

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 March 2012

Public Authority: London Fire and Emergency Planning Authority
Address: 169 Union Street
London
SE1 0LL

Decision

1. The complainant requested a range of information relating to AssetCo London Ltd's management of London Fire Brigade's fleet of vehicles. London Fire Brigade is run by the London Fire and Emergency Planning Authority (LFEPA), who are the relevant public authority for the purposes of Schedule One of the FOIA (Schedule One, paragraph 20).
2. LFEPA provided some of the requested information but refused to provide the specific values of payment 'abatements' applied in instances where AssetCo London Ltd failed to repair or replace vehicles within the contractual time limits. LFEPA argued that disclosing this information would prejudice the commercial interests of both parties. The relevant exemption to disclosure is provided by section 43(2) of the FOIA.
3. The Commissioner's decision is that LFEPA failed to respond to the request within the statutory time limit and that it incorrectly applied section 43(2) to withhold the value of payment abatements.
4. The Commissioner requires LFEPA to take the following steps to ensure compliance with the legislation:
 - Disclose the withheld information.
5. LFEPA 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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

6. Since February 2001 all LFEPA vehicles (including fire engines) and all operational equipment used by Fire Brigade crews have been provided under a 20 year Private Finance Initiative (PFI) contract with The Leasing Group (TLG). The contract has subsequently changed hands twice and is currently owned by AssetCo London Ltd ("AssetCo").
7. The focus of the request is on information relating to AssetCo's performance in dealing with 'Code 1' defects. Code 1 defects are faults which render vehicles out of service. A Code 1 "failure" refers to an instance where the contract holder fails to remedy a defect within the contractual time limit. The time limit is set at 2 hours for critical fleet items and 4 hours for others.

Request and response

8. On 2 September 2011 the complainant wrote to LFEPA and requested the following information:
 - (i) Since taking over the management of London's fleet of vehicles, how many times have AssetCo failed to repair code 1 defects or replace the machine within the time limit set out within their contract.
 - (ii) On the occasions where AssetCo failed to meet this target, how long did it take them to repair or replace the vehicles in question.
 - (iii) Where contractual target times were not met, how much was AssetCo fined.
9. According to LFEPA, the email mailbox to which the request was sent was intended to be deactivated but this had not happened at the time the request was sent. As a result, although the request was received, the mailbox was not checked and the request was not processed.
10. The complainant contacted the Commissioner about LFEPA's failure to respond to the request and on 17 November 2011 the Commissioner wrote to LFEPA and advised it to provide a response.
11. LFEPA responded on 1 December 2011 and provided information relating to the first 2 elements of the request. In relation to (iii), it clarified that failure to meet contractual target times did not result in fines but in 'abatements' to payments, effectively deductions from monthly payments to AssetCo. LFEPA confirmed that it was withholding details of the abatements under the commercial interests exemption.

12. Being dissatisfied with the response, the complainant wrote to LFEPA on 13 December 2011 and asked it to conduct an internal review. The complainant raised some queries about the accuracy of the information provided in response to (i) and asked for the decision to withhold the information requested in (iii) to be reconsidered.
13. LFEPA issued its internal review response on 19 January 2012. This provided some clarification about the information provided in response to (i) and upheld the original decision to withhold information under the commercial interests exemption.

Scope of the case

14. The complainant has asked the Commissioner to consider whether LFEPA has correctly applied section 43(2) to part (iii) of the request.
15. The Commissioner confirmed with the complainant that his investigation will confine itself to a consideration of this matter. He has also considered the relevant procedural issues.

Reasons for decision

Section 43(2) – Prejudice to Commercial Interests

16. Section 43(2) of the FOIA provides an exemption from disclosure of information which 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.
17. In this instance LFEPA has argued that disclosure of the information would prejudice its own commercial interests and those of AssetCo. In considering its response to the request, LFEPA, in accordance with the Code of Practice issued under section 45 of the FOIA, consulted with and sought the views of AssetCo.
18. In order to determine whether the exemption is engaged the Commissioner has first considered whether the prejudice claimed relates to the commercial interests of LFEPA or AssetCo.
19. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43. This comments that:

*"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."*¹

20. The withheld information relates to a PFI contract which relates to the provision of services and goods by a private partner to a public authority and the Commissioner considers that it relates to the commercial interests of LFEPA and Assetco. He, therefore, considers that the withheld information falls within the scope of the exemption.
21. The Commissioner has gone on to consider how any prejudice to the commercial interests of LFEPA and AssetCo would be caused by the disclosure of the payment abatements.

The nature of the prejudice

22. In the Commissioner's view, "prejudice" means not just that the disclosure of information must have some effect on the applicable interest(s), but that this effect must be detrimental or damaging in some real way. If a "trivial or insignificant" prejudice is claimed, such that it cannot be said to have any real detrimental or prejudicial effect, then the exemption should not be accepted. The detrimental effect need not necessarily be severe although the level of severity will inform any relevant public interest considerations.
23. Although LFEPA has argued that prejudice would be caused to its own and to Assetco's commercial interests, the Commissioner notes that the nature of the purported prejudice is intertwined. To an extent, the manner in which the effects of disclosure are projected to run is akin to that of a type of feedback loop with the damaging effects being reflected and amplified between both parties. He has, therefore, considered the relevant arguments as they apply to both parties together rather than in isolation.
24. AssetCo has argued that disclosure of the value of the abatements would have a detrimental impact on its ability to negotiate the finance required to support its provision of services to LFEPA. The sums of the abatements would be viewed by any potential financiers as fiscal punishments which would result in the perception of AssetCo as a higher risk than if the information were not disclosed. As a higher risk any

1

http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

interest rate charged on loans would, therefore, be higher. This would have the effect of inhibiting AssetCo's ability to provide a good value, effective service to LFEPA.

25. The perceived increased risk of doing business with AssetCo would also result in a reduction of the number of suppliers willing to take on this risk. As an effect, AssetCo's access to the available market would be impeded. The effect of prejudicing AssetCo's position in negotiating favourable rates of finance would also inhibit its ability to compete in future tendering evaluations as it would restrict its ability to present competitive bids. Public awareness of individual and total amounts imposed on AssetCo would be perceived as financial punishments, information which competitors would not place in the public domain. The bargaining position of AssetCo in future tendering evaluations would, therefore, be prejudiced by the disclosure of the information.
26. LFEPA has argued that the effects of disclosure on Assetco would have a direct impact on its ability to provide emergency services. Any additional costs incurred as a result of AssetCo's less favourable finance deals would be passed onto LFEPA. Payments for new vehicle assets would increase, costs of other parts and services would increase and a reduction in the availability of suppliers would result in delays in procuring equipment. Delays in securing parts and equipment would also increase the likelihood that AssetCo would be subject to more abatements, intensifying the prejudice already identified.
27. In relation to the prejudice to AssetCo, the Commissioner has considered information which is publically available and information LFEPA has disclosed about the frequency extent of abatements applied.
28. Assetco's financial situation has been a matter of public record. It was widely reported during 2011 that AssetCo owed in excess of £100 million to creditors and that there was a possibility of it entering into administration.² During September 2011 a Scheme of Arrangement was proposed involving an equity injection of £10 million into the company. The Scheme of Arrangement was agreed by creditors, shareholders and the High Court in September 2011 and the proposed refinancing has since been implemented³.

² See, for example: <http://www.guardian.co.uk/uk/2011/may/22/assetco-london-fire-brigade-privatisation>; <http://thelincolnite.co.uk/2011/07/fire-service-unaffected-by-assetco-administration/>

³ Further details are available on the AssetCo website here: <http://assetco.com/Investor-Relations/Regulatory-News.aspx>

29. In spite of any historical financial difficulties AssetCo might have been subject to and regardless of its current situation, the Commissioner is not satisfied that LFEPA has demonstrated that the disclosure of the value of the abatements would result in prejudice to its commercial interests, over and above any effects which might have ensued from the disclosure of details of instances of and extent of Code 1 failures. The Commissioner considers that any creditor or potential creditor would be able to determine the relative financing risks from the publicly available details of its performance under the contract, specifically the extent to which its contractual obligations have been met. Similarly, details of its current financial situation are also in the public domain and are open to scrutiny by creditors. The Commissioner does not accept that LFEPA has demonstrated how the disclosure of the actual value of abatements would, more likely than not, result in the prejudicial effects described.
30. As the Commissioner does not consider that it has been demonstrated that disclosure would prejudice AssetCo's commercial interests, he must also find, in view of the causal chain identified above, that disclosure would also not prejudice LFEPA's commercial interests.
31. The Commissioner has not been provided with sufficient arguments to enable him to conclude that disclosure of the full abatement values would prejudice the commercial interests of AssetCo or LFEPA. The Commissioner has concluded that section 43(2) is not engaged in this case and has, therefore, not gone on to consider the public interest arguments.

Right of appeal

32. 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

33. 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.
34. 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

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