

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 December 2017

Public Authority: Chief Constable of Cumbria Constabulary
Address: Police Headquarters
Carleton Hall
Penrith
Cumbria
CA10 2AU

Decision (including any steps ordered)

1. The complainant has requested a copy of a contract between Cumbria Constabulary and its insurer. Cumbria Constabulary disclosed the majority of the contract, but withheld financial information, citing the exemption at section 43 (commercial interests) of the FOIA.
2. The Commissioner's decision is that Cumbria Constabulary was entitled to rely on the exemption at section 43 to withhold the financial information. However, as Cumbria Constabulary responded to the request outside of the 20 working day timescale for compliance, she found a breach of section 10 (time for compliance) of the FOIA.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 6 March 2017, the complainant wrote to Cumbria Constabulary and requested information in the following terms:

"Please supply a copy of the contract held by CC with each its claims handlers since 2013 to date.

Also copy of the contract with the CC insurers from 2013 to date."

5. Having heard nothing, on 3 April 2017 the complainant wrote asking for a response to the request. Cumbria Constabulary replied the following day. It apologised for the delay. It said that the request was being

actioned, that it was awaiting information from a third party before it could respond, and that it would do so as soon as possible.

6. Cumbria Constabulary subsequently responded to the request on 21 June 2017. It disclosed a copy of a contract with its insurer, Gallagher Bassett. It redacted a small amount of financial information from the contract, setting out sums insured and fees chargeable, and said that the information was exempt from disclosure under section 43(2) (commercial interests) of the FOIA.
7. Following an internal review, Cumbria Constabulary wrote to the complainant on 22 July 2017. It accepted that its initial response had exceeded the statutory 20 working day time scale for compliance and apologised for the delay. It upheld its application of section 43 of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 25 July 2017 to complain about the internal review. The Commissioner asked her to provide a copy of the internal review and the reason for her dissatisfaction. These were provided by the complainant on 12 October 2017. The complainant wished to challenge the application of section 43 of the FOIA. She was also concerned by delays in providing both the initial response and the internal review, and said that Cumbria Constabulary had been late in responding to her previous requests.
9. The Commissioner has considered in this decision notice Cumbria Constabulary's application of section 43 of the FOIA to withhold information. She has also considered the timeliness of its responses, and has commented on its delay in completing the internal review in the "Other matters" section of this notice.

Reasons for decision

Section 1 and Section 10 – time for compliance

10. Section 1(1) of FOIA states that upon receipt of a request for information, a public authority must confirm or deny whether it holds the information. If it does hold the information, it must disclose it to the requester.
11. Section 10(1) of FOIA provides that a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

12. The complainant submitted her request on 6 March 2017 and received a response on 21 June 2017, 73 working days later. By exceeding the 20 working day timescale for response, Cumbria Constabulary breached section 10(1) of the FOIA.
13. Cumbria Constabulary has acknowledged that it did not comply with section 10(1). It has explained that the delay in responding to the request was exacerbated because it wrote to the complainant and asked for clarification as to the request's meaning. It says that it waited a month but received no response, at which point it made an assumption as to what the complainant had meant, and processed the request accordingly.
14. Cumbria Constabulary provided the Commissioner with a copy of its email requesting clarification. While she considers that it was reasonable for Cumbria Constabulary to seek clarification of the request, she notes that its request for clarification was sent on 12 April 2017. This was after the statutory 20 working day timescale had elapsed, and it therefore does not affect the overall finding of a breach of section 10(1).
15. The Commissioner would draw Cumbria Constabulary's attention to the provision at section 1(3) of the FOIA which removes the obligation to comply with a request, unless the public authority is supplied with further information necessary to identify and locate information, which it has asked the requester to provide.

Section 43 – commercial interests

16. Section 43(2) states:

"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)."

Information in scope

17. As noted in paragraph 13, above, Cumbria Constabulary asked the complainant to clarify which contract she was interested in, and in the absence of a response, it assumed it to be the main Contract for Services with its insurer, Gallagher Bassett, which covered the period 1 November 2011 – 31 October 2016. It clarified to the complainant when disclosing the contract that this had been its assumption, and the complainant has not subsequently indicated, either to Cumbria Constabulary or to the Commissioner, that this was an incorrect or unacceptable interpretation of her request. In the absence of any information to the contrary (and notwithstanding her comments at paragraph 15), the Commissioner is satisfied that this was a reasonable interpretation of the request.

Is section 43 engaged?

18. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers 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 – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers 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.
19. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner's guidance on the application of section 43¹ of the FOIA explains 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.
20. Cumbria Constabulary forwarded to the Commissioner an unredacted copy of the contract. The Commissioner notes that redactions were made to conceal eight fee, payment or liability figures which formed the basis of the contract between Cumbria Constabulary and its insurer. The contract expired on 31 October 2016, just over four months prior to the complainant submitting her request, having run for five years.
21. Cumbria Constabulary explained that, having consulted with Gallagher Bassett, it was satisfied that the financial information was confidential

¹ <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

and that its disclosure to the world at large, under the FOIA, would be likely to put Gallagher Bassett at a commercial disadvantage. This is because disclosure of the information would give Gallagher Bassett's competitors confidential information about their fee pricing. This would give competitors an unfair advantage in any future tendering exercise as it would potentially enable a competitor to undercut the fees charged by Gallagher Bassett.

22. Cumbria Constabulary also believed that its own commercial interests would be likely to be prejudiced if the withheld information was released into the public domain. This is because it considered that businesses would be less willing to contract with the Constabulary if it was believed that the Constabulary may be required to routinely disclose information under FOIA which was considered to be commercially sensitive. Cumbria Constabulary said that a reduced pool of service providers tendering for its business would potentially result in the Constabulary paying higher fees to acquire essential services in future.
23. The Commissioner is satisfied from the nature of the information, and by the submissions provided by Cumbria Constabulary, that it has demonstrated that the three criteria set out at paragraph 18 above are met, and consequently that section 43 is engaged.

The public interest

24. Section 43 of the FOIA is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Arguments in favour of disclosing the information

25. The complainant offered no specific reasons for requiring the information and so the Commissioner is not aware of any particular public interest which the complainant believes would be served by its disclosure.
26. Cumbria Constabulary recognised that disclosure of the information would facilitate greater public understanding of how it spends public funds and the services which are acquired from that expenditure. It said that this would assist the public to determine whether "value for money" is being achieved.
27. The Commissioner recognises the inherent public interest in public authorities being transparent and accountable with regard to public spending and she considers that disclosure of the withheld information would serve that interest.

Arguments in favour of maintaining the exemption

28. Cumbria Constabulary said that it has a duty to protect the sensitive commercial information it receives from companies that provide it with goods and services, so as not to leave them vulnerable to commercial harm. It is not in the public interest that a private body providing services to a public one be placed at a potential commercial disadvantage by that relationship.
29. With regard to the prejudice to its own commercial interests, it would clearly not be in the public interest for service providers to be deterred from tendering for contracts with Cumbria Constabulary, as this would affect its ability to competitively negotiate a contract which is of maximum benefit to the Constabulary and achieve the best possible value for public money.

Conclusion

30. The Commissioner considers that any company seeking to do business with a public authority must expect a greater degree of transparency about contractual details. However, the Commissioner accepts that in the circumstances of this case there would be likely to be prejudice to the commercial interests of both Gallagher Bassett and Cumbria Constabulary if the information was disclosed, given that the information was still very recent at the time of the request (bearing in mind that the figures were "current" for a period of five years, and only 4 months had passed since the contract ended). The withheld information is financial information that relates to a recently concluded contract and which would be highly relevant to any company preparing to participate in similar, upcoming tendering exercises, particularly where Gallagher Bassett may be one of the other tendering companies.
31. In the Commissioner's view and in the circumstances of this case, there is a significant public interest in protecting this information which outweighs the public interest in transparency and openness. In reaching this view, the Commissioner has had particular regard to the fact that at the time of the request the information was recent and therefore of particular use to Gallagher Bassett's competitors. Interfering with the bidding process for public sector contracts would not be in the public interest nor, ultimately, would it result in the best value for public money.
32. In summary, the Commissioner has concluded that the public interest in maintaining the exemption outweighs that in disclosing the information.

Other matters

Section 45 – internal review

33. There is no obligation under the FOIA for a public authority to provide an internal review process. However, it is good practice to do so, and where an authority chooses to offer one, the code of practice established under section 45 of the FOIA sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales.
34. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances. In no case should the internal review exceed 40 working days.
35. The complainant asked for an internal review of her request on 21 June 2017 and Cumbria Constabulary provided the outcome of the internal review on 22 July 2017, 22 working days later.
36. Cumbria Constabulary explained that the request for an internal review contained complaints and comments about a number of matters which did not appear to relate directly to the request, and it was not immediately clear to it that the correspondence was a request for an internal review. Cumbria Constabulary contacted the complainant on 3 July 2017 and asked her to clarify whether the communication was a request for an internal review, and she confirmed that it was, at which point the review commenced.
37. Cumbria Constabulary nevertheless acknowledged that it should have contacted the complainant earlier to clarify her intent, so as to complete the review within the 20 working days recommended by the Commissioner.

Right of appeal

38. 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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

39. 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.

40. 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

Samantha Bracegirdle
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