

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 February 2014

Public Authority: Cleveland Fire Authority
Address: Headquarters
Endeavour House
Stockton Road
Hartlepool
Cleveland TS25 5TB

Decision (including any steps ordered)

1. The complainant has requested information about proposed mutualisation of Cleveland Fire Brigade and the mutualisation process in general. Cleveland Fire Authority ("CFA") refused to provide this citing section 43 (commercial interests exemption) as its basis for doing so. At internal review it restated reliance on section 43, and introduced reliance on section 41 (information provided in confidence) and section 42 (legal professional privilege). During the course of the Commissioner's investigation it withdrew reliance on any exemptions in relation to part of the withheld information.
2. The Commissioner's decision is that CFA is entitled to rely on the exemptions it has cited as a basis for withholding the remainder of the requested information.
3. However, the Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information referred to in the Confidential Annex to this Notice as the first tranche of information.
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.

Background, request and response

5. CFA sets the direction, procedures and policies of Cleveland Fire Brigade.¹ On 20 September 2012, the Cabinet Office indicated financial support for a proposal to mutualise Cleveland Fire Brigade.² On 6 January 2014 (6 months after the request was made), CFA announced a public consultation on the proposed mutualisation.³
6. The proposed mutualisation has given rise to considerable controversy.⁴ In February 2013, the Cabinet Office issued a statement refuting suggestions that the proposal would lead to privatisation of the Fire Service.⁵
7. On 12 June 2013, the complainant requested information of the following description:

"I request all correspondence, documentation and statistical data held by the Authority related to the proposed mutualisation of Cleveland Fire Authority and the mutualisation process in general".
8. On 27 June 2013, CFA responded. It refused to provide the requested information. It cited the exemption at section 43 (prejudice to commercial interests) as its basis for doing so.
9. The complainant requested an internal review on 16 July 2013. CFA sent him the outcome of its internal review on 13 September 2013. It revised its position. It restated reliance on section 43, and introduced reliance on section 41 (information provided in confidence) and section 42 (legal professional privilege).

¹ <http://www.clevelandfire.gov.uk/fire-authority/what-we-do/>

² <https://www.gov.uk/government/news/95-000-boost-for-cleveland-fire-service-s-bid-to-mutualise>

³ <http://www.clevelandfire.gov.uk/2014/01/public-consultation-launched-today/>

⁴

http://www.thenorthernecho.co.uk/news/local/teesvalley/stockton/10217754.Claims_that_s_hake_up_at_Cleveland_Fire_Brigade_paves_way_for_privatisation/

⁵ <https://www.gov.uk/government/news/ministers-respond-to-false-alarm-of-fire-service-privatisation>

Scope of the case

10. The complainant contacted the Commissioner on 18 September 2013 to complain about the way his request for information had been handled.
11. During the course of the Commissioner's investigation, CFA withdrew reliance on any exemptions in relation to information contained in six documents. For ease of future reference, the Commissioner will now refer to this as the "first tranche" of information. The specific information to which this refers is identified in a Confidential Annex to this Notice.
12. The Commissioner has considered whether CFA is entitled to rely on the exemptions it has cited as a basis for refusal in relation to the rest of the information that has been withheld in this case. For ease of future reference, the Commissioner will now refer to this as the "second tranche" of information.

Reasons for decision

The first tranche of information

13. CFA withdrew reliance on any exemptions in relation to the first tranche of information. Given that CFA no longer considers the first tranche of information to be exempt, the Commissioner requires CFA to disclose it.

The second tranche of information

14. CFA seeks to rely on three exemptions as a basis for refusing to provide the second tranche of information, namely section 41 (information obtained in confidence), section 42 (legal professional privilege) and section 43 (prejudice to commercial interests). In relation to some of the information, it relied on two exemptions. However, it did not rely on all three exemptions in relation to any of the information.
15. Where the application of one exemption fails in relation to an item of withheld information, the Commissioner will consider the application of the other exemption cited in relation to the same information. Where the Commissioner is satisfied that an item of information is exempt by virtue of one exemption, he will not go on to consider whether that same item of information is exempt by virtue of the other exemption cited in relation to it. Full details of which parts of the second tranche of information have been considered in relation to which exemptions is set out in a Confidential Annex to this Notice.

Section 42 – legal professional privilege

16. Section 42(1) provides an exemption for information subject to legal professional privilege. This is a class-based exemption. Information which falls within this class is exempt from disclosure. However, by virtue of section 2 of the FOIA, Section 42(1) is qualified by a public interest test, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
17. There are two types of legal professional privilege; litigation privilege and advice privilege. Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant (main) purpose of seeking or giving legal advice. The legal adviser must have given advice in a legal context; for instance, it could be about legal rights, liabilities, obligations or remedies.
18. The Commissioner has considered the information to which section 42(1) has been applied and is satisfied that the information is subject to advice privilege and is therefore exempt under section 42(1).
19. As noted above, section 42(1) is qualified by a balance of public interest test.

Public Interest Test

20. Having found that the exemption has been correctly applied to the requested information, the Commissioner has gone on to consider the public interest factors present in this particular case.

The complainant's arguments

21. The complainant has drawn particular attention to the controversy surrounding the proposed mutualisation. In his request for internal review, addressing the CFA's argument that the matter was still "live", he said:

"It is precisely because matters are still in flux that understanding the current position of Cleveland Fire Authority is so essential. Cleveland noticeably did not participate in the pre-consultation exercise undertaken by the Chief Fire Officers' Association [he supplied a copy to the CFA for reference] for the Department of Communities and Local

Government.⁶ As such it is the only Fire Authority in England whose views on the subject are not public knowledge. This knowledge is essential so proper democratic oversight of changes to this vital public service can occur. The wider public is entitled to be a part of that decision making process, not simply being presented with a fait accompli.

It cannot be right that public money continues to be spent on consideration of a mutualisation process that is opaque and secretive”.

22. The complainant, who is a Member of Parliament, also supplied the names of a number of Members of Parliament for neighbouring areas who supported his position. He said “As a sign of the intense public interest in this matter, listed below are those democratic representatives of the area that support my appeal on public interest grounds”.

CFA's arguments

23. CFA submitted the following arguments in support of maintaining the exemption at section 42(1):
- The withheld information forms part of a decision making process that is not yet concluded.
 - Disclosure of the information would prejudice the decision-making process currently being followed.
 - Disclosure could prejudice the Authority being able to commission future work by legal consultants.
 - The public interest is best served by maintaining the exemption to safeguard openness in communications and ensure [it] continues to access full and frank legal advice.

The Commissioner's decision

24. The Commissioner recognises that, as section 42 is a class-based exemption, this demonstrates, in effect, an inbuilt public interest in protecting communications between lawyer and client that are subject to legal professional privilege. In considering the balance of public interest, the Commissioner is mindful of comments made by the Information Tribunal in *Bellamy and Secretary of State for Trade and Industry* (EA/2005/0023). In that case the Tribunal made clear (at paragraph 35

⁶ <http://www.cfoa.org.uk/14942>

of the judgement) that *'at least equally strong countervailing considerations would need to be adduced to override that inbuilt interest. It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case'*.

25. This does not mean that Section 42(1) should be treated as an absolute exemption. However, it does mean that there must be some clear and compelling justification for disclosing the specific information, such that the strong inbuilt public interest in protecting confidential communications between lawyer and client is outweighed.
26. The complainant has drawn attention to widely-reported concerns about the proposed mutualisation. These concerns have been raised by Members of Parliament. He has also raised concerns about what he sees as a lack of transparency about CFA's position.
27. The Commissioner acknowledges that there is a public interest in understanding more about the proposed mutualisation process and checking the merits of legal advice given to the CFA about such a novel proposal. Arguably, there is a public interest in testing the legal advice against the analysis of other informed stakeholders such as the complainant and others in order to determine the relative merits of advice that was obtained at public expense.
28. However, the Commissioner is not persuaded that the complainant's arguments are sufficiently compelling to outweigh the public interest in protecting lawyer-client confidentiality. In reaching this view, he has had particular regard for the age of the information withheld from disclosure under the FOIA in this case. The requested information is about an issue that remains live. It clearly attracts advice privilege. The Commissioner considers that this adds particular weight to the public interest in maintaining the exemption at section 42 and protecting lawyer-client confidentiality in this case.

Section 42 – Conclusion

29. The Commissioner has concluded that CFA is entitled to rely on section 42 of the FOIA in relation to the information to which this exemption has been applied.

Section 43

30. Section 43(2) provides that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).'

31. In order for a prejudice based exemption, such as section 43(2) to be engaged the Commissioner believes that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.
32. In relation to the commercial interests of third parties, the Commissioner does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, the Commissioner expects that arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns.

The parties' arguments

33. CFA put the following arguments in support of its use of section 43(2):
- Each of the consultants have submitted arguments as to the impact disclosure would have on trust and confidence in their work in providing advice. Disclosure would therefore prejudice their ability to undertake commercial activities in a competitive environment
 - The consultants have also argued that disclosure would reveal their methodologies which is commercially sensitive information.

- It also argued that that where there is a decision to convert the Cleveland Fire Brigade to a public sector mutual ("PSM"), disclosure would impact on that organisations ability to operate in a commercial environment.

34. The complainant argued that Cleveland Fire Brigade was not a commercial entity and that "commercial interests of a hypothetical, future mutual cannot be cited as a cause for refusing to release this information now".

The Commissioner's position

35. With regard to the three limb test for engaging a prejudice based exemption set out above, the Commissioner is satisfied that the first limb is clearly met because the nature of the harm envisaged, namely prejudice to the commercial interests of the consultants, clearly relates to the interests which section 43(2) is designed to protect.
36. With regard to the second limb, the Commissioner is also satisfied that there is a causal link between disclosure of the withheld information and prejudice to both the consultants' and the hypothetical PSM's commercial interests. This is because it is reasonable to argue that disclosure of information would reveal information about the consultants' methodologies and general approach to the project for which they were engaged. Furthermore, the Commissioner is satisfied that the resultant prejudice can be correctly described as one of substance given the value of the contracts under which the contractors were engaged.
37. As regards the third limb, the Commissioner agrees that the likelihood of this prejudice occurring is one that is more than hypothetical at least in respect of the consultants. He is less convinced as regards the commercial interests of the PSM. It is not yet decided that Cleveland Fire Brigade will become a PSM.
38. The withheld information is at the very heart of the work of the consultants. It is clear, from the statements submitted by the consultants to CFA regarding this request, that they envisage harm to their commercial interests where their bespoke advice is disclosed. That said, they acknowledge that it remains a matter for CFA to decide as to disclosure.
39. The Commissioner also thinks that the age of the information is relevant here. The information is work recently created by the consultants and, therefore includes their most recent approach to the matter under consideration. The proposal for a PSM is a pilot scheme and, as shown in Note 2, relates to an approach to public sector entities which the UK Government is keen to promote. It is therefore likely that there may be

other similar exercises in future which the consultants may wish to contribute to. Disclosure would give other consultancies the ability to tailor their tender submissions by drawing on the work done in this case.

40. In light of the above, and with particular regard to the age of the withheld information in question, the Commissioner agrees that section 43(2) is engaged.

Section 43 – Balance of public interest

41. The Commissioner has considered the complainant's argument in favour of disclosure that are set out above in the section of this notice which addresses section 42.

42. CFA put forward the following arguments in favour of maintaining the exemption:

- The information is incomplete.
- The withheld information forms part of a decision making process that is not yet concluded.
- Disclosure of the information would prejudice the decision-making process currently being followed.
- Disclosure could prejudice the Authority being able to commission future work by consultants.
- Disclosure could damage the reputation of Cleveland Fire Brigade or the confidence that customers, suppliers and the public might have in Cleveland Fire Brigade.
- Disclosure could negatively affect the commercial interests of the consultants and Cleveland Fire Brigade.
- Disclosure at this stage presents a significant risk that the decision-making process is influenced and potentially corrupted.

43. In the Commissioner's view, arguments as to the risk to the decision making process are not relevant here. They do not relate to the harm that section 43 seeks to avoid. They relate more closely to section 36 which covers various prejudicial outcomes to the effective conduct of public affairs. The Commissioner explained to CFA that he was willing to consider the late application of other exemptions if CFA wished to introduce any. However, CFA did not introduce any other exemptions beyond the three under consideration in this notice (sections 41, 42 and 43).

44. The complainant has drawn attention to the considerable local concerns that have arisen about the proposed PSM. In the Commissioner's view, there is a compelling public interest in seeing what advice CFA has received from consultants and what factors those consultants have drawn particular attention to or given weight to. The proposal is a wholly novel way of delivering an essential public service and any changes to the current model should be discussed openly. Disclosure would serve the compelling public interest in transparency in this case.
45. However, the timing of the request is crucial. The advice provided by the consultants was live at the time of the request and is still fresh at the time this notice was completed – this is the consultants' recent work based on its current expertise and experience. There is little public interest in providing the consultants' competitors with a commercial advantage over the consultants themselves. The consultants do not have access to their competitors' experience and expertise.
46. Another factor that the Commissioner has considered is the public consultation exercise (commenced in January 2014) itself. The public interest in addressing the considerable local concerns referred to above is satisfied to a significant extent by the consultation. The Commissioner recognises that the public consultation post-dated the request. However, it was envisaged at the time of the request.

Section 43(2) - Conclusion

47. The Commissioner considers the matter is finely balanced but he has concluded that the public interest in maintaining this exemption outweighs the public interest in disclosure. In reaching this view, the Commissioner has given particular weight to the timing of the request and the relative age of the requested information.

Section 41 – information provided in confidence

48. Section 41 has been applied in isolation to a section of the second tranche of information.
49. Section 41(1) of the FOIA states that information is exempt from disclosure if:

"(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

Was the information obtained by CFA from any other person?

50. By way of background, CFA explained to the Commissioner that the information in question was provided to it by consultants. In response to further enquiries from the Commissioner, it explained which information had been provided by which consultants.
51. The Commissioner is, therefore, satisfied that the withheld information was obtained by CFA from another person.

Does the information have the necessary quality of confidence?

52. For the information to have the necessary quality of confidence it must not be trivial and otherwise available to the public. Information which is of a trivial nature or already available to the public cannot be regarded as having the necessary quality of confidence.
53. Having viewed the withheld information the Commissioner notes that it relates to the mutualisation proposal referred to above. The information is detail provided by consultants on various aspects of the proposal. The Commissioner is satisfied that the information is not trivial and that it had not been made available to the public. For these reasons the Commissioner finds that the information to which section 41 has been applied has the necessary quality of confidence.

Was the withheld information imparted in circumstances importing an obligation of confidence?

54. CFA provided detail which showed that both it and the consultants had taken care to keep the information confidential because of its sensitivity. For example, the information had not been widely circulated within CFA.
55. Having viewed the withheld information and, taking into account the comments of CFA, the Commissioner accepts that the information was provided to CFA under an implied duty of confidence.

Would an unauthorised use of the withheld information cause detriment to the confider and result in an actionable breach of confidence?

56. CFA has explained that disclosure would cause detriment to the confider because it is information created using its expertise and experience. Its arguments in this regard were not particularly detailed and focussed on prejudice to the commercial interests of the confider. In this way, they were more applicable to section 43. However the Commissioner is satisfied that the information supplied by the confider (the consultants) is bespoke work that it provided to its client on a specific project. Disclosure would be likely to give rise to detriment to the confider because it would allow anyone, including their competitors, to use it.

57. In view of the likely detriment which disclosure would cause to the confider of the information (the consultants), the Commissioner is satisfied that release of the information to which section 41 has been applied would be likely to give rise to an actionable breach of confidence.

Public interest defence

58. Since Section 41 is an absolute exemption there is no requirement for an application of the conventional FOIA public interest test. However, disclosure of confidential information where there is an overriding public interest is a *defence* to an action for breach of confidentiality. The Commissioner is therefore required to consider whether CFA could successfully rely on such a public interest defence to an action for breach of confidence in this case.

59. Whereas in the case of qualified exemptions, the public interest test operates in favour of disclosure unless exceeded by the public interest in maintaining the exemption(s) applied, the reverse is the case in respect of the duty of confidence public interest test. Here, it is assumed that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.

60. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure of the information requested against both the wider public interest in preserving the principle of confidentiality and the impact that disclosure of the information would have on the interests of the confider. As the decisions taken by courts have shown, very serious public interest matters must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality.

61. As with section 43, a key point to consider here is the timing of the request. As above, the Commissioner has considered the circumstances prevailing at the time of the request.

62. Again, as with his consideration of section 43, the Commissioner accepts that there is a strong public interest in transparency about the advice given to CFA in this case.

63. However, the Commissioner has not seen any evidence of illegality, misconduct or gross immorality which would warrant the disclosure of

the information at the time of the request or which could form the basis of a public interest defence against breach of confidentiality.

64. Whilst the Commissioner notes that there is a public interest in learning more detail about what CFA was considering at the time of the request and what advice it had received in relation to the proposed mutualisation, he does not consider that the public interest in making this available was sufficiently strong at the time of the request. It is very unlikely that the public interest defence would, in this case, have been of sufficient strength to defend disclosure in the event that the breach resulted in legal action being taken.

Section 41 - Conclusion

65. The Commissioner is therefore satisfied that the information to which section 41 has been applied is exempt from disclosure by virtue of that exemption.

Right of appeal

66. 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: GRC@hmcts.gsi.gov.uk

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

67. 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.
68. 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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