower Ground
Victoria Square House
Victoria Square
Birmingham
B2 4AJ

Decision (including any steps ordered)

1. The complainant, on behalf of the Pubs Advisory Service, has requested particular correspondence about stocking requirements from the Pubs Code Adjudicator ('the PCA'). The PCA withheld the information it holds under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of the FOIA (prejudice to effective conduct of public affairs), section 31(1)(g) and 31(2)(c) (law enforcement) and section 43(2)(commercial interests). It considered that the public interest favoured maintaining these exemptions.
2. The Commissioner's decision is as follows:
 - At the time of the request, the requested information was exempt information under section 36(2)(b)(i) and section 36(2)(b)(ii) and the public interest favoured maintaining these exemptions.
3. The Commissioner does not require the PCA to take any remedial steps.

Background and nomenclature

4. A significant proportion of public houses in the UK are in fact owned by one of just six businesses (Pub-Ownning Businesses or 'POBs'). These

POBs are: Punch Pubs & Co, EI Group plc, Marstons plc, Star Pubs & Bars Ltd, Greene King plc, and Admiral Taverns Ltd.

5. In many cases, the POB will own the premises of a public house, which it then leases out to the publican. Often the publicans are 'tied' to the particular POB, meaning that they are subject to restrictions on what products they are permitted to sell. Supporters of this system argue that Tied Pub Tenants ('TPTs') benefit from lower rents, bulk-buying discounts and other protections by virtue of being part of a large company. Opponents argue that the restrictions prevent TPTs from offering the diversity and quality of products that they might otherwise be able to offer their clientele.
6. The Pubs Code, introduced in 2016, was aimed at redressing the perceived imbalance between individual TPTs and the large POBs to whom they are tied. As well as having an independent regulator to adjudicate on rent terms which may be unfair, TPTs also now have the right to request a Market Rent Only tenancy, which ends the "tie" to the POB. When TPTs have their regular rent reviews, they may request an assessment to find out what their potential rent might be if they were no longer tied – this is known as the MRO option and is subject to adjudication. A TPT then has the choice to decide whether to remain tied or to take the MRO option.
7. The Small Business, Enterprise and Employment Act 2015 created the office of a Pubs Code Adjudicator who is now responsible for overseeing the implementation of and resolving disputes arising under, the Pubs Code. The current Adjudicator is Ms Fiona Dickie.
8. Whilst it is the Adjudicator herself (or the office she occupies) who is the public authority for the purposes of the FOIA, all references to 'the PCA' within this notice should be read as referring to the corporate body and not the individual.

Request and response

9. On 12 November 2019 the complainant wrote to the PCA and requested information in the following terms:

"Under and [sic] FOI please send copies of all correspondence related to stocking requirements between July 2018 and July 2019 between Star Pubs & Bars and the PCA office."
10. The PCA issued a refusal notice on 8 January 2020. It withheld the information the complainant has requested under section 36(2)(b)(i) and (ii) and section 36(2)(c) of the FOIA, section 31(1)(g) and 31(2)(c)

and section 43(2). The PCA said the public interest favoured maintaining these exemptions.

11. Following an internal review, the PCA wrote to the complainant on 10 February 2020. It upheld its original response.

Scope of the case

12. The complainant contacted the Commissioner on 10 February 2020 to complain about the way his request for information had been handled.
13. The Commissioner's investigation has focussed on whether the PCA is entitled to withhold the information the complainant has requested under FOIA section 36(2)(b)(i) and (ii) and/or section 36(2)(c) and/or section 31 and/or section 43(2). She has also considered the public interest test associated with those exemptions.

Reasons for decision

14. In its submission to the Commissioner the PCA has provided the following further background to the request. The PCA is a corporation sole undertaking functions on behalf the Crown. The office was established by Part 4 of the Small Business, Enterprise and Employment Act 2015 (the 2015 Act) under which the Pubs Code etc Regulations 2016 (the Pubs Code) were made. The Department for Business, Energy and Industrial Strategy is the sponsor Department for the PCA. The current PCA, Ms Fiona Dickie, was appointed on 3 May 2020. The PCA office is small, with fewer than 20 members of staff.
15. The main purpose of the PCA as regulator is to enforce the Pubs Code statutory framework, which regulates the relationship between tied pub tenants (TPTs) and large pub-owning businesses (POBs). The PCA has three main statutory functions: (1) to arbitrate individual disputes between POBs and TPTs relating to the Pubs Code, (2) to investigate suspected breaches of the Pubs Code, and (3) to report unfair business practice to the Secretary of State.
16. The Pubs Code statutory framework comprises provisions contained in the 2015 Act, the Pubs Code and the Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016. The Pubs Code statutory framework regulates aspects of the relationship between POBs who own more than 500 tied pubs in England and Wales and their TPTs. Broadly speaking, under the tied pub model, the POBs own pubs and lease them to tenants, with provisions in that lease that the tenant buys drinks (and

potentially other products and services) to sell or use in the pub exclusively from the POB, in exchange for lower rent than they otherwise would be charged.

17. The Pubs Code places certain duties on the POBs in their dealings with their TPTs. This includes that where certain criteria are fulfilled, the POB must offer the TPT the option to end the tied contract and enter into a Market Rent Only (MRO) tenancy. A MRO tenancy will often be on different, possibly more onerous, commercial terms and conditions (the legislation specifies some requirements for terms of a MRO-tenancy, including that they must be reasonable), but will not include a tie in relation to drinks and other products and services, so the tenant will be free to purchase those from other providers. The terms of the MRO arrangement have been intensely disputed by the industry and the PCA has arbitrated, and appointed significant numbers of other people to arbitrate, such disputes under the Code. The law on what is or is not a reasonable term under a MRO proposal at the point that a TPT is entitled to change their contractual arrangement is therefore a new intervention in those contractual arrangements, is in many cases unsettled law and often under challenge.
18. Some POBs are brewing POBs, in that they produce their own beer and cider products which they may wish to market to tenants. Other POBs do not brew their own products. A POB that also has beer or cider brewing operations may include "stocking requirements" in its MRO tenancies. These are contractual terms that require a tenant to stock the POB's beer or cider, but do not require the tenant to buy that beer or cider from a particular supplier. Stocking requirements can include reasonable restrictions on – but must not prevent – the sales of beers or ciders produced by other brewers. In order for such a term to be classed as a "stocking requirement" and therefore potentially permissible in a MRO tenancy it must meet a number of conditions which are set out in section 68(7) of the 2015 Act. In addition, the test of reasonableness applies to all terms, including a term that meets the statutory definition of a stocking requirement.
19. Under section 53 of the 2015 Act the PCA is empowered to investigate breaches of the Pubs Code statutory framework. It is a requirement prior to launching an investigation under section 53 that the PCA has "reasonable grounds to suspect" that a regulated business has failed to comply with the Pubs Code framework. If the PCA determines at the conclusion of an investigation that the business has breached the Pubs Code, she can exercise regulatory powers including imposing a financial penalty and making recommendations as to the business' future behaviour that they must comply with.

20. On 10 July 2019 the PCA launched such a statutory investigation into whether a POB, Star Pubs & Bars, had failed to comply with provisions of the Pubs Code in relation to stocking requirements. The investigation took place between 10 July 2019 and 15 October 2020. As a result, the PCA determined that a number of Code breaches had taken place and she published the detailed findings of her investigation in a report on 15 October 2020. She imposed a financial penalty of £2,000,000 and made a number of recommendations that Star Pubs & Bars is required to comply with. If the PCA considers that Star Pubs & Bars has failed to follow a recommendation arising from the report she is further empowered under the 2015 Act to investigate this and potentially impose sanctions on the POB. The PCA and her advisors are currently liaising closely with Star Pubs & Bars in respect of the implementation of and compliance with the recommendations. It should be noted that Star Pubs & Bars is also currently in the process of appealing the imposition of the financial penalty to the High Court.

Section 36 – prejudice to the effective conduct of public affairs

21. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised, qualified person for that public authority. The qualified person's opinion must also be a "reasonable" opinion, and the Commissioner may decide that the section 36 exemption has not been properly applied if she finds that the opinion given is not reasonable.
22. Other than for information held by Parliament, section 36 is a qualified exemption. This means that even if the qualified person considers that disclosure would cause harm, or would be likely to cause harm, the public interest must still be considered.

Section 36(2)(b)

23. Section 36(2)(b)(i) of the FOIA says that information held by a public authority is exempt information if, in the reasonable opinion of a qualified person, disclosing the information would, or would be likely to, inhibit the free and frank provision of advice.
24. Section 36(2)(b)(ii) of the FOIA says that information held by a public authority is exempt information if, in the reasonable opinion of a qualified person, disclosing the information would, or would be likely to, inhibit the free and frank exchange of views.
25. The PCA has provided the Commissioner with a copy of the information it is withholding under all the section 36(2) exemptions. It comprises correspondence within the scope of the request and the enclosures/attachments associated with this correspondence.

26. To determine, first, whether the PCA correctly applied the exemptions under section 36(2)(b)(i) and 36(2)(b)(ii), the Commissioner must consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore, in order to establish that the exemption has been applied correctly the Commissioner must:
- ascertain who was the qualified person or persons
 - establish that an opinion was given by the qualified person
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
27. In this case, the PCA has explained that the qualified person (QP) at the time of the request was Mr Paul Newby who was the Pubs Code Adjudicator at that time and up to early May 2020. Ms Fiona Dickie was then appointed as the Pubs Code Adjudicator and is currently the QP. The PCA has advised the Commissioner that Ms Dickie has re-visited the request and considered it afresh. Her opinion is also that the section 36(2)(b) exemptions are engaged. The Commissioner has noted this but has focussed on the original QP opinion given at the time of the request.
28. The Commissioner is satisfied that, in line with section 36(5) of the FOIA, it was appropriate for the Pubs Code Adjudicator to act as the QP.
29. For the second of the above criteria, the PCA provided the Commissioner with a copy of the original section 36 submission that was sent to the QP. This evidences that the QP at that time confirmed that, in his opinion, disclosing the requested information "would or would be likely to have" the effects set out under sections 36(2)(b)(i) and 36(2)(b)(ii). The Commissioner is therefore satisfied that an opinion was given by the QP.
30. The request was submitted on 12 November 2019. The section 36 submission evidences that the original QP's opinion was given on 5 December 2019. The PCA refused the request on 8 January 2020 and upheld its position in its internal review of 10 February 2020. As such, the Commissioner is satisfied that the QP's opinion was given at the appropriate time.
31. Finally, the Commissioner has considered the fourth of the criteria - whether the opinion given was reasonable. It is important to note that this is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it is a reasonable opinion, and not necessarily the most reasonable opinion. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one

that a reasonable person could hold, she must find that the exemption is engaged.

32. In order for the QP's opinion to be reasonable, it must be clear as to precisely how the envisioned prejudice may arise. In her published guidance on section 36 the Commissioner notes that it is in the public authority's interests to provide her with all the evidence and arguments that led to the opinion, in order to show that it was reasonable. If this is not done, then there is a greater risk that the Commissioner may find that the opinion is not reasonable.
33. In the original submission document that it provided to the QP, the PCA included: a copy of the request, the information being withheld, an explanation of the section 36 exemptions, public interest arguments for and against disclosing the information (which will be discussed below) and a recommendation.
34. For both the exemptions under section 36(2)(b) that the PCA has cited, the Commissioner notes that the opinion of the QP at the time of the request was that inhibition and prejudice "would or would be likely to" occur ie the QP did not specify one or the other. In the Commissioner's view, the section 36 submission sent to the QP at the time of the request does not make a strong case that the envisioned prejudice would (definitely) occur. As such, the Commissioner is going to make her determination based on the lower level of likelihood – that the envisioned prejudice would be likely to occur. 'Would be likely' is a lower standard than 'would' but it means that the chance of prejudice is still significant and weighty, and certainly more than hypothetical or remote.
35. The Commissioner is satisfied that the QP had sufficient appropriate information about the request and the exemptions in order to form an opinion on whether reliance on the provision under sections 36(2)(b)(i) and 36(2)(b)(ii) was appropriate.

Conclusion

36. The Commissioner has noted the evidence at paragraph 33 and, since she is satisfied that the remaining points at paragraph 26 have also been addressed, she must accept that the QP's opinion ie that the envisioned prejudice would be likely to occur, is one a reasonable person might hold. She therefore finds that the PCA can rely on sections 36(2)(b)(i) and 36(2)(b)(ii) of the FOIA to withhold information within scope of the request.
37. The Commissioner has gone on to consider the public interest test.

Public interest test

Public interest arguments in favour of disclosing the information

38. In his correspondence to the Commissioner the complainant has not provided any arguments for the information's disclosure. In its correspondence to the complainant, and its section 36 submission to the QP, the PCA acknowledged that there is a legitimate public interest in transparency in respect of the implementation of the Pubs Code and the PCA's operation as regulator. The PCA also noted the importance of holding to account those who enforce and operate under the Pubs Code.

Public interest arguments in favour of maintaining the exemptions

39. In its correspondence to the complainant and the section 36 submission to the QP, the PCA gave broadly the public interest arguments that it has detailed in its submission to the Commissioner.
40. In its submission, the PCA has first noted that the QP's opinion was that the prejudice envisioned under section 36(2)(b) *would* occur. It says it has taken this into account when assessing the weighting of the public interest. However, as has been noted, the original QP's opinion was not clear on the level of likelihood and the Commission has found that prejudice being likely to occur is a more reasonable opinion.
41. The PCA goes on to argue that there is a reduced public interest in publishing full regulatory correspondence where the issue in that correspondence is the subject of a full report. It advised that the report published by the PCA on 15 October 2020 runs to 174 pages. The PCA has told the Commissioner that the report contains a summary of salient points from the correspondence requested where they are relevant to the PCA's findings and where it was considered appropriate to include that information. The report also contains some details of the correspondence released to the public in a controlled and appropriate manner. This satisfies the public good in transparency while not releasing the documents themselves and therefore protecting the "safe space" and confidence that the regulated businesses must have in their engagement with the regulator.
42. The PCA says that the correspondence requested was created prior to the decision on whether it was appropriate to launch a formal statutory investigation into the conduct of Star Pubs & Bars. As regulator, before launching an investigation it is proportionate for the PCA to consider what steps short of a formal statutory investigation she could take to remedy a potential issue. This might involve providing advice to a regulated POB about the PCA's position or about how the POBs may take steps to mitigate a potential breach or remedy its behaviour to ensure

compliance with the Code. This is because it allows the entity being regulated to adjust its ways of working in order to avoid a significant breach of the legislation or the need for a formal investigation. An informal approach can be more effective because formal (and thus, public) action could push a POB into adopting a defensive position because it wishes to defend its corporate reputation. An informal approach can also be more cost effective if it removes the need for both parties to go through a formal process. If the PCA's pre-investigation correspondence to POBs on particular issues were subject to disclosure, this would deter the POBs from seeking informal advice and it might affect the candour of advice the PCA felt able to give.

43. According to the PCA it is in the public interest that it is able to have candid discussions with the regulated businesses about the operation of the Pubs Code in a free and frank way without fear that these discussions will be made public, both so that the regulated businesses are open with the regulator about their actions and views, and also so that the regulator is able to give her uninhibited views to the regulated businesses.
44. The regulatory environment in which the PCA operates to regulate the POBs is still a relatively new and uncertain one. As a regulator, this means that there is an even greater need for the PCA to hold full and frank discussions with POBs, and to fully explore and test issues arising in relation to regulated entities as such information may be used in future PCA regulatory and/or investigation activity. This includes determining whether to launch a statutory investigation, or whether other action short of investigation would be more appropriate or beneficial to the tied pub industry. The statutory framework which governs the behaviour of the POBs and which the PCA enforces, is new, complex and many aspects of it are unsettled. It is key to the operation of the Pubs Code especially in these early years that the PCA can discuss a potentially contentious issue openly with the regulated businesses and know that she will receive their uninhibited responses as to their views and their practice to enable the PCA to understand whether to invoke other regulatory powers. If the PCA were less able to effectively make informed decisions as to the exercise of her regulatory powers this would harm the effectiveness of the PCA as a regulator. This would not be in the public interest and the PCA considers this would be a severe impact on the regulator.
45. The PCA argues that it is important that when the regulator communicates with the regulated businesses, they will respond to her fully and freely. There is a space before the use of formal statutory powers where it is key that free and frank discussions are able to be had and be preserved. The correspondence and enclosures which fall within the scope of the request contain detailed discussions of Star's policies,

position as to the law and their business practices. This correspondence was valuable in enabling the PCA to determine whether there was reasonable suspicion of a breach of the Pubs Code and to consider the correct course of action she should take to best fulfil her statutory role and to assist the tied pubs industry. The PCA needs the POBs to engage openly and honestly with the regulator without their correspondence being tailored to account for its disclosure. If POBs considered that pre-investigation correspondence and discussions with the regulator could be subject to disclosure to the world there is a real risk that they would be considerably less candid and less open in their engagement with the PCA. This chilling effect in discussions with the POBs would damage the quality of information that the PCA is able to consider when making regulatory decisions.

46. The PCA notes that this information relates to an issue that is still live. It is currently actively engaging with Star Pubs & Bars about the implementation of recommendations made in the report. There is a current dialogue taking place between the parties about Star's conduct and how it is to go about complying with these recommendations. It is in the public interest that the PCA is not hindered in her ability to have an open dialogue with Star Pubs & Bars about these still current issues to enable her to make informed decisions and take any further action as regulator that she considers appropriate. In addition, Star Pubs & Bars is currently appealing elements of the investigation outcome and the Court's jurisdiction to reopen the findings of fact in the investigation is at issue in that appeal. As such the content of the requested correspondence may or may not fall for the Court's consideration.

Balance of the public interest

47. As has been discussed above, the Commissioner accepts that the prejudice envisioned under the section 36(2)(b) exemptions would be likely to occur. That being so, the public interest in releasing the requested information must be greater than the public interest in preventing that envisioned likelihood of prejudice by withholding the information.
48. The complainant may have a personal interest in the disputed information, but he has not made a case that the information has a wider public interest. The report that the PCA has referred to had not been published at the time of the request. However, the public interest in the PCA being open and transparent is met, in the Commissioner's view, by its initial launch of the investigation into Star Pubs & Bars including its publication of the Notice of Investigation on 10 July 2019. At the time of the request the PCA's Star Pubs & Bars investigation was live, and it remains live.

49. The Commissioner finds that, at the time of the request, there was a greater public interest in the parties involved in the ongoing investigation being able to give advice and exchange views freely without being inhibited by the possibility of those communications being put in the public domain. This would ensure that the ongoing investigation was robust and that the PCA was able to be an effective regulator.
50. To summarise, the Commissioner is satisfied that, at the time of the request, there was greater public interest in the PCA withholding the requested information under sections 36(2)(b)(i) and 36(2)(b)(ii). Since she has found that those exemptions were engaged and that the public interest favoured withholding the information, it has not been necessary for the Commissioner to consider the section 36(2)(c), section 31 and section 43 exemptions that the PCA also relied on.

Right of appeal

51. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

52. 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.
53. 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

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