

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 April 2012

Public Authority: London Borough of Newham
Address: Newham Dockside
1000 Dockside Road
London
E16 2QU

Decision

1. The complainant requested details of any financial relationship or transactions between the London Borough of Newham (the "council") and Obsidian Forest Gate Ltd. (OFG).
2. The council provided some information but withheld other information because it considered that disclosure would be likely to prejudice its commercial interests and those of OFG. It also argued that disclosure of the information could result in an actionable breach of confidence.
3. The Commissioner's decision is that the council has correctly applied the commercial interests exemption to the withheld information and that the public interest favours maintaining the exemption.
4. The Commissioner does not require the council to take any steps.

Background

5. The council has identified the regeneration of Forest Gate town centre as one of its long standing policy objectives. In January 2010 the council adopted a Supplementary Planning Document (SPD) which was designed to "...strengthen planning policy for the area, in order to be able to actively engage with developers in shaping any new development that

comes forward, to ensure that it meets the council's regeneration objectives for the area."¹

6. In this context, OFG, which has land interests in the proposed regeneration area, has been in discussion with the council and in November 2010 the council published a report which sought Cabinet approval for the sale of a long leasehold interest in a council-owned vacant site in Forest Gate town centre to OFG. OFG has published its proposals for the regeneration of Forest Gate, referred to as the 'masterplan'².
7. At the time the request was made negotiations between the council and OFG were in progress and the associated planning application had not been submitted.

Request and response

8. In September 2011, the complainant wrote to the council and requested information in the following terms:

"....details of any financial relationships or transactions (if any) between LBD and Obsidian FG (or sister companies). I am interested in the precise nature (i.e., financial or otherwise) of the partnership between Obsidian FG and LBN, which I cannot find on the website."

9. The council responded on 11 October 2011 stating that no formal partnership existed between the council and OFG. The council explained that the "Heads of Terms" of a potential future agreement were negotiated between the parties during 2010 and approved on 18 November 2010. The council directed the complainant to the relevant cabinet report on its website and confirmed that the appendices to this report were being withheld under the commercial interests exemption.
10. Following an internal review the council wrote to the complainant on 8 December 2011 and confirmed that it was upholding its decision to withhold the information. The council also stated that it considered the appendices were subject to the exemption for information provided in confidence.

¹ <http://www.newham.gov.uk/NR/rdonlyres/4485D8DA-FDC8-4AB1-8BE1-B722F613F77A/0/ForestGateSPD.pdf>

² <http://www.forestgateregeneration.com/>

Scope of the case

11. The complainant contacted the Commissioner to complain about the way their request for information had been handled. They asked the Commissioner to determine whether the council had correctly applied the exemptions to withhold the information contained in appendices B, C and D of the cabinet report.
12. During the course of the Commissioner's investigation the council confirmed that it considered that the exemption for legal professional privilege also applied to some of the withheld information.
13. The Commissioner has confined his investigation to a consideration of these matters.

Reasons for decision

Section 43(2) – Prejudice to Commercial Interests

14. 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.
15. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43. 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."*³
16. The withheld information relates to negotiations towards an agreement between the council and OFG regarding the ownership of land and the delivery of a large-scale building development. The Commissioner

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http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

considers that it relates to the commercial interests of the council and OFG. He, therefore, considers that the withheld information falls within the scope of the exemption and has gone on to consider the nature of the prejudice and how it is linked to disclosure.

17. In this instance the council has argued that disclosure of the information contained in appendices B, C and D would be likely to prejudice its own commercial interests and the commercial interests of OFG. In considering its response to the request, the council, in accordance with the Code of Practice issued under section 45 of the FOIA, consulted with and sought the views of OFG.
18. In reaching his decision about the application of this exemption, the Commissioner has considered the arguments put forward by the council, OFG and the complainant. In the Commissioner's view, "prejudice" means not just that the disclosure of information must have some effect on the applicable interest(s), but that this effect must be detrimental or damaging in some real way. If a "trivial or insignificant" prejudice is claimed, such that it cannot be said to have any real detrimental or prejudicial effect, then the exemption should not be accepted. The detrimental effect need not necessarily be severe although the level of severity will inform any relevant public interest considerations.
19. During the course of the Commissioner's investigation the council reviewed its application of the exemption and decided that it would disclose some of the information from appendices B and C. The Commissioner has, therefore, confined his considerations to the remaining withheld information.

The nature of the prejudice

(i) Appendix B – Supplemental Officers Report

20. Appendix B is one of 4 appendices that were presented alongside a report for approval by the council cabinet on November 18 2010. The cabinet report sought approval for proposed land transactions and agreement to the form of negotiations towards a formal contractual arrangement between the council and OFG.
21. The council has argued that the disclosure of this information would be likely to prejudice its own commercial interests. It has stated that, at the time the request was received, the terms that would form the basis of any agreement between the council and OFG were still under negotiation, subject to any future planning permission obtained by the company.
22. The council stated that it wishes to keep its financial discussions and its negotiation strategy private so as not to weaken its position during

these and any future negotiations. In keeping with this, and in order to protect these interests, the council confirmed that appendix B had not been disclosed to OFG.

23. The Commissioner notes that some of the information contained in the document is mirrored in appendix C and would, therefore, already be known to OFG as a result of its involvement in the negotiation of the details of the Heads of Terms.
24. Having viewed the withheld information, the Commissioner notes that this contains references to proposed payments, rates of rent, other pricings and conditions for the transfer of land. The document also contains a consideration of the risks and benefits of the proposed approach.
25. The Commissioner considers that this information identifies a specific bargaining position and disclosure of this information would be likely to adversely affect the council's position to negotiate a favourable agreement with OFG. Disclosure of the information whilst negotiations are ongoing would reveal only a partial, potentially inaccurate picture of the form a future agreement between OFG and the council might take. This, with the increased potential for speculators to attempt to acquire interests in the proposed development area would be likely to combine to cause delays to the council's regeneration objective.
26. Having considered the relevant arguments, the Commissioner accepts that disclosure of the information would be likely to inhibit the council's ability to secure a best value deal for its regeneration objective. He has, therefore, concluded that disclosure of the withheld information from appendix B would be likely to prejudice the council's commercial interests and the exemption is engaged. The Commissioner also considers that, for the reasons identified in paragraph 25, disclosure of the information would also result in prejudice to the commercial interests of OFG.

(ii) Appendix C – Heads of Terms and Appendix D – Draft Associated Lock Out Agreement

27. The Heads of Terms document sets out the basis of a future contractual agreement in relation to the transfer of council land to OFG and the possible use of the council's compulsory purchase powers to facilitate the objective of Forest Gate regeneration. It was negotiated between the two parties during 2010 and approved by the council on 18 November 2010.
28. Appendix D sets out the draft basis for the form that the agreement between OFG and the council will take should the regeneration project

go ahead. In addition to mirroring some of the detail of appendix C, appendix D also contains details of the nature of a proposed lock out agreement. Lock out agreements can be defined in the following manner:

*"Written or oral contract between a seller and a buyer in which the seller agrees not to seek or accept other offers for a specified period. This arrangement allows the earnest buyer time to conclude the purchase free of pressure from other bidders."*⁴

29. In this section, the Commissioner has considered the council's and OFG's reasons for the engagement of the exemption as applied to both appendices.
30. The council has explained that it considers that disclosure of the information would also make it less likely that companies or individuals would provide the council with commercially sensitive information in the future and consequently undermine its ability to perform its public role in negotiating its regeneration objectives.
31. The council considers that the information identifies OFG's approach to the overall economics of the project and other sensitive matters such as landownership details. It has argued that disclosure of this information would be of use to OFG's direct competitors or other organisations and would be likely to affect its ability to participate effectively, resulting in significant loss of revenue.
32. The council has also argued that disclosure could undermine the ongoing negotiations between OFG and the council and adversely affect OFG's ability to do future deals of a similar nature.
33. The Commissioner is not convinced that the arguments provided by the council explain how, in this specific instance, disclosure would be likely to cause the proposed prejudice. For example, the council has not explained how the danger posed by prospective competitors is applicable in this situation. Whilst such arguments would be relevant in cases where, for example, tenders are received as part of an open procurement exercise, the negotiations between the council and OFG do not appear to take place against such a backdrop.

⁴ <http://www.businessdictionary.com/definition/lockout-agreement.html>

34. The council has confirmed that it accepts and supports the arguments provided by OFG during its consultation regarding the handling of the request. The Commissioner has, therefore, referred to OFG's submissions which provide more detail about the specific nature of the prejudice likely to occur and the causal link with disclosure.
35. OFG has argued that, as a result of its existing interests in the proposed regeneration area, it falls within the category of 'special purchaser'. In relation to land valuation, the Royal Institution of Chartered Surveyors (RICS) defines a special purchaser as "A purchaser to whom a particular asset has a special value because of the advantages arising from its ownership that would not be available to general purchasers in the market."⁵
36. By nature of its position as a special purchaser, OFG has argued that the transaction structure by which it hopes to acquire the council's land interest at a fair price is unique. Disclosure of the transaction model would be likely to harm OFG's ability to conduct favourable negotiations with other parties holding interests in the regeneration area. In this respect, OFG considers that disclosure of the information would be likely to result in prejudice to its ability to assemble remaining land interests and would inhibit its and the council's ability to deliver the regeneration objective.
37. OFG has argued that disclosure of the information would be likely to result in third party speculators acquiring interests in the site with the intention of delaying delivery of the project and achieving a ransoming position. As an outcome, OFG would have to pay more money to secure the site and the council's ability to achieve timely and cost effective regeneration would be inhibited. In this way, OFG argues that prejudice to both its own and the council's commercial interests would result.
38. Having considered the arguments put forward by OFG, the Commissioner is satisfied that the disclosure of the information in appendices C and D would be likely to inhibit OFG's and the council's ability to secure the timely and best value regeneration of Forest Gate. He has, therefore, concluded that the exemption is engaged.
39. Having found that the commercial interests exemption is engaged in relation to the withheld information, the Commissioner must next consider the application of the public interest test.

⁵ See: http://www.rics.org/site/download_feed.aspx?fileID=4064&fileExtension=PDF

Public interest arguments in favour of disclosing the withheld information

40. In weighing the balance of the public interest arguments the Commissioner has considered submissions from the complainant, the council and OFG.
41. All parties have made the general argument that disclosure of the information would enhance the quality of public debate surrounding these issues. The complainant has argued that disclosure of the information would assist those directly affected by the proposed development in submitting informed objections to the associated planning application.
42. There is similar agreement between the parties on the benefits of the general principle of transparency; on the link between openness and public confidence that authorities are acting in an accountable manner.
43. Concerns about the proposals for the redevelopment of Forest Gate are a matter of public record and a local pressure group, "Save Forest Gate", has been set up in this regard⁶. The complainant has argued that the need for transparency is greater where large amounts of public money are involved, such as in the case of the development under consideration.

Public interest arguments in favour of maintaining the exemption

44. The council and OFG have argued that disclosure of the information whilst negotiations between the two parties is ongoing would, as a result, generally discourage companies from entering into transactions with public authorities and entrusting authorities with relevant commercially sensitive information. This would inhibit the council's ability to secure goods and services it needs to provide as part of its public function. The council maintains that the public interest in accountability and transparency has been served by the information regarding the proposed development which has already been placed in the public domain⁷.

⁶ <http://www.saveforestgate.co.uk/>

⁷ In making this point, the council referred to the following website:
<http://www.forestgategeneration.com/intro/about-obsidian/>

45. OFG has argued that, in considering the public interest in disclosure, the timing of the request is significant. It considers that it is undeniably prejudicial for a public authority such as the council to have to release information during a commercial negotiation. OFG considers that those responsible for decision making at the council have had access to the relevant information and there is no role for public participation at the negotiation stage of a commercial transaction.
 46. Both the council and OFG maintain that the public interest in seeing that the council negotiates terms with a private company that secure best value is better served by the council being able to protect the details of its bargaining position whilst this process is in train. The council has argued that the opportunity for public engagement with the issues should be during the formal consultation which takes place as part of the associated planning application.
 47. The council has also argued that disclosure of the information prior to a formal agreement between the parties being reached would undermine the public interest in transparency and accountability. Disclosure of the information at this stage, information which, in effect, represents a provisional, working agreement, would result in the public only having access to a partial picture. As the terms of the agreement could be subject to future renegotiation, the public interest in being able to scrutinize the grounds upon which the agreement between OFG and the council is actually founded would not be served by the disclosure of the information.
 48. According to arguments provided by the council and OFG, public contribution to and scrutiny of the regeneration plan should take place at the planning permission stage. This is something which is provided for by planning legislation. The commercial agreement between the two parties, which is rehearsed in the withheld information, is a separate matter to the planning process. The public interest arguments in favour of disclosure are, therefore, based on a misunderstanding of the planning process.
 49. In relation to the complainant's submission that the public interest in transparency and accountability is enhanced in cases where a lot of public money is at stake, the council has argued that, in this instance, there is very little public money involved. Both OFG and the council have submitted that, as the proposed regeneration is a private sector project, it is qualitatively different to a scheme funded by public money.
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Balance of the public interest arguments

50. The Commissioner recognises that there is a general public interest in public authorities displaying transparency in their dealings with third parties, particularly where the outcome has a significant effect on substantial numbers of people. However, this has to be weighed against the public interest in authorities being able to negotiate best value deals, particularly where these relate to public assets.

51. In weighing the balance of the public interest arguments, the Commissioner has referred to his own awareness guidance which states:

*"Very often, in a commercial environment, the timing of the disclosure will be of critical importance. The application of any exemption has to be considered in the circumstances that exist at the time the request is made. Circumstances will change over time. Information submitted during a tendering process is more likely to be commercially sensitive whilst the tendering process is ongoing compared to once the contract has been awarded."*⁸

Whilst he notes that the withheld information does not relate to a tendering process, the Commissioner considers that the general point about the timing of disclosure is relevant in the case under consideration.

52. The Commissioner has considered whether disclosure of the withheld information during the negotiation process would serve the public interest in accountability and transparency. The transitional nature of the withheld information is such that, were it disclosed, the public would be presented with an incomplete version of the nature of the proposed agreement. Any ensuing public scrutiny would, therefore, not be based on access to the terms of the final agreement.

53. The Commissioner has also considered whether there would, in any event, be a genuine public interest in the withheld information being disclosed. In doing this he has referred to the council's and OFG's argument that the public interest submissions in favour of disclosure are based on a flawed interpretation of the planning process.

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http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

54. Whilst he does not intend to speculate as to the complainant's understanding of the planning process, the Commissioner does not accept that, even if the process were misunderstood, this would necessarily render the associated public interest argument invalid. The complainant's original request enquired as to the relationship between the council and OFG. By definition, the withheld information falls into this category and all parties have acknowledged that there is a general public interest in transparency and accountability around public authorities' commercial dealings with private companies.
55. However, in this instance, the Commissioner accepts that the timing of the request is relevant and that disclosure whilst negotiations are ongoing would be likely to result in the described prejudice to the commercial interest of the council and OFG.
56. In relation to this point, the Commissioner does not consider that the public interest in disclosure outweighs the public interest in protecting the likely damage to both parties' commercial interests.
57. The Commissioner accepts that there is a particularly strong public interest in transparency and accountability in cases where significant public expenditure is involved, for example, in tendering or procurement exercises. However, on the basis of the council's and OFG's submissions he has concluded that this is not applicable so he does not consider this to be an argument which contributes to the weighting in favour of disclosure.
58. On the facts of this matter, the Commissioner does not consider that there are any compelling potential benefits to the information being disclosed whilst negotiations between the council and OFG are ongoing. He has, therefore, concluded that the public interest disclosing the withheld information does not justify the likely damage that would be caused to the commercial activities of the council and OFG.
59. Consequently, the Commissioner is satisfied that, in the circumstances of this case, the balance of the public interest favours the maintenance of the exemption.
60. As he has found that all the information is exempt under section 43(2) of the FOIA the Commissioner has not gone on to consider the council's application of section 41 and 42 to the requested information.

Right of appeal

61. 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

62. 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.
63. 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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