

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 August 2018

Public Authority: Competition and Markets Authority

Address: Victoria House
Southampton Row
London
WC1B 4AD

Decision (including any steps ordered)

1. The complainant has requested a copy of a financial dataset which informed a report produced by the public authority following a Care Homes Market Study. The public authority withheld the financial dataset on the basis of the exemption at section 43(2) FOIA.
2. The Commissioner's decision is that the public authority was entitled to rely on the exemption.
3. No steps required.

Request and response

4. The complainant submitted a request for information to the public authority on 5 December 2017 in the following terms:

"Please could you supply to me in Excel format the following full datasets which are referenced in the CMA's Care Homes Market Study Final Report:

- "Companies House financial dataset" referenced in para 4.19 (a) page 59 of the main report

- "Large providers dataset" referenced in para 4.19 (b) page 60 of the main report....."
5. The public authority responded on 21 December 2017. It confirmed that it held information within the scope of the first part of the request in relation to the Companies House financial dataset. It however

considered that information exempt from disclosure on the basis of section 21 FOIA. It also confirmed that it held information within the scope of the request in relation to the large providers dataset. It considered that information exempt on the basis of section 44(1)(a) FOIA.

6. The complainant requested an internal review on 24 December 2017 specifically with regards to the decision to withhold the information held within the scope of the first part of his request on the basis of section 21.
7. The public authority wrote to the complainant with details of the outcome of the internal review on 25 January 2018. The review revised the original decision to rely on section 21 and concluded that the information was exempt on the basis of section 43(2) FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 31 January 2018 to complain about the way his request for information had been handled. He specifically complained about the decision to withhold the information held within the scope of the first part of his request namely; the Companies House financial dataset, on the basis of section 43(2) FOIA. The Commissioner has referred to his submissions at the relevant parts of her analysis below.
9. During the course of the investigation, the public authority disclosed the names of the companies included in the financial dataset to enable the complainant to source publically available data about the companies from Companies House without disclosing the work product of the analytics company¹. Therefore, the names of the companies provided to the complainant do not form part of the "withheld information" for the purposes of this decision notice.
10. For the avoidance of doubt, the complainant is seeking the disclosure of the remaining dataset.

¹ This information was provided to the complainant on 14 June 2018.

Reasons for decision

Application of exemption

Withheld information

11. The withheld information consists of a Company's House financial dataset which was referred to in the Competition and Markets Authority's (the public authority) Care Homes Market Study Final Report² (the Report). The dataset is contained in a spreadsheet and was created by an analytics company, Company Watch Ltd.
12. The public authority explained that Company Watch created the dataset by collecting information from a variety of sources which it collated into specific categories and performed calculations on to obtain the figures which became part of its report to the public authority. This work took the company approximately 75 hours to complete.

Section 43(2)

13. The relevant part of section 43 FOIA states³:

"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)."

Complainant's submissions

14. The complainant's submissions relevant to the application of section 43(2) are reproduced below.

"Companies House stated in a recently published correspondence relating to an FOI request that there is a legal duty for this information to be made publicly available:

'All this information [on registered companies] is made available to searchers pursuant to s1085 and s1086 of the Companies Act 2006. [...] Most of the material on the companies register, with the exception of a small category of material which is exempt from statutory disclosure

² <https://assets.publishing.service.gov.uk/media/5a1fdf30e5274a750b82533a/care-homes-market-study-final-report.pdf>

³ The full text of the exemption can be found here:
<http://www.legislation.gov.uk/ukpga/2000/36/section/43>

requirements, is "public information" that the Registrar of Companies is under a statutory obligation to make available to the public'

Therefore, Company Watch Ltd do not own the data nor do they have the copyright for this information. The data is technically owned by the companies themselves.

The investment made in "preparing this information" has been funded by the CMA (and ultimately the taxpayer) and not by Company Watch Ltd. As a result, there can be no argument that the release of this data would allow any other person or business to "free-ride" on their "investment". Indeed by releasing this information this would allow members of the public, research bodies and others (who have ultimately funded this investment) to exploit this data for the wider public good.

The data which the CMA has assembled as part of its study into the Care Home Market is of significant value in aiding the public policy debate in this area but the summary data contained within the original report is insufficient to facilitate a comprehensive understanding of the current challenges facing the sector.

In order to replicate the CMA's analysis I would need to know which of the 5000+ care home companies were in the CMA dataset. This is not possible without the CMA providing this information to me.

There is also a wider public interest in external scrutiny of the work carried out by the CMA as part of its study into the Care Home Markets. An argument can be made that the conclusions reached by the CMA – which are in part based on an analysis of this dataset – are erroneous and that their recommendations for rectifying the issues identified in the report are contestable.

However, unless the full data on which the CMA has arrived at its conclusions is made publicly available this will not be possible. Given the influence that the CMA has on government policy there is thus a strong public interest argument for enabling scrutiny of the CMA's methodology and interpretation of publicly available financial information."

15. The complainant also provided the Commissioner with extracts from a contract between the public authority and a research company for the provision of Research into Energy Markets which assigns any copyright and intellectual property rights owned by the company in respect of the research to the public authority. He submitted that this evidence undermines the argument that disclosure of the withheld information would damage the ability of the public authority to procure research services in the future at a low cost. In other words, companies providing

similar research services to the public authority already know that they would lose their copyright and intellectual property rights and are therefore unlikely to increase the cost of their services for that reason.

Public authority's submissions

16. The public authority's submissions are summarised below.
17. The public authority considers that disclosing the withheld information would be likely to prejudice the commercial interests of Company Watch and, would be likely to prejudice the commercial interests of the public authority.
18. With respect to the likelihood of prejudice to the commercial interests of Company Watch, the company has explained that considerable effort and expertise went into producing the dataset and that if the information were made available it would give its competitors a strong head start when performing their own analysis of this sector. It would enable competitors to perform their own analysis without having to undertake the work undertaken by Company Watch to compile the dataset. This could give its competitors a competitive advantage.
19. Furthermore, other businesses who are interested in the sector may engage Company Watch to undertake this work. If the withheld information were disclosed, those businesses would have free access to the information and would not have to engage Company Watch to perform the analysis. Contracts it enters into for this type of work ordinarily contain clauses prohibiting disclosure to third parties.
20. To summarise, disclosure could lead to a loss of revenue for Company Watch and as an SME, even a small amount of revenue loss is significant to the company. It would also place the company at a competitive disadvantage. Both outcomes plainly prejudice Company Watch's commercial interests.
21. The public authority provided the Commissioner with copies of correspondence between the authority and Company Watch in respect of the commercial sensitivity of the withheld information.
22. With respect to the likelihood of prejudice to the commercial interests of the public authority, the public authority argued that disclosure would be likely to increase the costs of procuring similar services in future. Companies such as Company Watch are less likely to wish to contract with the public authority on favourable terms if they know confidential information, which would prejudice their commercial interests if shared with competitors, may be released under the FOIA. It argued that the public authority is engaged in commercial activity as a procurer of

services. In this case, it had procured the services of Company Watch in order to inform its findings in the Care Homes Market Study.

23. With respect to the balance of the public interest, the public authority is of the view that there is a public interest in companies whose data is included in the dataset, and for the public, to be able to use the data in the dataset for the purposes of their own research. It also acknowledged that there is a general public interest in transparency of its decision-making processes.
24. It however argued that there is a strong public interest in protecting confidential information supplied to it. It is important that the principle of confidentiality is upheld as that allows information to be provided to public authorities in turn allowing public authorities to perform their functions with access to the most complete information available.
25. There is also a public interest in respecting the commercial interests of companies which provide services to the public authority. It is in the public interest that companies such as Company Watch should be able to compete fairly and equally within their markets. There is a strong public interest in the public authority being able to engage services from companies such as Company Watch at competitive rates. It is not in the public interest for the public authority's costs for such services to increase as a result of concerns about the possibility that commercially sensitive information may be disclosed.
26. The public authority also responded to some of the complainant's submissions. The response is summarised below.
27. It is correct to say that some of the information in the dataset is available from Companies House. However, the dataset itself, a compilation of data and calculations performed on the data, is not publically available. Compiling the data into the financial dataset is the result of a considerable amount of work. Disclosure would enable others, including competitors, to use the data without having to undertake the work conducted by Company Watch. Disclosing the names of the companies would enable the complainant and others to source publically available data about the companies and conduct their own calculations.
28. The fact that the production of the dataset has been funded by the public authority does not mean it should automatically be available to the public. As mentioned, there is a public interest in the public authority being able to engage services which include the provision of confidential information and being able to do so at competitive rates. The public interest in third parties being able to use the dataset to perform their own research and analysis was taken into account in the assessment of the balance of the public interest. However, the public

authority considers that the factors in favour of maintaining the exemption are weightier.

Commissioner's analysis

29. The Commissioner first considered whether the public authority was entitled to engage the exemption at section 43(2) specifically on the basis that disclosure of the withheld information would be likely to prejudice the commercial interests of Company Watch and of the public authority.
30. The Commissioner has been guided on the interpretation of the phrase 'would be likely to prejudice' by a number of Information Tribunal decisions. With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)* confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk".
31. Having seen the withheld information and considered all of the submissions including the correspondence between Company Watch and the public authority, the Commissioner had no hesitation endorsing the view that disclosure of the information would present a real and significant risk of prejudice to the commercial interests of Company Watch. This is because the Commissioner is satisfied that a considerable amount of work has gone into creating the dataset, including manually manipulating the source data which clearly requires a degree of expertise. Disclosing this finished product would give the company's competitors interested in analysis of the care homes market a strong headstart with little effort. It would also be useful to organisations who are specifically interested in this sector and who might otherwise engage Company Watch to undertake this type of work on their behalf. There is a real and significant risk that Company Watch could lose revenue as a result which would inevitably be prejudicial to the company's commercial interests.
32. The Commissioner also endorses the view that disclosure of the withheld information would be likely to prejudice the commercial interests of the public authority. This is because she considers that engaging the services of Company Watch to undertake research and analysis in order to inform a study of the care homes market is a commercial activity within the meaning envisaged under section 43(2) FOIA. It is clearly an activity linked to the public authority's financial interests. However, it is also an activity linked to its commercial interests because as a procurer of similar research services, the public authority is participating competitively in a commercial activity. There is therefore a real and significant risk that disclosure of the withheld information could result in

companies offering the public authority less favourable terms on the grounds that they are not confident it would be able to protect their commercially sensitive information.

33. Clearly companies transacting with public authorities will be well aware of their obligations under the FOIA and therefore the potential for information to be published. However, they will equally be aware that commercially sensitive information can be protected by public authorities by relying on relevant exemptions, which is what the public authority has sought to do in this case. If companies such as Company Watch do not feel confident that their commercially sensitive information can be protected by the public authority under the FOIA, there is a real and significant risk that they would engage with the public authority on less favourable financial terms in the future. The Commissioner does not endorse the view that transfer of copyrights and intellectual rights to the public authority under the terms of a specific contract is evidence that companies such as Company Watch would be prepared to allow the public authority to release their commercially sensitive information without passing some of the consequential costs to the public authority.
34. The Commissioner has therefore concluded that the public authority was entitled to engage the exemption at section 43(2).

Balance of the public interest

35. The Commissioner next considered whether the withheld information should be disclosed in the public interest. Therefore, in accordance with the provision in section 2(2)(b), the Commissioner has considered whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
36. The Commissioner agrees with the complainant that there is a public interest in the public, including research bodies, interrogating the dataset which informed the Report. Disclosure would further inform public debate in this area. However, given that the Report does contain a summary of the information included in the dataset, the Commissioner does not consider that the public interest in disclosure is weightier in the absence of any demonstrable concerns about the accuracy of the dataset information contained in the Report. There is nothing preventing others from conducting their own research using the names of the companies released by the public authority.
37. The view that an argument could be made that the conclusions reached in the Report are erroneous does not carry any significant weight in the absence of supporting evidence. Clearly there will be those who disagree with the Report's findings and recommendations. However, the public

interest in protecting the commercial interests of Company Watch in particular is comparably weightier than disclosure of the dataset merely on the basis of a suggestive view regarding its accuracy even though no evidence has been provided in support of that view.

38. Furthermore, the fact that the work to produce the dataset was publicly funded does not undermine the strong public interest in protecting the commercial interests of both the public authority and Company Watch. As the public authority has successfully argued, there is a real risk that it would not be able to obtain competitive rates for similar research in the future if companies felt they could not rely on it to protect their commercially sensitive information. Disclosing the dataset because it was publicly funded risks increasing the costs to the taxpayer for similar research in the future and that would not be in the public interest.
39. The Commissioner considers that there is a strong public interest in not disclosing the withheld information. The risk from disclosure is both real and significant and the public interest in disclosure is comparably less strong.
40. The Commissioner has therefore concluded that on balance, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

Right of appeal

41. 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

42. 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.
43. 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

Gerrard Tracey
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