

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 January 2012

Public Authority: Audit Commission

Address: 1st Floor
Millbank Tower
Millbank
London
SW1P 4HQ

Decision (including any steps ordered)

1. The complainant has requested a copy of the HB COUNT (Housing Benefit Count Once Use Numerous Times) guidance. The Audit Commission explained to the Commissioner that this is an interactive tool which consists of a series of modules and workbooks which are viewed and completed electronically by the user.
2. The Information Commissioner's ('the Commissioner') decision is that the Audit Commission has appropriately refused to disclose the information in accordance with section 43(2) of the Freedom of Information Act ('the FOIA').
3. The Commissioner requires no steps to be taken.

Request and response

4. On 15 March 2011, the complainant wrote to the Audit Commission and requested a copy of the HB COUNT guidance.
5. The Audit Commission responded on 12 April 2011. It stated that it held the information but relied on the exemption in the FOIA concerning prejudice to commercial interests, section 43(2), to withhold it.
6. Following an internal review the Audit Commission wrote to the complainant on 20 April 2011. It stated that it upheld the initial decision to withhold the information under section 43(2).

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant explained his concerns regarding the use of a software system for social housing tenants and the payment of rent over 46 or 52 weeks each year. This matter dates back to 2004 and the complainant has pursued Telford and Wrekin Council, the auditors and the Audit Commission for answers to his questions outside of the FOIA. This case only considers the specific request for a copy of the HB COUNT guidance.
8. The Commissioner therefore considered whether the requested information was correctly withheld under section 43(2).

Reasons for decision

9. Section 43(2) of the FOIA 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)". This is a qualified exemption and is therefore subject to the public interest test.
10. In this instance the Audit Commission argued that disclosure of the requested information would be likely to prejudice its own commercial interests. In order to determine whether prejudice would be likely to occur, the Commissioner has considered whether the possibility of prejudice is real, significant and more than hypothetical or remote.
11. The term 'commercial interests' is not defined in the FOIA. However the Commissioner's guidance states that such interests relate to the ability to participate competitively in a commercial activity such as the sale or purchase of goods or services.
12. The Audit Commission explained that the HB COUNT is guidance it developed for use by its appointed auditors when they are carrying out a specific statutory audit function. The Audit Commission requires its auditors to use it when carrying out their work on housing and council tax subsidy claim certification at local authorities. The HB COUNT was developed to ensure a consistent approach across its auditors, both in-house and appointed from audit firms, to ensure the Department for Work and Pensions' requirements in relation to certification are fully met.

13. The HB COUNT is the intellectual property of the Audit Commission and was developed using specialised expertise and knowledge of officers at public expense. The Audit Commission derives an income from making the HB COUNT available under licence to other bodies. Currently Audit Scotland and the Wales Audit Office make annual payments for the guidance. The terms of the licence set out restrictions on use, which include prohibiting modifying, copying or reproducing the guidance.
14. The Audit Commission considers that revealing the withheld information to a particular member of the public may not result in commercial prejudice. However it considers that, as disclosure under FOIA is disclosure to the world (without restrictions placed on the use of the disclosed information), the consequences of disclosure to bodies required to pay to use the information would be likely to prejudice the Audit Commission's commercial interests by reducing income generated from licensing opportunities.
15. The Commissioner is satisfied that the withheld information does relate to a commercial activity as the Audit Commission is able to licence the guidance for a fee under its statutory powers to provide advice and assistance to other public bodies. The income achieved contributes to the public purse against the cost of developing and maintaining the guidance.
16. There is also a separate consideration in this case in respect of the likely generation of income from the realisation of the commercial value of the Audit Commission's intellectual property. This is in the context of the current process of the Audit Commission's abolition. If the HB COUNT was already in the public domain its value would naturally be diminished.

Nature of the Prejudice

17. The Commissioner considers that for the exemption to be engaged there must be a causal link between the potential disclosure and the identified commercial prejudice. He also considers that the prejudice that could arise would need to be greater than insignificant or trivial.
18. Having considered the arguments presented by the Audit Commission the Commissioner accepts that disclosure could harm its commercial interests. He further considers that the harm would not be insignificant or trivial.

Likelihood of Prejudice

19. Following previous Information Tribunal decisions the Commissioner must establish that there is a risk of prejudice which is substantially more than remote. In this case the Commissioner is satisfied, for the reasons given above that the requested information, if it were to be disclosed, would be likely to prejudice the commercial interests of the Audit Commission and therefore the exemption is engaged.

Public interest in favour of maintaining the exemption

20. The public interest arguments in favour of maintaining the exemption are focussed on the reasons for the initial engagement of the exemption, namely the prejudice that disclosure is likely to cause.
21. In this case the commercial prejudice to the Audit Commission that would be likely has been established above.
22. The Audit Commission presented arguments to the Commissioner to support maintenance of the exemption, stating that disclosure would potentially allow private companies to obtain the benefit of using HB COUNT without contributing financially to the public purse.
23. The Audit Commission also expressed concerns that if the guidance was in the public domain it could be used by bodies without training, using an out-of-date version or for a different purpose than was intended resulting in a risk of misrepresentation of the validity of the work undertaken.

Public interest in disclosing the information

24. There is always a public interest in transparency and openness in the operation of public authorities. The complainant's concerns regarding the accuracy of the HB COUNT guidance and its application may impact on social housing tenants nationwide. Disclosure may therefore assist with checking the accuracy of the calculation of tenants' housing benefit.
25. The complainant informed the Commissioner that he considers that the Department for Work and Pensions ("the DWP") has not ensured that the amended Housing Benefit Regulations 2006 have been implemented correctly. He explained that:

"When the law changed in August 2005 (amended Act of Parliament) this made the software illegal at Councils for tenants with rent free weeks."

26. The complainant has stressed to the Commissioner that his request is to enable him to judge whether the "HB COUNT wording is illegal". He explained that his concern is that a particular firm of auditors conducts audits on tenants with rent free weeks as if they pay a weekly rent. He therefore concludes that either the HB COUNT is inaccurate or the DWP has given an illegal instruction to local government. The complainant is concerned that affected tenants may be being illegally assessed. This concern is a factor weighing in the public interest in disclosure of the requested information.

Balance of the public interest arguments

27. The Commissioner accepts that there is a strong public interest in the accuracy of the calculation and administration of housing benefit. However, having reviewed the nature of the withheld information and assessed the Audit Commission's explanations, he is not convinced that disclosure of the information would achieve this objective.
28. Having considered and balanced the public interest arguments, the Commissioner has concluded that in the circumstances of this case the public interest is weighed in favour of maintaining the application of the exemption. In reaching this conclusion the Commissioner took particular account of the argument he was persuaded by relating to the loss in any potential income for the public purse.
29. The Commissioner notes that the complainant has already contacted the Prime Minister who has appointed an officer to investigate and report on the points raised by the complainant. The Commissioner considers that such an investigation will assist in addressing the complainant's concerns and understanding of the implementation of the Housing Benefits Regulations.

Right of appeal

30. 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

31. 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.
32. 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

Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF