

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 July 2018

Public Authority: Office of the Pubs Code Adjudicator

Address: Victoria Square House
Victoria Square
81 New Street
Birmingham B2 4AJ

Decision (including any steps ordered)

1. In a series of 17 requests, the complainant has requested information about various aspects of the Pubs Code Adjudicator's performance. The Pubs Code Adjudicator (the PCA) released some information. It withheld information within the scope of requests 9, 10 and 15 under section 40(2) of the FOIA (third person personal data) and section 41(1) (information provided in confidence). The PCA has also withheld information falling within the scope of requests 3 and 8 under section 41(1).
2. The Commissioner's decision is that:
 - The PCA does not hold the information requested in requests 9 and 10.
 - The information requested in requests 3, 8 and 15 does not engage section 41(1).
 - Section 40(2) cannot be applied to request 15.

3. The Commissioner requires the PCA to take the following steps to ensure compliance with the legislation:
 - Release the information requested in requests 3, 8 and 15.
4. The PCA must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 25 May 2017 the complainant submitted 17 requests for information to the PCA. These are reproduced in the Appendix to this notice.
6. The PCA responded on 23 June 2017. It released information within the scope of requests 1, 2, 12, 14, 16 and 17 and indicated that it does not hold information relevant to request 13. The PCA withheld information within the scope of requests 4, 5, 6, 7 and 8 under section 41 of the FOIA (information provided in confidence), withheld information within the scope of requests 9, 10, 11 and 15 under section 40(2) and withheld information within the scope of request 3 under section 43 (commercial interests).
7. The PCA provided a review on 21 September 2017. It corrected some of the figures it had released previously and released further information. It maintained its position that five of the complainant's requests concern information that is exempt from release. The PCA confirmed that it considers requests 9, 10 and 15 attract the exemption under section 40(2) and that requests 3 and 8 attract the exemption under section 43(2).
8. During the Commissioner's investigation the PCA advised that it was no longer relying on section 43 with regard to requests 3 and 8. It considered that information covered by these two requests and also requests 9, 10 and 15 is exempt from release under section 41, as it had originally indicated in its response to the complainant. The PCA said it had written to the complainant again to confirm its revised position. The PCA considers that section 40(2) also applies to request 15.
9. However the PCA also indicated that, on considering the matter further, it is of the view that it does not hold information falling within the scope of requests 9 and 10 and had also communicated this position to the complainant.

Scope of the case

10. The complainant contacted the Commissioner on 15 November 2017 to complain about the way her requests for information had been handled.
11. Following correspondence to the complainant, the Commissioner's investigation has focussed on five of the complainant's 17 requests. She has considered whether the PCA holds information within the scope of requests 9 and 10 and, if so, whether the PCA can rely on section 41(1) with regard to the information it has withheld in relation to these requests and requests 3, 8, and 15. If necessary she has also been prepared to consider PCA's application of section 40(2) to request 15.

Reasons for decision

Background

12. The PCA has provided the Commissioner with the following background information and context. It has explained that it is a corporation sole undertaking functions on behalf the Crown. The office was established by Part 4 of the Small Business, Enterprise and Employment Act 2015, under which the Pubs Code etc Regulations 2016 (the Pubs Code) were made. The Department for Business, Energy and Industrial Strategy is the sponsor Department for the PCA and the Secretary of State appointed the first PCA, Mr Paul Newby, who took up post on 2 May 2016. Ms Fiona Dickie was appointed as Deputy PCA (DPCA) and took up post in November 2017. The PCA office is small, with fewer than 20 members of staff. The PCA is funded by a levy on the pub-owning businesses to which the Pubs Code applies.

The Tie

13. The PCA has further explained that a tied pub tenant is a tenant or (licensee) of a pub who is contractually obliged to purchase some or all of their alcohol from the pub-owning business who is their landlord. Pubs can be "tied" in this way in relation to the purchase of other products or services too. A tied tenant would usually pay below market rent for the premises in return for the "tie", and tenancy agreements generally include terms which flow from the tie representing a benefit to the tenant, for instance around repair obligations.

The Pubs Code

14. The Pubs Code applies to pub-owning businesses in England and Wales who own 500 or more tied pubs, which at present captures six pub-

owning businesses (Admiral Taverns Ltd, Ei Group PLC, Greene King PLC Marston's PLC, Punch Taverns PLC and Star Pubs and Bars (Heineken UK)) and their tied pub tenants (approximately 12,000 tenants). The Code applies to tied pubs in England and Wales only.

15. The main purpose of the PCA as regulator is to enforce the Pubs Code, which regulates the relationship between tied pub tenants and large pub-owning businesses. The PCA has three main statutory functions (1) to arbitrate individual disputes relating to the Pubs Code and (2) to investigate suspected breaches of the Pubs Code (3) to report unfair business practice to the Secretary of State.
16. The two key principles underpinning the Pubs Code are: (1) fair and lawful dealing by pub-owning businesses in relation to their tied tenants and (2) tied tenants should not be worse off than they would be if they were not subject to the tie.
17. The main problem the Pubs Code aims to address is the inequality in bargaining position between tied tenants and pub-owning businesses. The Pubs Code attempts to deal with this problem by putting tenants in a more informed position at the point they are negotiating a tied rent review or a new agreement (either at the outset before becoming a tied tenant, or when renewing an existing tenancy). The Code does this by requiring pub-owning businesses:
 - a) to provide full information in respect of the tied tenancy agreements they are offering;
 - b) to follow certain rules of conduct in their dealings with tied tenants; and
 - c) in certain circumstances to also provide to current tied tenants the option of an alternative tenancy which is not tied, namely the option to occupy the pub on a "Market Rent Only" basis (MRO option).

Market-Rent Only (MRO)

18. One of the key new rights available to tied tenants under the Pubs Code is the right, in certain circumstances, to ask for a MRO option (this right arises if any of 4 gateways, specified in regulations 24-27 of the Code, occurs).
19. Where a MRO Notice has been received by a pub-owning business they are required to give a full response pursuant to regulation 29 of the Pubs Code. Where the pub-owning business accepts the MRO Notice, it is required to provide a MRO-compliant proposed tenancy as part of its full response (see regulation 29(3) of the Pubs Code).

20. A MRO-compliant tenancy is one which meets the requirements in regulations 30 and 31 of the Pubs Code and meets the definition of a MRO-compliant tenancy in section 43(4) of the Act.
21. MRO-compliant proposals are controversial. The right to take a MRO option represents a significant interference in the contractual relationship between the pub-owning business and their tied tenant. For many, it significantly changes their business model arrangements and potentially their profitability. As the law is in its infancy, many issues are being tested about the approach to a MRO-compliant proposal.

Statutory Arbitrations

22. The PCA says its position is unique. Parliament has given the PCA the dual role to act as both a regulator of the industry and independent arbitrator of statutory arbitrations under the Pubs Code. The PCA (or DPCA) must either arbitrate a dispute referred to him/her, or appoint another person to arbitrate the dispute - either by virtue of section 48(5) of 2015 in respect of non-MRO disputes, or by virtue of regulation 58(2) of the Pubs Code in respect of MRO-related disputes. Such arbitrations are required to be conducted in accordance with the Chartered Institute of Arbitrators (CI Arb) rules or the rules of another dispute resolution body determined by the arbitrator (see section 51(5) of the 2015 Act and regulation 58(3) of the Pubs Code).
23. A Pubs Code-related arbitration is a statutory arbitration within the meaning of section 94 of the Arbitration Act 1996 (AA Act 1996).

Section 1 – general right of access to information a public authority holds

24. Under section 1(1) of the FOIA, anyone who requests information from a public authority is entitled a) to be told if the authority holds the information and b) to have the information communicated to him or her if it is held and if it is not exempt information.
25. With regard to requests 9 and 10, in its initial submission the PCA has told the Commissioner that, having considered the matter further, providing the numbers of awards 'in favour of' the tied pub tenant and those 'in favour of' the pub-owning business is not possible without further analysis of the raw data as judgement needs to be applied to the information it holds in relation to awards to identify the data.
26. This is because an arbitration award sets out the findings of fact and law relating to the complaint at hand. Cases may contain many issues to be considered, and it is highly unlikely that in any given case one party is successful in all the arguments they put forward. As a result it is a judgement call as to whether in any given case the award 'is in favour'

of one or other party. For example, many cases relate to whether the pub-owning business has put forward a MRO proposal which is compliant with the Code. On analysis of all the terms in the proposal, it may be the case that one term is found to be non-compliant, but 10 others are found to be not so. A judgement is needed to determine whether the award is 'in favour of' one or other party. In other cases the award may set out the settlement terms reached between the parties. In such cases there is no award in either party's favour.

27. In a further submission the PCA further explained that awards in arbitration can be made for a number of different reasons within a case. Awards might deal with a preliminary or single issue to enable effective negotiations to take place; to decide matters remaining in dispute; to record settlement or withdrawal; or to terminate a case and/or to deal with costs. PCA says that it is likely that most cases will have more than one award if the case does not settle at an early stage. A PCA arbitration case is not concluded until a costs award has been issued.
28. With regard to this particular point, the PCA has explained that a costs award deals with the costs in the case, both those of the parties and also of the arbitrator. The award ensures that the arbitrator's reasonable fees and expenses are payable in accordance with the Fees Regulations and that any costs relating to the arbitrator's appointment of an expert or legal adviser are recovered.
29. Where the case settles, the parties have usually agreed on the costs issues too (often agreeing to pay their own costs). The award will record this agreement on party costs as well as ensure the arbitrator's fees and expenses are ordered to be paid
30. In principle costs follow the event, so generally a successful party can be expected to recover their reasonable costs. However the arbitrator retains discretion to apportion costs as they consider appropriate taking into account, for example, conduct, the number of issues which were successful or not, whether a party is legally represented or not, or any other relevant circumstances. It is therefore not an absolute indicator in all cases of in whose favour the overall award can be said to have been made (which continues to be a matter of judgement in each case).
31. The PCA has next explained to the Commissioner that at the outset of a case the arbitrator will consider case management issues, which may involve a case management hearing with the parties to help identify appropriate directions that can narrow or clearly define the issues in dispute. Such intervention can lead to a more focussed approach and support continued effective negotiation and even settlement. The numbers of awards issued is not an indication of the effectiveness of the arbitration, and settlement is not an indication that the arbitration case

has not completed a 'full arbitration' process. Each case is considered and managed according to its own circumstances with the arbitrator acting as the independent decision-maker in each case. For example, the arbitrator has [recently] issued a lengthy award dealing with some issues as a preliminary award, to facilitate effective negotiation. The PCA says that the fact that this award has not dealt with all issues in the case does not indicate that the matter has not been dealt with in an effective manner. Neither does the number of awards identify the amount of time the arbitrator has spent involved in the case.

32. Where parties settle outside of an arbitration, similarly the award is not in favour of either party.
33. The PCA has explained that an award issued on a substantive matter is often like a judgment of the court - each issue in dispute is addressed considering the evidence and making a decision. Every decision will turn on its own facts. The PCA has given the following example: a Claimant raises multiple terms which they consider to be non-compliant with the Pubs Code. The arbitrator determines that on one term the Claimant is correct. However the Claimant does not make out their case on a number of terms challenged and so loses on the majority of issues in the case. In this case, it is not clear if the award 'was in favour' of either party.
34. As such the PCA says its primary position with regard to these two requests is that, in fact, it does not hold the information relating to these requests and any judgement applied to the information means the formulated data was not held at the time of the request.
35. The PCA has told the Commissioner that it has now made it clear to the complainant that this is its primary position in relation to this particular information.
36. The FOIA does not require a public authority to form an opinion or make a subjective judgement about information so that that information can be placed within the scope of a request. In this case, awards are not categorised as being 'in favour' or 'against' a particular party, with the 'in favour' awards going on to one pile and the 'against' awards going on to another. If they were categorised in this way, the PCA would hold that information and would be in a position to release the information the complainant has requested: the number of each. But for the reasons that the PCA has explained, categorising the information in this way requires a degree of analysis and subjectivity. The Commissioner appreciates that one PCA's 'in favour' might be another PCA's 'against'.
37. The Commissioner wrote to the complainant on 22 June 2018 for her view on the PCA's revised position but did not receive a response. In

the absence of any arguments to the contrary, the Commissioner therefore agrees with the PCA that it cannot be said to hold the information that has been requested in requests 9 and 10, as those requests have been framed.

Section 41 – Information provided in confidence

38. The PCA has applied section 41(1) to the information it holds that falls within the scope of the remaining requests in question; that is requests 3, 8 and 15.
39. With regard to request 3 and request 8 the PCA has withheld the breakdown by pub-owning business of particular referrals to arbitration.
40. With regard to request 15, the PCA has withheld the number of referrals that were concluded over a series of months in 2016/2017.
41. Section 41(1) of the FOIA says that information is exempt information if (a) it was obtained from any other person and (b) disclosing the information to the public (otherwise than under the Act) would constitute a breach of confidence actionable by that or any other person (ie the aggrieved party would have the right to take the authority to court as a result of the disclosure and the court action would be likely to succeed). Although section 41 is an absolute exemption and is therefore not subject to a public interest test under the FOIA, the common law duty of confidence contains an inherent public interest test.

41(1)(a) – Was the information obtained from another person?

42. The information withheld under section 41(1) comprises:
 - Numbers associated with referrals from pub tenants broken down by the pub owning business of the pub tenants (request 3)
 - Numbers associated with referrals from tied pub tenants in relation to MRO disputes broken down by the pub owning business of the tied tenant (request 8)
 - Numbers of referrals accepted for arbitration that were concluded during each month between July 2016 and June 2017 (request 15).
43. In her guidance on section 41, the Commissioner advises that if disclosing information that a public authority has created would reveal the content of the information it obtained from the other person, then the exemption may also cover the material it generated itself.

44. The Commissioner considers that the PCA can be said to have created the above information itself: it is statistical information and not information about each arbitration case; that is information either party may have provided to the PCA as part of the arbitration process.
45. The Commissioner does not consider that releasing the information that has been requested would reveal the content of the information that it obtained from the other person (that is, the pub tenants and pub-owning businesses). Her view is therefore that the PCA cannot be said to have been provided with the requested information by another person, and that the condition under section 41(1)(a) has not been met.
46. Since section 41(1)(a) has not been met, the Commissioner finds that the PCA cannot rely on section 41(1) to withhold the disputed information and it has not been necessary to consider section 41(1)(b).
47. The Commissioner has gone on to consider whether the PCA can rely on section 40(2) to withhold the information requested in request 15.

Section 40 – personal data

48. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of third persons, ie someone other than the requester, and the conditions under either section 40(3)(a) or 40(4) are also satisfied.
49. The Commissioner has first considered whether the information the PCA has withheld is the personal data of a third party/parties.

Is the information personal information?

50. The Data Protection Act 1998 (DPA), which was in force at the time that the PCA responded to the request, says that for data to constitute personal data it must relate to a living individual and that individual must be identifiable.
51. As discussed, the withheld information is for the number of referrals accepted for arbitration that were concluded during each month between late September 2016 and June 2017. The PCA has noted in its submission that it had advised the complainant that, since a referral could only be validly made from September 2016, no cases could be properly concluded in July, August or early September 2016. The PCA has provided the Commissioner with the information in question and she has noted the spread of numbers over particular months. She is also aware that the PCA has disclosed the total number of arbitrations concluded during this period: 37.

52. The PCA considers that the requested information is likely to identify, "*together with other information*", the identity of parties to confidential arbitrations given the small data set.
53. The PCA says the personal data it is seeking to protect is the "*name and address of the tied pub tenant*" in the context of a private business dispute and that the information includes the address of a property at which the business is run (ordinarily also the person's home address). The PCA has confirmed that its position is that disclosing a small data set (in real, or very close time), together with other information that may have been put into the public domain by third parties can determine a particular tied pub tenant as party to a confidential arbitration.
54. With regard to request 15, this is a request for numbers, and not the names and addresses of tied pub tenants as, at first sight, the PCA appears to have indicated. With regard to the numbers, the majority of the numbers, across a number of relevant months, are more than 10; one is five or lower. In general the Commissioner considers that a number that is five or lower could lead to a specific individual being identified, if this information is used in conjunction with other information that is already in the public domain or that might already be known by an individual or individuals.
55. Section 40(2) cannot apply to businesses, per se, as businesses are not private individuals. The Commissioner understands that the PCA is concerned that the numbers involved are sufficiently low so as to enable, when combined with other information that may already be in the public domain, specific individuals (pub tenants) to be identified and for it to be made public that that private individual has been involved in an arbitration. The PCA has provided the Commissioner with published news articles associated with the PCA and in some of which specific pub tenants discuss their concerns.
56. First, as explained above, the Commissioner considers that numbers that are six and higher are high enough so as to negate the possibility that a specific private individual can be identified. She therefore does not consider that this particular information can be considered to be personal data. The Commissioner has noted that, in response to a separate, but somewhat similar, FOIA request, the PCA has released the number of arbitrations from 14 accepted referrals, that had concluded (at September 2017).
57. With regard to the current case, the Commissioner has turned to the one data set that is lower than five. Despite information about particular situations and arbitrations having been published, the Commissioner has not been persuaded that publishing the very small

number of arbitrations that concluded in one particular month between late September 2016 and June 2017 will lead to any particular private individual being identified. A small number of arbitrations may have concluded in one particular month but the Commissioner is not convinced that any connection can be made from this number to any published articles that, in any case, are likely to have been published some time later. As above, because she considers that the remaining number does not identify any particular private individual, she is satisfied that this remaining number is also not personal data.

58. The Commissioner has found that the information requested in request 15 cannot be categorised as personal data, section 40(2) cannot be applied to this information. It has also therefore not been necessary to consider whether a condition under section 40(3) or 40(4) is satisfied.

Right of appeal

59. 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

60. 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.
61. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

APPENDIX

The information I would like to request is:

1. The number of queries received through the Adjudicator's online enquiry form.
2. The number of queries received through the Adjudicator's telephone enquiry line (0800 528 8080)
3. The number of referrals for arbitration, received from pub tenants by the Adjudicator, broken down by the pub owning business of the pub tenants.
4. The number of referrals for arbitration, in relation to dilapidations, received from pub tenants by the Adjudicator.
5. The number of referrals for arbitration, in relation to business support, received from pub tenants by the Adjudicator
6. The number of referrals made in relation to Market Rent Only disputes which were referred by the pub owning business
7. The number of referrals made in relation to Market Rent Only disputes which were referred by a tied pub tenant
8. The number of referrals made in relation to Market Rent Only disputes which were referred by a tied pub tenant, broken down by the pub owning business of the tied tenant
9. The number of cases referred for arbitration which on conclusion have been awarded in favour of the pub owning business.
10. The number of cases referred for arbitration which on conclusion have been awarded in favour of the tenant of the pub owning business.
11. The number of cases referred for arbitration which have been concluded due to the parties reaching a decision between themselves.
12. The number of referrals which were rejected for arbitration due to lack of clarity or the provision of insufficient information.
13. The number of referrals which were rejected for arbitration due to being found vexatious.
14. The number of referrals accepted for arbitration, where the cases were opened in.
 - a. July 2016
 - b. August 2016
 - c. September 2016
 - d. October 2016
 - e. November 2016
 - f. December 2016
 - g. January 2017
 - h. February 2017
 - i. March 2017
 - j. April 2017
 - k. May 2017
 - l. June 2017

- 15 The number of referrals accepted for arbitration, where the cases were concluded in:
 - a. July 2016
 - b. August 2016
 - c. September 2016
 - d. October 2016
 - e. November 2016
 - f. December 2016
 - g. January 2017
 - h. February 2017
 - i. March 2017
 - j. April 2017
 - k. May 2017
 - l. June 2017

16. The total number of open cases for arbitration that have not been concluded as of 25th June 2017

- 17 Of the current cases for arbitration that have not been concluded, the number of each that have been open for
 - a. 1 month
 - b. 2 months
 - c. 3 months
 - d. 4 months