

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 July 2019

Public Authority: The London Borough of Barking and Dagenham

Address: Barking Town Hall

Town Hall Square

Barking

IG11 7LU

Decision (including any steps ordered)

1. The complainants submitted a request to the London Borough of Barking and Dagenham (the Council) for copies of various electricity supplier bills for a particular property. The Council refused to disclose the information on the basis of section 43(2) (commercial interests) of FOIA. The Commissioner has concluded that the requested information is exempt from disclosure on the basis of this exemption and that in all of the circumstances of the case the public interest favours withholding the information.

Background

2. The request concerns the electricity provided to Peverel House, in the London borough of Barking and Dagenham, whose residents are both Council tenants and leaseholders. More specifically, the request concerns the 'Landlord Controlled Heating / Hot Water System' and communal electricity supply. Both are fuelled by electricity arranged by the Council under an energy buying group framework. The energy supply for these services which goes into each flat is not individually metered, and the residents have to take and pay for this supply as demanded by the Council rather than choose their own supplier. The supply for this service is separate to a resident's own domestic supply.
3. The provisions of section 22 of the Landlord and Tenant Act 1985 gives leaseholders the right to inspect the accounts, receipts and other

documents relevant to the service charge information in the summary of the service charge account and to have them copied. Under this legislation the complainants had previously been provided, in September 2016, with copies of system electricity bills covering several years up to June 2016.

Request and response

4. The complainants submitted the following request to the Council on 20 April 2018:

'Under the provisions of the Freedom of Information Act we require the London Borough of Barking & Dagenham to provide the following information within the statutory timescale:-

1) In respect of the Landlord Controlled Heating / Hot Water System for Peverel House all actual Electricity Supplier Bills (not summary spreadsheets) for all system meters covering the periods:

a) 01 April 2015- 31 March 2016

b) 01 April 2016- 31 March 2017

c) 01 April 2017- 31 March 2018

2) In respect of the Landlords Communal Electricity Supply for Peverel House all actual Electricity Supplier Bills (not summary spreadsheets) for all system meters covering the periods:

a) 01 April 2015- 31 March 2016

b) 01 April 2016- 31 March 2017

c) 01 April 2017- 31 March 2018'

5. The Council initially refused to comply with this request citing section 14(1) (vexatious) of FOIA. The complainants made a complaint to the Commissioner about this refusal and on 23 October 2018 the Commissioner issued a decision notice (reference FS50738803) concluding that section 14(1) did not apply and the notice ordered the Council to issue a fresh response to this request.¹

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2018/2260218/fs50738803.pdf>

6. The Council did so on 27 November 2018 and explained that it considered the requested information to be exempt from disclosure on the basis of section 43(2) (commercial interests) of FOIA.

Scope of the case

7. The complainants contacted the Commissioner on 5 December 2018 in order to complain about the Council's refusal to provide the requested information on the basis of section 43(2) of FOIA.²

Reasons for decision

Section 43(2) – commercial interests

8. Section 43(2) states 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).'

9. 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,

² In light of the history of this request, and the complainants' previous complaint to her about this matter, the Commissioner decided to exercise her discretion and accept this complaint without the Council completing an internal review in relation to its application of section 43(2) of FOIA.

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.

The complainant's position

10. The complainants explained that they did not accept that disclosure of the requested bills would harm the commercial position of the Council as such bills are not protectively marked as 'Commercial in Confidence'. (They based this comment on having access to previous versions of the bills via the Landlord and Tenant Act 1985 as noted above).

The Council's position

11. By way of background, the Council explained that it had entered into a tripartite agreement with Kent County Council (the Contracting Authority), EDF (Energy Supplier) and LASER energy buying group (LASER).
12. The Council explained as part of the fully managed service LASER act as the procurement broker between the Council and the energy supplier. The Council explained that the arrangement also included closely monitoring the market at all times to ensure customers receive the best price, and as part of the contract agreement LASER check that its billing and prices are correct. LASER also perform a number of billing and invoice validation checks to make sure that the billing is within the expected tolerance range for that meter. LASER will then pay the bills to the supplier and then bill the Council with their added cost to process of billing, invoice validation and energy management.
13. The Council explained that the contractual arrangements between the parties were covered by a Service Level Agreement which included the following condition related to confidentiality, that all the participating authorities are bound by:

'Any market and pricing information provided by LASER to the Customer should be utilised for internal purposes only. The Customer will not distribute this information outside of their organisation'

14. The Council explained that in considering this request it had consulted with LASER to assess their interpretation of the confidentiality clause included in the contract and the commercial interest impact on it if the withheld information was disclosed. In response LASER had stated that it considered the withheld information to be covered by the

confidentiality clause and furthermore that disclosure of it would reveal its charges which may affect its commercial position if suppliers or other customers were able to access this information.

15. Furthermore, the Council argued that disclosure of the information would be likely to harm its own commercial interests because it would affect the Council's reputation and ability to secure similar deals in future energy procurement exercises and this would put the Council at a disadvantage when negotiating their fees, terms and conditions. More specifically, the Council explained that the project to re-procure its energy contract is underway and confidential discussions with LASER and other market options are ongoing as to what energy contract and framework the Council is likely to choose. The Council argued that by sharing LASER's confidential information, it is possible that LASER will not want the Council as a customer moving forward meaning that it would have to go out and procure a new energy contract. The Council argued that this would cause it a significant financial impact as any new supplier would have less time to buy its, ie the Council's, supplies on the open market meaning it would pay more for its energy than if it had with stayed with LASER.
16. As part of her investigation, the Commissioner noted that in response to decision notice FS50738803 the Council had also been required to provide a fresh response to the following request (Council reference 5730938):

'In respect of Peverel House, Stour Road, Dagenham RM10 7H for the year 01 April 2017- 31 March 2018 for the electricity supplied for the Landlord Controlled Heating Hot water system::

- a) The Standing Charge for each meter excluding vat. With clarification of the standing charge period eg per day or whichever is applicable*
- b) The date/ dates that any changes to the Standing Charge/ Charges was/ were applied.*
- c) The unit cost per Kilo Watt Hour excluding vat for each rate.*
- d) The date/ dates that the Charge/ Charges was/ were applied. i.e. The dates that any changes were made to the unit costs.'*

17. Rather than cite section 43(2), the Council complied with this request and provided the complainant with the following two spreadsheets:
- Spreadsheet 1- a six months (April 1/4/17 to 30/9/17) and six months (1/10/17 to 31/3/18) summary Standing charge (£/day rate) and Standard charge (£/month rate).

- Spreadsheet 2- a six months (April 1/4/17 to 30/9/17) and six months (1/10/17 to 31/3/18) summary Night rate price (p/kWh); Evening/Weekend Rate Price (p/kWh) and day rate price (p/hWh)
18. The Commissioner asked the Council to clarify its different responses to the two requests, noting that the standing charge and cost per Kilo Watt Hour had now been disclosed and were presumably contained on the bills which the Council was seeking to withhold. In response, the Council explained that before providing the above information, it had consulted LASER and also risk assessed the format of the information and concluded that, whilst it contained some unit cost data, the market sensitive risks associated were lower and it decided to provide the information in this format without compromising the confidentiality agreement between the Council and LASER. The Council suggested that it provided the complainant with as much information that it could without breaching its confidentiality contract with LASER because the format of the information provided makes it difficult to work out LASER's charges and their pricing model.
19. The Council emphasised that there are significant commercial risks associated with providing copies of LASER's detailed bills for each of the 12 meters, for each month, for the past 3 years (total 432 bills) per property. It concluded that confidentiality will be permanently lost if such detailed commercial sensitive information entered the public domain. The Council also established that disclosure of the bills would reveal new and more detailed information than was previously provided. The LASER invoice contains not only the cost information for the consumption of electricity, but it also contains LASER's charges. The Council explained that by having the raw data information for price per kWh costs and then having the LASER invoice it would be possible to work out what LASER charges the Council. This information is considered to be commercially sensitive as it comprises LASER's pricing model.

The Commissioner's position

20. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the Council clearly relates to the interests which the exemption contained at section 43(2) is designed to protect.
21. With regard to the second criterion and LASER's commercial interests, the Commissioner is satisfied that disclosure of the withheld information has the potential to harm its commercial interests. The Commissioner has reached this conclusion given that the withheld information contains details of LASER's pricing costs. In the Commissioner's view it is clearly plausible to argue that disclosure of this information has the potential to

harm LASER's commercial interests given the insight such information would provide to its competitors and potential customers. With regard to the third criterion the Commissioner also accepts that this is also met and thus if the withheld information were to be disclosed there is clearly more than a hypothetical risk of prejudice occurring; rather there is a real and significant risk of this prejudice occurring. The Commissioner has reached this view given the insight the withheld information would provide both to LASER's competitors and its potential customers into its pricing strategy. The Commissioner also considers the fact that LASER has been content for the information in request 5730938, to be disclosed, but not the information sought by the request which is in the scope of this request, given her greater confidence that LASER has genuinely considered which parts of the information contained in the billing information provided to the Council can be provided without prejudicing its commercial interests, and which parts would be likely to result in such prejudicial consequences.

22. With regard to the Council's commercial interests, the Commissioner also accepts that the second criterion is met. Disclosure of the information would clearly be against the express wishes of LASER and therefore the Commissioner accepts that there is a possibility that LASER could therefore decide to not enter into future contracts with the Council in the future. The Commissioner accepts that this could harm the Council's commercial interests by resulting in it having fewer suppliers to choose from for the purchase of its energy. Furthermore, the Commissioner recognises that as the Council is actively seeking to re-procure its energy contract revealing details of the prices it currently pays for services provided by LASER could also potentially affect the Council's negotiating position in such a procurement exercise. Taking these two factors together, the Commissioner accepts that there is a more than hypothetical risk of prejudice occurring to the Council's commercial interests if the information was disclosed and third criterion is therefore met

23. Section 43(2) is therefore engaged.

Public interest test

24. Section 43 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.

Public interest in favour of disclosing the information

25. The complainants argued that the Council appeared to be very concerned about public scrutiny. However, they explained that in the

past having copies of the bills had allowed them to identify several issues that pointed to significant errors with billing and evidence that the system was not being operated in such a way so as to provide best possible value for money to the residents who have no other option but to use and pay for this energy. For example, the complainants explained that electricity supplied by several meters had not been included in the service charge and that electricity was continuing to be consumed outside the cheapest tariff.

26. The complainants argued that had they not been given such earlier bills then they would not have been able to identify such issues that the Council needed to then resolve. The complainants explained that in light of this experience it was concerned that the system was not being properly managed and that on receipt of the bills the Council appears not to have conducted any due diligence on the received bills or carried out any remedial action off its own back to protect the financial interests of all residents that have to use and pay for this service whether they use it or not
27. The complainants noted that prior to the Council providing its section 43(2) refusal notice, in response to their requests to view the bills under the provisions of the Landlord and Tenant Act the Council had informed it that did not have the bills, but had requested them from its supplier and once it had received them it would be provided with them in-line with that legislation; however, the bills had not been provided.
28. The complainants argued that if the Council was allowed to withhold this information then it would set a dangerous and undesirable precedent that would effectively allow the Council to charge whatever it likes for these services without any justification. The complainants emphasised that in their view relevant scrutiny and challenge are in the best interests of the consuming public by providing confidence that the system has been adjusted and is operated in the most cost effective way and that consumers are being accurately charged for their consumption. The complainants also noted that although they were concerned with the bills for their dwelling, they explained that the same, or similar, systems were used in other housing schemes operated by the Council and there was therefore a broader public interest in the disclosure of this information.

Public interest in maintaining the exemption

29. The Council argued that it was clearly against the public interest to disclose information that would harm its commercial interests because to do so would result in it having to pay higher prices for its energy and this would be likely to result in higher prices for its residents. The Council explained that it had also taken into the impact on LASER of disclosing the withheld information that such impacts on its interest would also be against the public interest.

Balance of the public interest

30. With regard to the public interest in disclosure, the Commissioner recognises that the complainants have previously used the energy bills to audit the accuracy of billing system and that as a result she agrees that there is legitimate interest in the disclosure of the information to inform such a process. The Commissioner also recognises the difficulties the complainants have previously had in being able to access bills which are the focus of this request under Landlord and Tenant Act, hence their reliance on FOIA to do so instead. The Commissioner is prepared to accept that such difficulties arguably add to the public interest in the disclosure of such information under FOIA. Moreover, disclosure of the information under FOIA, would arguably increase the Council's openness and transparency in respect of how it manages its energy contracts.
31. However, whilst the Commissioner recognises, and is sympathetic to, the complainants' difficulties in using that the Landlord and Tenant Act to access the withheld information, in her view FOIA cannot be seen as a direct alternative for that access route. This is because disclosure of the information under FOIA is considered to be disclosure of information to the world at large, not simply to a limited group of residents, and thus the consequences for disclosing that information to the world at large have to be taken into account when considering the balance of the public interest test. In the Commissioner's opinion there is very strong and inherent public interest in ensuring fairness of competition and in her view it would be firmly against the public interest if a third party's commercial interests, in this case LASER's, are harmed simply because they have previously entered into a contract with the Council. Furthermore, the Commissioner considers there to be a clear public interest in ensuring that the Council's commercial interests are not harmed during its ongoing re-procurement of this contract either via LASER's reluctance to continue supplying the Council and/or by undermining the Council's negotiating position with other potential suppliers. The Commissioner is conscious that either such outcome would have a broad impact across all of the properties to which the contract re-procurement applies, not simply the one which the focus of this request.

32. Given the cumulative weight that she considers should be applied to these two factors, the Commissioner has concluded that the public interest favours maintaining the exemption. In reaching this conclusion, she wishes to emphasise that she is not seeking to dismiss the validity of the complainants' arguments. However, in balancing the public interest test, she does consider it relevant to take into account the fact that the Landlord and Tenant Act does – in theory - provide a route of access for the complainants, and indeed other residents, to access that information and that FOIA cannot simply be used as an alternative means of access should that route fail.

Right of appeal

33. 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@justice.gov.uk

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

34. 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.
35. 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

Jonathan Slee
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