

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 24 April 2014

**Public Authority:** Bromley Clinical Commissioning Group

**Address:** Bassetts House  
Broadwater Gardens  
Orpington  
Kent  
BR6 7UA

#### **Decision (including any steps ordered)**

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1. The complainant has requested a copy of a report written by property consultants GVA for Bromley Clinical Commissioning Group (the CCG) about potential sites for a new 'Well Being Centre'. The CCG refused to disclose this information under section 43(2) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the CCG has failed to demonstrate that section 43(2) FOIA is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Provide a copy of the withheld GVA 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**

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5. On 10 December 2013 the complainant requested information of the following description:

"I wish to make an FOI request to BCCG.

BCCG paid £16k excluding vat to review the different properties that were potential sites for a Well-Being-Centre. They were used instead of local estate agents because I was told at Public Question Time, they could report on all the other costs in developing a site. The consultants were named Property Consultancy Company GVA.

Under the FOIA I wish to see all those reports issued by GVA to BCCG without any redactions."

6. The CCG responded, it refused to disclose the information requested under section 43(2) FOIA.
7. The complainant requested an internal review on 8 January 2014. The CCG sent the outcome of its internal review on 7 February 2014. It upheld its original position.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 11 February 2014 to complain about the way his request for information had been handled.
9. The Commissioner's investigation has looked at whether the CCG correctly applied section 43(2) FOIA to the withheld information.

### **Reasons for decision**

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#### **Section 43 – commercial interests**

10. 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.
11. 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."*<sup>1</sup>

12. Upon viewing the withheld information the Commissioner considers that it relates to the potential acquisition and development of a site for, amongst other things, a 'Well Being Centre'. He considers that this is a commercial activity and does therefore fall within the scope of the exemption. The CCG has confirmed that this is the only report produced by the GVA on this issue.
13. Having concluded that the withheld information falls within the scope of the exemption the Commissioner has gone onto consider the prejudice which disclosure would cause and the relevant party or parties which would be affected.

*Whose commercial interests and the likelihood of prejudice*

14. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.
15. The CCG has stated that disclosure of the information would prejudice its own commercial interests and the commercial interests of its public sector partners including NHS Property Services and Community Health Partnerships.

*The nature of the prejudice*

16. The CCG has argued that it is still working to complete a Stage 1 Business Case for the Project to which the requested report relates, in line with national NHS guidance. It said that this will include a range of financial and other information, including an evaluation of the potential sites based on a scoring methodology, combining both financial and non-financial factors. It said that much of the latter will be derived from the withheld GVA report.

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<sup>1</sup> See here:

[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](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)

17. The CCG went on to explain that it does not have statutory authority to develop a capital project such as the Health and Well-Being Centre itself. It explained it does so through development partners, which may include other national public sector bodies and also private sector developers. It said that in relation to this project, the CCG, via NHS Property Services, is yet to engage in formal discussions with the latter. It argued that the release of the information in the withheld GVA report would be prejudicial to both the CCG and its public sector partners until those negotiations have been completed, which will not be until later in 2014. It said that releasing the withheld GVA report would weaken the bargaining position of the CCG and its public sector partners in ensuring that the project achieves best value for money for the public purse.
18. The Commissioner's guidance and many previous decision notices have accepted the general principles that information relating to a commercial activity is more likely to be sensitive when the activity in question is live<sup>2</sup>.
19. However, the Commissioner considers that arguments which identify this generic scenario alone are not sufficient to engage the exemption. The Commissioner considers that the prejudice test is not a weak test, and a public authority must be able to point to prejudice which is "real, actual or of substance" and to show some causal link between the potential disclosure of specific withheld information and the prejudice.
20. The Commissioner considers that an evidential burden rests with public authorities to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, real, actual or of substance. In the Commissioner's view, if a public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected.
21. In this case, the CCG has argued that disclosure of the information would result in prejudice to its own and its public sector partner's competitive position in relation to forthcoming formal discussions with private sector developers. However, the Commissioner considers that the CCG has failed to identify precisely what form the prejudice would take and failed to clarify how this would be caused by the disclosure of the specific withheld information, that is information as to the potential

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<sup>2</sup> See, for example, this decision notice relating to the London Borough of Newham:  
[http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs\\_50431421.ashx](http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs_50431421.ashx)

value and projected income of developing a site. As the CCG has explained that it does not have the statutory authority to develop a capital project, it has not demonstrated how disclosure of the whole report, would or would be likely to prejudice the CCG's or its public sector partners' commercial interests. Furthermore it has not directed the Commissioner to explain why any particular parts of the report would have the prejudicial affect it has claimed. Finally the Commissioner notes that it has not explained how disclosure of this information, would or would be likely to damage its negotiating position with the private sector body, which at the time the request was made, had not acquired the site in question. The Commissioner has provided some further information to explain his position in the Confidential Annex attached to this Notice.

22. The Commissioner has therefore concluded that the CCG has failed to demonstrate that the exemption is engaged. As he does not consider that the exemption is engaged, the Commissioner has not gone on to consider the public interest arguments.

## Right of appeal

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23. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

24. 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.
25. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**