

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 July 2021

Public Authority: London Borough of Waltham Forest
Address: Waltham Forest Town Hall
Forest Road
Walthamstow
E17 4JF

Decision (including any steps ordered)

1. The complainant submitted a request to the London Borough of Waltham Forest (the Council) seeking information about a trial of facial recognition software by a company called AnyVison. More specifically the request sought the agreement with AnyVison, the Data Protection Impact Assessment (DPIA) and the evaluation report for the trial. The Council explained that it had not conducted a specific DPIA for the trial and although it held information falling within the remaining parts of the request, it considered this information to be exempt from disclosure on the basis of sections 41(1) (information provided in confidence) and 43(2) (commercial interests) of FOIA.
2. The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of section 43(2) of FOIA and that in all the circumstances of the case the public interest favours maintaining the exemption.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the Council on 29 June 2020:

'In January 2019, Waltham Forest Council conducted a three day trial of facial recognition software in several locations. The software was provided by AnyVision.

Under the Freedom of Information Act, could I please see a copy of the following documents:

- *The agreement / contract with AnyVision for the three day trial*
- *The Data Protection Impact Assessment (DPIA) that was completed for the trial*
- *The evaluation report for the trial'*

5. The Council responded on 8 July 2020. In relation to question 1 it explained that it had signed a non-disclosure and confidentiality agreement for the proof of concept trial. However, the Council explained that it considered this to be exempt from disclosure on the basis of section 41(1) (information provided in confidence) of FOIA. In relation to question 2 the Council explained that a DPIA was not specifically conducted in relation to this trial. In relation to question 3 the Council explained that the third party organisation, AnyVison, who wrote the report had not given the Council permission to disclose it, albeit the Council did not cite any FOIA exemption to withhold this particular report.
6. The complainant contacted the Council on 8 July 2020 and asked it to conduct an internal review of its response to questions 1 and 3.
7. The Council informed the complainant of the outcome of the internal review on 30 July 2020. The review concluded that both the agreement / contract with AnyVision, and the evaluation report, were exempt from disclosure on the basis of section 41(1) of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 8 August 2020 to complain about the Council's decision to withhold both the agreement / contract with AnyVision and the evaluation report on the basis of section 41(1) of FOIA.
9. During the course of the Commissioner's investigation the Council explained that the agreement / contract consists of a 'Non-Disclosure

Agreement' and that the evaluation report consists of a 'Proof of Concept Report'. The Council explained to the Commissioner that in addition to section 41(1) of FOIA it also considered both documents to be exempt from disclosure on the basis of section 43(2) (commercial interests) of FOIA.

10. The Council noted that the Commissioner has issued a decision notice, reference number IC-49783-P1S4, in January 2021 which also concerned a request submitted to the Council for information about the AnyVision trial. The Council noted that this previous request had sought a range of information, the scope of which included the Non-Disclosure Agreement and Proof of Concept Report, and the Commissioner's decision notice had concluded that these were exempt from disclosure on the basis of section 43(2).¹
11. In light of this development the Commissioner advised the complainant that in line with her findings in relation to the previous decision notice, she was satisfied that the Council was entitled to withhold the Non-Disclosure Agreement and Proof of Concept Report on the basis of section 43(2) of FOIA. The Commissioner asked the complainant whether he wished to withdraw his complaint at this stage or whether he wished a decision notice to be issued. The complainant explained that he wanted a decision notice to be issued in relation to his complaint.

Reasons for decision

Section 43 – commercial interests

12. Section 43(2) of FOIA 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).'

The Council's position

13. In the previous decision notice cited at footnote 1, the Council argued that disclosing the withheld information, which included the Non-Disclosure Agreement and Proof of Concept Report, would be likely to prejudice the commercial interests of AnyVision. The Council's basis for this position is set out in paragraphs 20 to 27 of the previous notice.
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¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/2619191/ic-49783-p1s4.pdf>

The Commissioner's position

14. In the previous decision notice the Commissioner concluded that some, albeit not all, of the disputed information was exempt from disclosure on the basis of section 43(2) of FOIA. However, the Non-Disclosure Agreement and Proof of Concept Report were two of the documents that the Commissioner did accept were exempt on the basis of this exemption.² The Commissioner's basis for reaching this finding is set out at paragraphs 29 to 38 of the previous decision notice.
15. The Commissioner acknowledges that the request in the previous notice was submitted on 3 October 2019 and that the request which is the subject of this present notice was submitted on 29 June 2020. However, despite this passage of time the Commissioner is satisfied that if the Non-Disclosure Agreement and Proof of Concept Report were disclosed in response to the complainant's request then this would still be likely to prejudice AnyVison's commercial interests for the reasons in paragraph 34 of the previous notice:

'The Commissioner has therefore concluded that it is more probable than not (ie more than a 50% chance) that disclosing the information she has set out in Annex A would prejudice AnyVision's commercial interests. The information is commercially sensitive because it relates to the capabilities of the facial recognition technology, pricing and methodology. Competitors would find the information useful. Disclosing the information is also likely to weaken AnyVision's bargaining position in a similar procurement process. In the Commissioner's view, this information also falls under the category of information that the NDA considers confidential.'

16. The Commissioner therefore adopts the reasoning of paragraphs 29 to 38 of the previous notice and is satisfied that the Non-Disclosure Agreement and Proof of Concept Report are exempt from disclosure on the basis of section 43(2) of FOIA.

² A position confirmed at points vii and viii of the annex.

Public interest test

17. Section 43(2) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of the FOIA. The Commissioner therefore has to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
18. As with her consideration of whether the exemption is engaged, the Commissioner adopts her findings in the previous decision notice at paragraphs 40 to 48 with regard to the public interest test. In reaching this conclusion the Commissioner is satisfied that despite the passage of time between the request which is the subject of this request, and the earlier one, the balance of the public interest favours maintaining the exemption contained at section 43(2) and withholding both the Non-Disclosure Agreement and Proof of Concept Report.

Section 41 – information provided in confidence

19. In light of her findings in relation to section 43(2) of FOIA the Commissioner has not considered the Council's position that the withheld information is also exempt from disclosure on the basis of section 41(1) of FOIA.

Right of appeal

20. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

21. 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.
22. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF