

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 June 2012

Public Authority: The Department for Business, Innovation and Skills

Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant requested information concerned with the tendering process for the delivery of marketing workshops from Business Link West Midlands (BLWM) whose freedom of information responsibilities have now been assumed by the Department for Business, Innovation and Skills (BIS).
2. The Commissioner's decision is that the majority of the requested information is not held. His decision regarding the remaining information is that BIS was entitled to withhold this information as its disclosure would breach the Data Protection Act 1998. Accordingly the information is exempt from disclosure under FOIA by virtue of the personal data exemption at section 40(2). However, the public authority breached sections 1(1)(a) and 10(1) of the FOIA by not informing the complainant that it held no information relating to certain parts of the request.
3. The Commissioner does not require the public authority to take any further steps.

Background

4. The complainant first made his request for information from BLWM. At first BLWM did not accept that it was a public authority. Later it conceded that it was a public authority as the Commissioner pointed out the fact that, as a wholly owned subsidiary of Advantage West Midlands (AWM) which was/is a

public authority it must be subject to the FOIA. However, BLWM was in the process of closing down and the Commissioner was referred both to AWM and BIS at different times in the investigation of this complaint. AWM was also in the process of closing down and it finally did so on 31 March 2012. Thereafter BLWM's responsibilities under FOIA devolved to BIS.

Request and response

5. On 26 April 2011, the complainant wrote to BLWM and requested information in the following terms:

"1. What was the composition of the evaluation panel which received and scored my tender for delivery of the marketing workshops, in terms which include the name, job title and the material experience and qualifications of each?"

2. What exactly were the tender evaluation guidelines, including the weighting of the criteria and scoring rules, to which the panel worked?"

3. What exactly was the guidance including approval, regarding its processing of such tenders, which the Business Link obtained from the consultant referred to in its letter of 7 April 2011 (copy attached)?"

4. Who was the consultant, and what were his/her material qualifications and experience?"

6. BLWM responded on 5 May 2011, stating that it was not subject to the FOIA. It did provide the complainant with the information requested in point 2 of his request but declined to provide anything further.
7. After a request for an internal review on 28 September 2011, BLWM responded again to the complainant on 4 October 2011, accepting that it was subject to the FOIA and providing a partial response. BLWM explained that it had already supplied the complainant with most of the information requested under point 2 but was willing to resend that information. It also stated that there was no weighting of scores and provided the percentages carried by each scoring element which were equal. BLWM also provided information under point 3 stating that it held no further information beyond what it had already provided.

8. Points 1 and 4 were refused because it believed that disclosure would breach the Data Protection Act 1998.
9. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He argued that the FOIA creates a presumption in favour of the disclosure of information involved in the tendering for a public contract and that no exemption applied to the information he requested.
10. The Commissioner considers the scope of his investigation to focus on what was held by BLWM at the time of the request and the appropriateness of the application of section 40(2) to the remaining requested information.
11. On 12 December 2011, the Commissioner emailed BIS asking for any further arguments. BIS explained that it would not be taking responsibility for BLWM until the end of March 2012. On 30 January 2012, he was informed by BLWM that the information concerning point 4 of the request (the consultant information) had been destroyed.
12. On 15 February 2012, the Commissioner emailed BLWM asking it to confirm that no further information was held regarding points 3 and 4 of the complainant's request. He also provided his view that he would expect the names and job titles of the individuals in point 1 to be disclosed if they were relatively senior, junior management level and above, and acting in their public capacity.
13. On 1 March 2012, BLWM confirmed that it was withholding the requested information at point 1 of the request under section 40(2).

Reasons for decision

Section 1

14. Section 1 of the FOIA states that any person making a request to a public authority must be informed in writing if that information is held and, if that is the case, to have that information disclosed to him.
15. On 1 March 2012, the Commissioner tried to ascertain exactly what information was held at the time of the request by asking a series of questions.

16. BLWM confirmed on 1 March 2011 that the information it held had been progressively archived or destroyed since the closure of BLWM had been confirmed in January 2011. It further explained that a major restructuring of BLWM had taken place in March 2011 when most of its operations were shut and that records that were not archived were destroyed prior to March 2011. Remaining records were destroyed or archived as they became "*non-current*" between March 2011 and November 2011.
17. BLWM stated, at that point, that it had not retained a record of the destruction of most of the requested information. BLWM claimed that it had no legal requirement to keep any records because it was a private limited company. The Commissioner did not accept this point. Some records had been archived at the request of BIS as they evidenced the use of European funds and had been sent there for storage. Process and procedures regarding closure and records management were put in place by BLWM and AWM which then liaised with BIS. BLWM also stated that it held no electronic copies of the requested information. It had no business purpose to keep these records and no statutory requirement to do so.
18. On 16 March 2012, during the brief time it had responsibility for BLWM before BIS took over, AWM responded to the Commissioner to confirm that it was withholding the names of individuals sitting on the panel, as requested in point 1 of the complainant's request. The information was withheld under section 40(2). AWM explained that it would be unfair and beyond the reasonable expectations of the individuals involved. AWM also stated that it would not be possible to get the consent of the individuals involved. However, it was prepared to release their job titles as they adequately reflected the seniority and experience of the panel.
19. When BIS took over responsibility for BLWM at the beginning of April 2012 the Commissioner wrote for clarification regarding what, if any, information relating to the complainant's request was held.
20. On 27 April 2012, BIS wrote to the Commissioner with its final arguments regarding this complaint. Firstly, it explained that the individuals on the selection panel, as requested in point 1 of the complainant's request, were not involved in the initial scoring of the bids which was the stage at which the complainant's bid was eliminated. The tender process was in 2 stages and the individuals referred to in the request were on an interview panel that only played a role in the second stage which the complainant did not

reach. For this reason BIS contends that the names of these individuals, their job titles, material experience and qualifications are not part of the scope of the request and therefore, it would not be appropriate to reveal this information. The Commissioner agrees that, for the purposes of this request, the information at point 1 of the request is 'not held', though he considers that the complainant's misapprehension was compounded by the responses he received from BLWM.

21. BIS stated that it holds scoring summary sheets and scores against individual tenders but that it is no longer possible to say who conducted that initial scoring. It is not possible to identify the individual/s involved in the initial scoring that rejected the complainant's tender.
22. BIS confirmed that it does not hold any information relating to the material qualifications and experience of the consultant as requested in point 4 of the complainant's request. It confirmed that it does hold the name of the consultant, however, contrary to previous responses from BLWM.
23. Although the Commissioner accepts that there is no information held with regard to the complainant's request, other than that which has already been provided or that to which BLWM has applied section 40(2), he wishes to express concern about the conduct of BLWM in responding to matters that arose from his investigation of this complaint. BLWM was less than helpful throughout, and there were unnecessary delays in the course of his investigation as both BLWM and AWM's preoccupation with imminent closure took priority. Although understandable, the Commissioner did not feel that he was able to expedite matters for the complainant when faced with attempts to shift responsibility and a degree of incomprehension as to why he was asking any questions at all with regard to this matter. BIS has highlighted the fact that, until April 2010 when it was acquired by AWM, BLWM was effectively a private company and not subject to FOIA. As far as BIS is aware this is the first and last FOI request made to BLWM. Whilst this may explain BLWM's inability to respond in line with the legislation, it does not excuse the delay and confusion in a non-complex matter that was easily resolved once BIS took over responsibility for the case.

Section 40(2)

24. Section 40(2) of FOIA states that personal data is exempt from disclosure if disclosure would breach any of the data protection principles contained within the Data Protection Act (the DPA). BIS

has argued that disclosure of the requested information would be unfair and thus breach the first data protection principle which states that:

'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...'

25. For section 40(2) to be engaged the information being withheld has to constitute 'personal data' which is defined by the DPA as:

'...data which relate 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.'

26. On 27 April 2012, BIS explained that the BLWM files did reveal the name of the consultant who was engaged in assisting BLWM on the tendering process. It was stressed that he was not involved in the actual scoring/selection. However, BIS does not believe that his name, or the other requested information relating to him, should be released.
27. The Commissioner is satisfied that the individual's name, qualifications and experience which are the focus of point 4 of this request clearly constitute his personal data as he can be identified from them.
28. The Commissioner has gone on to consider whether the disclosure of this information would be in breach of the first principle of the DPA. The first principle requires that personal data is:
- a. processed fairly and lawfully, and
 - b. that one of the conditions in schedule 2 is met.
29. The Commissioner has first considered whether the disclosure of the withheld information would be fair.

30. In considering whether disclosure of this information would be fair the Commissioner has taken the following factors into account:
 - a. whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned;
 - b. the individual's reasonable expectations of what would happen to their information; and
 - c. whether the legitimate interests of the public are sufficient to justify any negative impact to the rights and freedoms of the data subject.
31. The complainant's position is that a public authority cannot contract out of its responsibilities under the FOIA and that information must be released, unless it is covered by an exemption. The complainant also highlighted the Commissioner's own guidance in 'Awareness Guidance No. 2, Information Provided in Confidence', which he said states that information such as staff names and job titles are unlikely to be deemed confidential. However, it should be noted that the complainant's arguments were influenced by the wider scope he believed his request covered in relation to points 1 and 4 of his request. In reality, it has been established that only point 4 concerning information about the consultant used in the process was actually 'held' information.
32. BIS's position is that the consultant was not employed in a senior management role and had no direct line management responsibilities. His role was to provide support and guidance on various project and procurement issues and he had no involvement in the selection itself. Additionally, the consultant was not employed by BLWM, as a result, he could reasonably assume that his name would not be released. It further argued that, until April 2010, BLWM was a private company and not subject to the FOIA and that there was no culture of responding to FOI requests which BIS suggested make the consultant's expectations that his name would be released even more remote.
33. For the reasons given BIS argued that it would not be fair to release the name of the consultant and that no schedule 2 condition applied to allow it to be released. The Commissioner agrees with this reasoning.
34. The Commissioner accepts that it is important for members of the public to be able to trust any tendering process conducted by a public authority. He does not believe that it is necessary to know

the exact qualifications or experience of the consultant in question in order to have faith in the advice given. The Commissioner is not convinced that the public interest is served by members of the public conducting their own assessment of the value of the advice provided by a consultant based on their views as to the merits of that consultant's qualifications. In the Commissioner's opinion the ability of any public authority to follow due process in tendering matters could be hindered if members of the public disputed the outcome of a particular decision because of the qualifications of the individual who made the decision.

35. In conclusion, despite the fact that disclosure would be likely to cause the individual who provided expertise in this matter minimal damage or distress, the Commissioner accepts that the disclosure of the requested information would be unfair. In reaching this conclusion the Commissioner is also satisfied that there is no compelling public interest in disclosure of the requested information. This is because the information already provided to the complainant on 5 May 2011 about the expertise of the consultant sufficiently meets any legitimate interests in knowing how the consultant was qualified to carry out his role.

Procedural Requirements

36. BLWM (BIS) breached section 1(1)(a) because it should have confirmed to the complainant that some of the information was not held by the time of the internal review or the time for statutory compliance. It also breached section 10(1) by not carrying out this action within the statutory time for compliance.

Right of appeal

37. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

38. 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.
39. 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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