

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 29 May 2013

Public Authority: Hertfordshire County Council
Address: County Hall
Pegs Lane
Hertford
Hertfordshire
SG13 8DE

Decision (including any steps ordered)

1. The complainant has requested information from Hertfordshire County Council ('the council') relating to Wendy Fair Markets Limited. The Commissioner's decision is that the council has correctly applied the law enforcement exemption at section 31 of the FOIA and the exemption for legal professional privilege at section 42 of the FOIA and, in both cases, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Commissioner does not require any steps to be taken.

Background

2. The council has been pursuing legal action relating to Bovingdon market since 2007. Claims are being jointly made by Hertfordshire County Council and the London Borough of Brent against 'Wendy Fair Markets, [named individual], and others' concerning the sale of counterfeit goods. There is a trial set for five days starting on 4 November 2013 in the High Court, Chancery Division. The complainants in this case are the legal representatives of the defendants.

Request and response

3. On 19 March 2012, the complainant wrote to the council and requested information in the following terms:

1. "All information relating to or touching upon the Court of Appeal Judgement (no 200704515/4515/C3 EWCA Crim 2459) in R v Wendyfair Markets Limited, Nicholas Giles Hobday and Sally Ann Ward, created, modified or received by Herefordshire County Council (including by any of its officers, employees or agents) after 16 October 2008.
2. All information recording or otherwise giving an account of conduct that took place at any time in the last 12 months (i.e. at any time in the period 19/03/2011-18/03/2012) at any stall at any market conducted by Wendy Fair Markets Ltd and which, if true, would or might constitute a breach of the Copyright, Design & Patents Act 1988 (ignoring any defences under that Act).
3. All information relating to or touching upon Wendy Fair Markets Limited created, modified or received by Herefordshire County Council (including by any of its officers, employees or agents) after 16 October 2008."
4. The council responded on 19 April 2012 and refused to provide the requested information citing the following FOIA exemptions:
 - For information requested at point 1 – section 42.
 - For information requested at points 2 and 3 – sections 31(1)(a), 31(1)(b) and 31(1)(g) by virtue of 31(2)(a), 31(2)(b), 31(2)(c).
5. The complainant requested an internal review on 29 June 2012 and the council provided its response on 16 August 2012. Two news releases were disclosed but the council maintained its original position in respect of the rest of the information.

Scope of the case

6. The complainant wrote to the Commissioner on 21 September 2012 to complain about the way the request for information had been handled. The complainant stated that the response was received outside of the permitted 20 working days and that none of the information within the terms of the request falls within any exemption under the FOIA.
7. The Commissioner has considered the council's application of section 42 to the information requested at point 1 of the request and section 31 to the information requested at points 2 and 3.
8. In relation to the law enforcement exemption at section 31 of the FOIA, the Commissioner has specifically considered subsection 31(1)(b) as the

council provided arguments in relation to this subsection during his investigation.

9. The council also applied section 41 to some of the information requested at points 2 and 3 of the request. However, as the Commissioner has decided that section 31(1)(b) applies to all of this information, he has not gone on to consider the application of section 41.
10. The Commissioner has not deemed it necessary to consider the documents disclosed to the complainant under court disclosure rules for the current action being taken in the High Court. Such documents were disclosed to the complainant on 5 April 2013 as part of Schedule 1 of the standard disclosure.

Reasons for decision

Section 31 – Law enforcement

11. Section 31(1) states that:

“Information which is not exempt information by virtue of section 30 [information held for the purposes of investigations and proceedings conducted by public authorities] is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

b) the apprehension or prosecution of offenders ...”.

Would disclosure be likely to prejudice the apprehension or prosecution of offenders?

12. In *Hogan v the ICO and Oxford City Council*¹ the Information Tribunal stated that:

“The application of the “prejudice” test should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption...Second, the nature of the ‘prejudice’ being claimed must be considered...A third step for the decision-making concerns the likelihood of occurrence of the prejudice”.

¹ Appeal numbers EA/2005/0026 and EA/2005/0030

13. The relevant applicable interest in this exemption is the apprehension or prosecution of offenders. In his guidance on the exemption for law enforcement², the Commissioner states that section 31(1)(b) is;

"...not restricted to information held by investigating bodies, nor restricted to individual offenders. This activity is wide enough to cover any situation that could lead to penalties for criminal behaviour or for breaking military law. It could cover activities both in relation to specific instances of the apprehension and prosecution of offenders and to general strategies, techniques, processes and policies established for these purposes."

The Commissioner therefore accepts that as the information provides details of the surveillance and intelligence gathering which forms part of the investigation resulting in the current litigation, it directly relates to this prejudice.

14. When considering the second step as set out in the Hogan case, the Commissioner must be persuaded that the nature of the prejudice is "real, actual or of substance" and not trivial or insignificant. He must also be satisfied that some causal relationship exists between the potential disclosure and the stated prejudice.
15. The nature of the prejudice argued by the council is that disclosure would, or would be likely to, prejudice enforcement activities by the council for civil or criminal liabilities. The council stated that the harm that is likely to be caused is as follows:
- " - It would place into the public domain information about market stall holders at Bovington Market who have come to the attention and remain of interest to Trading Standards. I believe this could affect the ability of Trading Standards to continue to investigate such stallholders where necessary.
 - It is likely to identify investigation techniques employed by Trading Standards at Bovington Market, which may affect any future investigations undertaken."
16. Having seen the withheld information and considered the council's arguments, the Commissioner is satisfied that there is a causal link

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http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/S31_EXEMPTION_FOR_LAW_ENFORCEMENT_V3.ashx

between the disclosure of the requested information and prejudice to the apprehension or prosecution of offenders, and that the prejudice is real and of substance in this instance. He therefore finds that the second stage of the test from Hogan is satisfied.

17. When considering the third step as set out in Hogan, the Commissioner notes that the council has not explicitly stated whether disclosure would or would be likely to result in the prejudice identified above. He has therefore found it appropriate to apply the lesser test, specifically that the exemption will be engaged if disclosure would be likely to cause the prejudice described in section 31(1)(b) of the Act. The Commissioner considers that this means there must be a 'real and significant risk' of prejudice although the risk need not be more probable than not.
18. Although the council has not provided the Commissioner with evidence of the 'real and significant risk' of prejudice, the Commissioner has considered the harm that is likely to be caused, in conjunction with the withheld information itself, and believes that the risk of an adverse effect on the apprehension and prosecution of offenders is real and significant. He believes that the chance of prejudice being suffered from disclosure of the requested information is more than a hypothetical possibility; it is a real and significant risk.
19. For the reasons set out above, the Commissioner considers that all three stages of the prejudice test set out on Hogan have been satisfied and therefore accepts that the exemption at section 31(1)(b) is engaged. He has therefore gone on to consider the application of the public interest test associated with this exemption.

The public interest test

20. As the exemption under section 31(1)(b) is a qualified exemption, it is subject to a public interest test. In accordance with that test, as set out in section 2(2)(b), the Commissioner must consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

Public interest arguments in favour of disclosing the requested information

21. The council identified the following public interest arguments in favour of disclosure:
 - Disclosure may contribute to the accountability and transparency of the County Council.

- Disclosure may allow individuals to better understand decisions made by the County Council which affect their lives and, in some cases, may assist individuals in challenging those decisions.
 - Disclosure may encourage public debate, in that the public would be able to engage with the County Council on important issues at an early stage.
22. The complainant has stated that there have been on-going differences between its client and the council and they have raised concerns that the council's conduct has amounted to harassment. The complainant provided the Commissioner with a copy of a judgement of the Court of Appeal dated 16 October 2008 and stated that there is an enhanced public interest in knowing 'what was going on in Hertfordshire County Council in pursuing an ill-fated prosecution'.
23. As the copy of the judgement provided by the complainant was illegible, the Commissioner requested that the complainant provide a summary of the judgement for consideration. The complainant did not provide a summary or even respond to the Commissioner on this point. Therefore the Commissioner has not taken the judgement into consideration when examining the public interest test.
24. The Commissioner considers that the 'default setting' of the FOIA is in favour of disclosure. This is based on the underlying assumption that disclosure of information held by public authorities is in itself of value because it promotes better government through transparency, accountability, public debate, better public understanding of decisions and informed and meaningful participation of the public in the democratic process.

Public interest arguments in favour of maintaining the exemption

25. The council identified the following public interest arguments in favour of maintaining the exemption:
- There is a likelihood of harm and/or prejudice by the disclosure of the information requested, particularly with respect to proceedings that the County Council is currently contemplating.
 - The severity of harm and/or prejudice which would be caused is high as proceedings by the County Council are in exercise of its function in relation to the protection of the public.
 - As investigations are still ongoing and enforcement action is being contemplated, the information is currently highly sensitive.

- Disclosure of the information at this stage would adversely affect the current investigation.
- Trading Standards officers should be able to conduct investigations and pursue litigation where an offence has been committed.
- Release of the information is likely to inhibit future investigations of this sort by providing information to those seeking to trade unlawfully.
- The ability of Trading Standards officers to work and share information with other crime detection organisations would be impaired if it was believed that information obtained from confidential sources would be disclosed by the council prior to court proceedings.

Balance of the public interest arguments

26. The council stated that, on balance, it is not in the public interest to disclose the information requested. It said that whilst it is keen to promote transparency and, in normal circumstances, may disclose information which could highlight misconduct, wrongdoing, or risks to the public, it considers that in light of the factors above, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
27. Although the Commissioner considers that the 'default setting' of the FOIA is in favour of disclosure, he also considers that given the strong public interest in protecting the activities listed in section 31, it is likely that this will often outweigh the public interest in releasing the information although the public interest must always be considered as a separate issue on a case-by-case basis.
28. The Commissioner considers that there will always be strong grounds for protecting information that may result in the prosecution of offenders. This view was supported by the Information Tribunal in the case of *Toms v Information Commissioner*³ the Tribunal stating:

"[freedom of information] should not undermine the investigation, prosecution or prevention of crime, or the bringing of civil or criminal proceedings by public bodies. The investigation and prosecution of crime involve a number of essential requirements. These include the

³ Appeal number EA/2005/0027

need to avoid prejudicing effective law enforcement, the need to protect witness and informers, the need to maintain the independence of the judicial and prosecution processes, and the need to preserve the criminal court as the sole forum for determining guilt.”

29. The Commissioner recognises that no formal prosecution proceedings were being pursued at the time of the request but that they were being contemplated. Given the real possibility that proceedings would be undertaken, the Commissioner considers that the council has a strong case for ensuring that, to paraphrase the Tribunal above, the prejudicing of effective law enforcement is avoided and the integrity of the criminal court preserved.
30. The Commissioner has placed significant weight on the fact that proceedings in the High Court have been set for later this year as this enforces the view held at the time of the request that there was a real possibility of proceedings. Disclosure at this time would not be in the public interest due to the impact on the success of those 'live' proceedings.
31. Significantly, the Commissioner considers that the public interest arguments for disclosure are based on the more general principles of accountability and transparency. In contrast, there is specific, and considerable, public interest in allowing the potential apprehension and prosecution of offenders to take place without impediment. There is also significant public interest in safeguarding investigative techniques for future investigations.
32. In addition, the Commissioner considers that there is strong public interest in the apprehension and prosecution of offenders where the crime would cause harm or distress to individuals. In this case, the crime is the sale of counterfeit goods which would adversely affect individuals who unknowing purchase such products.
33. Taking all of the above into consideration, the Commissioner's decision is that the public interest in avoiding prejudice to the apprehension and prosecution of offenders outweighs the public interest in disclosure in all the circumstances of this case.

Section 42 – Legal professional privilege

34. This exemption provides that information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

35. The principle of legal professional privilege is based on the need to protect a client's confidence that any communication with his or her legal advisor will be treated in confidence. It protects the confidentiality of communications between a lawyer and a client and has been described by the Tribunal, in the case of *Bellamy v the Information Commissioner and the DTI*⁴ as;

"a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation." (paragraph 9)

36. There are two limbs of legal professional privilege: advice privilege and litigation privilege. In this case, the council sought to rely on litigation privilege.

37. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. For information to be covered by litigation privilege, it must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation.

38. In response to the Commissioner's enquiries, the council confirmed the following:

- It has been pursuing legal action relating to Bovingdon market since 2007 and there is a trial set in the High Court starting on 4 November 2013.
- The documents are confidential and have not previously been disclosed.
- The documents consist of:

⁴ Appeal number EA/2005/0023

- Correspondence between HCC's solicitor acting in this matter with Trading Standards officers who are her client.
 - Communication between the county council's solicitors on this matter.
 - Communication between the County Council's solicitor and Counsel engaged by the solicitor.
 - Correspondence between Counsel (QC and junior counsel) and the Trading Standards officers.
39. The Commissioner has reviewed the withheld information. Based on that review and the council's submission detailed in the above paragraph, the Commissioner is satisfied that the withheld information is subject to legal professional privilege. This is because the information is not publically known and there is no suggestion that privilege has been lost, there was a real likelihood of litigation taking place at the time of the request, and the information is for lawyers to use in preparing a case for litigation.

The public interest test

40. As section 42 is a qualified exemption, 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 information.

Public interest arguments in favour of disclosing the requested information

41. The council considered the following factors to be in favour of disclosure:
- Disclosure may facilitate the accountability and transparency of the council for decisions it takes;
 - Disclosure may allow individuals to better understand decisions made by the council affecting their lives and, in some cases, assist individuals in challenging those decisions.
42. As stated in paragraph 24, the Commissioner considers that the 'default setting' of the FOIA is in favour of disclosure. This is based on the underlying assumption that disclosure of information held by public authorities is in itself of value because it promotes better government through transparency, accountability, public debate, better public understanding of decisions and informed and meaningful participation of the public in the democratic process.

Public interest arguments in favour of maintaining the exemption

43. The council considered the following factors to be in favour of maintaining the exemption:
- There is a strong inherent public interest for legal advice to be exempt from disclosure as disclosure may prevent access to full and frank legal advice in the future;
 - The advice is live and current;
 - There is a strong public interest in the council being able to pursue litigation in fulfilment of its consumer protection functions;
 - If the information were to be disclosed the council's position in respect of this particular litigation would be considerably weakened.
44. The Commissioner and the Information Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal professional privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry*⁵, the Information Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests".
45. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice. The Commissioner's published guidance on legal professional privilege states the following:
- "The client's ability to speak freely and frankly with his or her legal adviser in order to obtain appropriate legal advice is a fundamental requirement of the English legal system. The concept of LPP protects the confidentiality of communications between a lawyer and client. This helps to ensure complete fairness in legal proceedings."
46. It is also important that if an authority is faced with a legal challenge to its position, it can defend its position properly and fairly without the

⁵ Appeal number EA/2005/0023

other side being put at an advantage by not having to disclose its own legal advice in advance.

47. In light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept. The Information Tribunal recognised this in the Bellamy case when it stated that:

“...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...”

48. The above does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above.

Balance of the public interest arguments

49. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible. However, having regard to the circumstances of this case, it is not the Commissioner's view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the council's right to consult with its lawyers in confidence.
50. The Commissioner notes that the public interest in maintaining this exemption is a particularly strong one and to equal or outweigh that inherently strong public interest usually involves factors such as circumstances where substantial amounts of money are involved, where a decision will affect a large amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the information, the Commissioner could see no sign of unlawful activity, evidence that the council has misrepresented any legal advice it had received or evidence of a significant lack of transparency where it would have been appropriate.
51. The Commissioner has placed significant weight on the fact that the advice is live and protects the rights of individuals in that the council is pursuing litigation in fulfilment of its consumer protection functions.
52. It is clear to the Commissioner in this case that the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour

of disclosure. He has therefore concluded that the public interest in maintaining the exemption at section 42 outweighs the public interest in disclosure of the information.

Section 10 – Time for compliance

53. Section 10(1) states:

“Subject to subsections (2) and (3), 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.”

54. The complainant stated that the response was issued outside of this statutory time limit.

55. The council received the request on the 20 March 2012 and responded on 19 April 2012 which, taking into account the bank holidays of 6 and 9 April 2012, is the 20th working day following the date of receipt. Therefore, the council responded to the request within the statutory time limit and so did not breach section 10(1).

Right of appeal

56. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

57. 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.
58. 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

Andrew White
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