

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 November 2012

Public Authority: London Borough of Enfield
Address: Civic Centre
Silver Street
Enfield
EN1 3XY

Decision (including any steps ordered)

1. The complainant requested information from the London Borough of Enfield ("the council") about payments for repairs relating to Botany Bay Farm. The council provided some information, but sought to withhold other information using the exemptions under section 40(2) and 43(2) under the Freedom of Information Act 2000 ("the FOIA"), or in the alternative, regulation 13(1) and 12(5)(e) of the Environmental Information Regulations 2004 ("the EIR"). These provisions concern third party personal data and prejudice to commercial interests.
2. The Commissioner's decision is that the information has been correctly withheld using the exemptions under section 40(2) and 43(2), with the exception of the name of a council staff member that the Commissioner considers was not exempt. The Commissioner also considers that the council breached section 1(1)(a), 1(1)(b), section 10(1) and 17(1) of the FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the name of the staff member who wrote the feasibility report
4. The public authority must take these steps 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

5. On 6 December 2011, the complainant requested information in the following terms:

"After considerable effort by myself and intervention by the F.O.I the following invoices were provided in relation to payments made to KNIGHT FRANK which all relate to Botany Bay Farm.

351H0192 £2245.00, 351H0340 £1706.25, 351H0563 £2184.00, 351G0725 £929.71, 351G0730 £1641.46

I request that the council provide explanatory and supporting documentation which fully explains the purpose and validity of these payments.

The council also provided a further 2 invoices, also made to KNIGHT FRANK which also related to Botany Bay Farm.

LBE0004 £12,556,50 LBE0009 £38,641,81

These two payments are in connection to repairs and I request the following

Information in support of these payments (a) estimates detailing the repairs

(b) extent of works evaluated by the council, (c) explanatory and supporting documentation which validates these payments".

6. The council failed to respond within the statutory 20 working days, which prompted a complaint to the Commissioner. Following this, a response was provided on 14 March 2012. The council said that it had disclosed the information requested and it provided some redacted material, citing the exemptions under section 40(2) and 43(2) of the FOIA.
7. The complainant requested an internal review on 10 May 2012.
8. The council provided a copy of its internal review to the complainant on 13 July 2012. It acknowledged the fact that it had previously provided redacted material without an adequate explanation. It confirmed that it wished to maintain its position that some information should be withheld and it provided a more detailed explanation. The council indicated that if the request ought to be considered under the EIR it would wish to rely on regulation 13(1) and regulation 12(5)(e) in the alternative. The council also added that it had located some additional information that

had not previously been identified at the time of its initial response although it wished to withhold this information for the same reasons.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He asked the Commissioner to consider the following issues:
 - The council's late response and its failure to conduct its internal review in a timely manner
 - Whether any more information was held
 - Whether the council correctly relied on exemptions under the FOIA
10. The complaint regarding the internal review has been dealt with in the Other Matters section of this decision notice because that issue is not covered by a statutory breach.
11. The council redacted the address of the property concerned from some of the documents. It is clear that the council has already disclosed that information however so it has not been given any further consideration in this notice. The council also told the Commissioner that it wished to withhold the bank details of its managing agent using section 41 of the FOIA, the exemption relating to information provided in confidence (which the council sought to rely on at a late stage). However, as the complainant told the Commissioner that the council had already disclosed those details, the Commissioner has not considered that information any further in this notice. The same applies to a redaction made by the council relating to the name of the tenant's managing agent, which had already been disclosed in another document. Finally, a figure was redacted at the end of a document itemising electrical services. That figure has now been disclosed as part of an invoice that was discovered by the council at a late stage in the Commissioner's investigation and it was therefore not necessary to consider that redaction in this notice.
12. During the course of the Commissioner's investigation, the council also identified that it held additional information that it had failed to identify and provide to the complainant. That information has now been provided, thereby informally resolving that part of the complaint.

Reasons for decision

Is the information environmental?

13. The council initially cited exemptions under the FOIA. However, in its internal review, it indicated that it considered that exceptions under the EIR may be relevant. The Commissioner asked the council to explain why it was of this view and it said that the information is about property on green belt land. The Commissioner's view is that this in itself does not mean that the information will be environmental. The council pointed out that some of the works carried out at the property included repairs to a leaking roof and it suggested that this may engage regulation 2(1)(f). The Commissioner was not persuaded that the EIR was relevant in this case. The information that has been redacted does not clearly concern the state of human health and safety in respect of it being affected by the state of the elements as required by this part of the EIR.

Was more information held?

14. Section 1(1) of the FOIA provides a general right of access to information held by public authorities. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's reasons for believing that more information was held. He will also consider the actions taken by the authority to check that the information was not held and he will consider if the authority is able to explain why the information was not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held. He is only required to make a judgement on whether the information was held "on the balance of probabilities".¹
15. As already mentioned in this notice, by the time the council had conducted its internal review, it conceded that it had not identified all the relevant information it held at the time of its initial request. The council said that this new information should be withheld and this has been considered in more detail below.
16. Towards the end of the Commissioner's investigation, the council also conceded that it held three additional invoices that it had previously

¹ This approach is supported by the Information Tribunal's findings in *Linda Bromley and Others / Environment Agency* (31 August 2007) EA/2006/0072

failed to identify and provide to the complainant, with the exception of tenant details which it maintained should be withheld.

17. The council said that it did not believe that any more information was held. It said that it had conducted searches of the paper files held by its managing agents. It said that there are no electronic records for the period in question. It said that the council's Property Services Division had also been consulted about the request.
18. The Commissioner understands from the council's response that it would have expected to have held more relevant information. The council acknowledged that historically, the records management in relation to this matter during the period in question had been poor and that it is true to say that its records appear to be incomplete. The council said that steps have now been taken to rectify this matter, although because of the previous poor practice, it was not able to confirm to the Commissioner whether any relevant information had been deleted, destroyed or mislaid. The Commissioner has commented on this issue further in the Other Matters section of this notice.

Section 40(2) – Third party personal data

19. This exemption provides that third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act 1998 ("the DPA").

Is the withheld information personal data?

20. Personal data is defined by the DPA as any information relating to a living and identifiable individual. For clarity, the council did not apply this exemption to all of the withheld information listed below however, having regard to the nature of the information and the circumstances, the Commissioner considered that it was appropriate to consider the application of the exemption under section 40(2) to more information than suggested by the council. The withheld information that the Commissioner has considered under this exemption is as follows:
 - Document A – a file note dated 16 August 2006 recording a meeting written by the advisor of the council's tenant
 - Document B – a file note dated 17 August 2006 recording a meeting and again, written by the advisor of the council's tenant
 - Tenant names
 - The email address of the tenant's advisor
 - Detail about financial transactions involving the council's tenant
 - A breakdown of the time spent by the council's managing agent dealing with various tasks relating to the tenant's circumstances and the breakdown of the costs involved in respect of dealing with

each task. Detail about the overall issue being managed has also been redacted.

- The name of one council staff member and an employee working for the council's managing agent

21. The Commissioner was satisfied that the information described above is personal data. It relates to issues involving the council's tenants, and other individuals who can be identified.

Would disclosure breach the Data Protection Principles?

22. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. There is no evidence available to the Commissioner to suggest that the disclosure of the information would be unlawful. The Commissioner's considerations below have therefore focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

Reasonable expectations

23. The Commissioner notes that there would generally be a reasonable expectation that precise details relating to an individual's tenancy and any issues that arose during that tenancy would be treated in a confidential way. The Commissioner was not persuaded that there is evidence to suggest that these normal expectations would not have arisen in this case given the nature of the withheld information.

24. In relation to the staff name that has been redacted, the Commissioner notes that the redacted name is the author of a report entitled "Feasibility report". The council told the Commissioner that the individual concerned is graded at middle management level. The Commissioner was not persuaded that the disclosure would have been outside this individual's reasonable expectations since the individual is at management grade and was clearly involved in the compilation of information that affected the council's decision-making in this matter. The council provided no specific evidence to the Commissioner to indicate that the individual had any other expectation.

25. In relation to employees working for the council's managing agent, the Commissioner was satisfied that there was no evidence to indicate that these individuals would expect their names to be disclosed in this context. Although the Commissioner appreciates that the company concerned has been contracted by the council, the employees of that

company are not public sector employees and would not have the same levels of expectation.

Consequences of disclosure

26. Given that the Commissioner was not satisfied that disclosure would have been within the reasonable expectations of those concerned (with the exception of the name of the author of the report), the Commissioner considered that the disclosure could be distressing or may prompt unwanted contact or unwarranted attention. Given the seniority of the individual who wrote the report, the Commissioner did not consider that there would be any adverse consequences to the disclosure.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

27. There is always some legitimate interest in the disclosure of information held by public authorities as this helps to support the aims of the FOIA to encourage accountability and transparency. It helps the public to understand the decisions made by public authorities.
28. The Commissioner also notes that there is a specific public interest in disclosure of information that concerns the expenditure of public funds. The Commissioner notes that the complainant has raised serious concerns about the way these issues have been dealt with by the council. The Commissioner understands that the council is currently investigating the matter. However, overall, the Commissioner was not satisfied that the legitimate public interest at the time of the request was sufficiently strong to outweigh the legitimate interests of the individuals concerned.
29. While the Commissioner can appreciate that there is a strong public interest in understanding the costs being incurred by the council in relation to the properties that they own, he does not accept that it is necessary to disclose the level of detail requested by the complainant to satisfy that legitimate interest. The complainant has already been provided with a significant amount of information about the repairs carried out and the costs involved, and an investigation is currently being pursued. The Commissioner had regard to the nature of the information in dispute against this background when deciding that the balance of the public interest favours withholding the information on this occasion.
30. The Commissioner acknowledges that the complainant has concerns about the way these issues have been handled, however an investigation is on-going to consider the validity of those concerns and it

would not be proportionate to disclose information which would go beyond the usual expectations of confidentiality that the tenants had a right to expect in the circumstances at this time.

31. The only exception to the Commissioner's analysis above is the staff name of the individual who wrote the feasibility report. As indicated already, given the role of that individual and the circumstances, the Commissioner was not persuaded that disclosure would have been outside his reasonable expectations or that there would be any adverse consequences to the disclosure. In view of those findings, the Commissioner concluded that the legitimate interest in the council being transparent outweighed concerns about the individual's privacy.

Would the disclosure be necessary?

32. For clarity, when a disclosure would be fair, the Commissioner must consider whether it would be necessary in accordance with Condition 6 in Schedule 2 of the DPA. The full wording of Condition 6 is as follows:

"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject".

33. The Commissioner considers that it is important that public authorities are transparent about the work activities of its staff members wherever possible and appropriate and it is necessary to disclose the name to achieve this in this case.

Section 43(2) – Commercial interests

34. This exemption provides that public authorities may withhold information if the disclosure would or would be likely to prejudice the commercial interests of any party, including itself.
35. The council relied on this exemption in respect of the precise rate it had agreed with its managing agent. It also relied on this exemption in respect of some other information however since the Commissioner was satisfied that this information was exempt under section 40(2), it is not necessary to consider whether section 43(2) had been correctly engaged in respect to that information.
36. It has been established in a number of previous rulings by the Information Tribunal that the word "would" means "more probable than not" and "likely" denotes less of a risk but one which should still be a real and significant one, rather than a mere possibility.

37. It has also been established that when engaging this exemption, public authorities must ensure that they do not speculate on behalf of third parties. The Commissioner expects public authorities to provide evidence that its arguments genuinely reflect the concerns of the relevant third parties. This is in line with the decision by the Information Tribunal in the case of *Derry City Council v The Information Commissioner* ([EA/2006/0014](#)). In the latter case, the council tried to argue that disclosure of information would prejudice the commercial interests of Ryan Air, but as the arguments expressed only represented the council's own thoughts on the matter rather than any concerns expressed by Ryan Air itself, the Tribunal found that section 43(2) was not engaged.
38. In this case, the council argued that the disclosure of the precise rate agreed with its managing agent would prejudice the commercial interests of the managing agent and itself. The council did not specify clearly whether it wished to argue that the prejudice above would or would be likely to occur, and in the absence of any specific evidence to indicate that the higher threshold would be appropriate, the Commissioner considered whether the prejudice described would be likely to occur.
39. In relation to prejudice to the managing agent's commercial interest, the council told the Commissioner that its managing agents had made it clear that they neither expect nor wish the council to disclose the precise rate since this is considered by the company to be commercially sensitive information. The council provided a direct quote from the company concerned that was contained in an email sent by the company to the council on 26 July 2012. In the email, the company expressed the following concerns:

"We submitted a quotation via a formal tender process for the provision of management and consultancy services to LBE. We were successful in that tender. The price quoted was a material consideration in the decision-making process.

The price quoted was therefore an aspect where Knight Frank LLP was successful against others in a competitive environment.

The release of that information is a release of Knight Frank LLP's competitive advantage.

This could be used by others at some future date and to our disadvantage in competitive bid situations not only in any future role with LB Enfield but also for other clients and roles".

40. The Commissioner notes that the information remains current. Given this, the Commissioner is willing to accept the argument advanced by the council's management agent above. Disclosure of the precise rate agreed for the work is an element that has been subject to negotiation and agreed between the council and its managing agent. The Commissioner was persuaded that if the precise rate agreed was disclosed, this would be likely to adversely affect the company's ability to compete fairly with others, either bidding for work from this council in the future or when trying to obtain similar contracts from other authorities. The Commissioner accepts the argument that there is a real risk that disclosure may lead to undercutting or the company facing pressure to offer better rates. He has had regard to the fact the information is still current, the level of competition, and the likelihood that the company will wish to bid for similar work in the future.
41. In relation to prejudice to the council's own commercial interests, the council said that its commercial interests would be likely to be prejudiced because the information in question now forms part of "a potential litigation claim". It said that if its ability to defend the claim was prejudiced, this would be likely to affect its commercial interests, albeit indirectly. This argument has not been considered any further by the Commissioner because the Commissioner was not persuaded by the council that this argument relates to the council's commercial interests.
42. The council also said that it had considered that it is important that the council is able to maintain trust and integrity in respect to its dealings with contractors. It said that in order to do this, the council places a great emphasis on protecting information such as the rate agreed. The council argued that to do otherwise would be likely to have a detrimental impact on the prices submitted if the companies involved were concerned about protecting their own commercial interests. The council said that this would be likely to lead to higher prices and less value for money for the council tax payer.
43. Ultimately, the Commissioner was not persuaded that the prejudice described was likely to occur. The Commissioner's published guidance on this exemption points out that public authorities should be wary of making the argument that the potential for commercial information to be released would reduce the number of companies willing to do business with the public sector in a competitive way, resulting in reduced competition and increased costs for the taxpayer. The guidance states the following:

"In practice, many companies may be prepared to accept greater public access to information about their business as a cost of doing business with the public sector. And the overall value of public sector contracts is a great incentive to tender for them.

Increasing access to information about the tendering process may in fact encourage more potential suppliers to enter the market. A better understanding of the process...could also lead to more competition and so decrease costs to the public authority. Indeed where a contract comes up for renewal, limiting this kind of information may well favour the current contractor and reduce competition”.

44. Further to the above, since the introduction of the FOIA, there is no longer any guarantee that contractual information will not be disclosed and organisations entering into public sector contracts should appreciate that there is a greater expectation of transparency and accountability and that commercial information will be disclosed unless the public interest in maintaining the exemption is stronger than the public interest in disclosing it.
45. For the reasons above, the Commissioner was prepared to accept that section 43(2) was engaged because the disclosure of the precise rate agreed would be likely to prejudice the commercial interests of the council's managing agents. However, the Commissioner was not prepared to accept the general argument advanced by the council in respect of prejudice to its own commercial interests.

Public interest arguments in favour of disclosing the requested information

46. There is always some public interest in the disclosure of information for its own sake. This is because disclosure of information serves the general public interest in promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process.
47. There is also a more specific public interest in understanding how public money has been spent when a contract is awarded to a third party and whether the council has achieved value-for-money. It is also the Commissioner's view that the disclosure of information of this nature should to some extent be within the reasonable expectations of contractors when they agree to perform services on behalf of a public body, using public money.

Public interest arguments in favour of maintaining the exemption

48. The exemption under section 43(2) is designed to recognise that there are certain circumstances in which it is appropriate to withhold information that would harm the commercial interests of a third party. There is a public interest in ensuring that business is conducted in a fair

and competitive manner and that commercially sensitive information is not disclosed unless it would warranted and proportionate.

49. In this case, the Commissioner has accepted that there is a real risk that the council's managing agent would be hindered from competing fairly for work in the future if the information was disclosed.

Balance of the public interest arguments

50. The Commissioner's general position is that information concerning contracts will be more sensitive before the contract is signed. After that, it is generally the case that the competition element will diminish to some extent. It is also important at that stage for public authorities to make details of the contract reasonably transparent because contracts involve the investment of a sum of public money, usually over a few years. In the Commissioner's view, being exposed to the possible risk of some commercial harm is often the price that organisations have to pay for securing lucrative and valuable public sector contracts. The FOIA has been in place for some time and organisations entering into agreements with public authorities should be aware of their obligations to be as transparent and accountable as possible. Disclosing information of this nature may also have the benefit of increasing competition.
51. However, the Commissioner appreciates that in relation to any future bidding processes, the costs are likely to form a very significant part of the bid and would be highly useful to the company's competitors. The complainant has been provided with the total cost of the work carried out by the managing agent. The Commissioner considered that this was a proportionate approach in the circumstances that strikes a balance between being transparent and accountable about the costs incurred by the council in managing this case and limiting commercial harm to the managing agents when bidding for future work.

Procedural issues

52. In this case, the council responded to the request outside of the 20 working day timeframe and supplied some information. This was a breach of section 10(1) of the FOIA.
53. The council also sought to rely on exemptions under the FOIA outside the 20 working day timeframe and did not explain the reasons for applying those exemptions when it did respond. This was a breach of the council's obligations under section 17(1).
54. The Commissioner has found that the name of a council staff member had been incorrectly withheld for the reasons given above. The council also identified and disclosed some information at a late stage. The Commissioner has therefore found the council in breach of its general

obligation to identify that it holds information and where possible provide information under section 1(1)(a) and (b).

Other Matters

Internal review

55. There is currently no statutory time limit regarding internal reviews. However, the Code of Practice under section 45 states that they should be undertaken promptly. The Commissioner's guidance recommends that an internal review should not generally take longer than 20 working days. The Commissioner notes that the council exceeded this time on this occasion however he trusts that it will make improvements in the future. For ease of reference, the Code may be accessed here:

<http://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/code-of-practice>

Records Management

56. The Commissioner notes that the council has acknowledged that it has encountered issues surrounding records management. The council has assured the Commissioner that its records management has improved since that time however the Commissioner would also like to draw the council's attention to the recommendations in the Code of Practice under section 46 regarding best practice in this area. The Code may be accessed via the link shown above.

Right of Appeal

57. 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

58. 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.
59. 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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