Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 September 2012

Public Authority: The Governing Body of Wycliffe Hall
Address: 54 Banbury Road
Oxford
OX2 6PW

Decision (including any steps ordered)

1. The complainant has requested information relating to the relationship between Wycliffe Hall (Wycliffe), a theological college within the University of Oxford, and the Oxford Centre for Christian Apologetics (OCCA). Wycliffe agreed to the disclosure of the requested information with the exception of a limited amount contained in a partnership agreement. This was withheld under section 43(2) (commercial interests) of FOIA.

2. The Commissioner's decision is that Wycliffe incorrectly applied section 43(2) of FOIA. He therefore requires it to disclose a complete copy of the partnership agreement to ensure compliance with the legislation.

3. The public authority 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

4. On 14 March 2012 the complainant wrote to Wycliffe and requested information in the following terms:

    1. "What is the legal status of the Oxford Centre for Christian Apologetics? What is the precise legal relationship between the Centre and Wycliffe Hall? Are its accounts included within the published accounts of Wycliffe Hall?"

2. "In your accounts for the year 2007-08 you mention that media consultants were employed to assist in the management of profile and reputation. Can you please indicate, for the last five complete financial years, what media consultants were employed, how much they were paid, and what brief they were given?"

5. Wycliffe responded to the requests on 27 March 2012. It provided some information within the scope of request 1 but refused to comply with request 2 on the grounds that the information was commercially sensitive. No exemption in FOIA was cited at this stage.

6. Later that same day the complainant asked Wycliffe to reconsider its response to the requests. In addition, he made a further request to Wycliffe about its relationship with OCCA:

3. "Can you please provide me with a copy of the partnership agreements, and could you tell me, for the past five financial years, what income Wycliffe Hall has derived from OCCA, what it has spent on OCCA and what profit or loss it has derived from this arrangement?"

7. Wycliffe sent the outcome of its internal review, which included its response to request 3, on 10 April 2012. This provided further clarification in respect of request 1. Regarding request 2, Wycliffe upheld its position that the information was commercially sensitive, citing section 43 of FOIA as the basis for refusing the request. Furthermore, it stated that section 40 (personal data) of FOIA applied to the names included in the information. Finally, in relation to request 3, Wycliffe explained that it was not possible to identify the profit or loss it had derived from its relationship with OCCA as this was not recorded separately in its accounts. For the information it did hold, Wycliffe confirmed that it was refusing disclosure because it considered that this, too, was exempt information on the basis that it was commercially sensitive.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his requests for information had been handled.

9. During the Commissioner's investigation, Wycliffe has agreed to the disclosure of further information or clarified its position with respect to other parts of the requests. In light of these developments, the complainant has confirmed that the Commissioner's decision can be

limited to Wycliffe's refusal to disclose a copy of the partnership agreement described at request 3.

10. In revisiting the information, Wycliffe has decided to drop its reliance on section 43(2) with the exception of three sections contained in the partnership agreement – 4.1(b), 4.3 and 7. It has therefore only been necessary for the Commissioner to consider Wycliffe's position in relation to this information.

Reasons for decision

11. Broadly speaking, section 43(2) protects the ability of a party to participate competitively in a commercial activity, namely the purchase and sale of goods or services. The successful application of section 43(2) is dependent on a public authority being able to demonstrate that the following conditions are satisfied –

    - Disclosure of the requested information would, or would be likely to, prejudice the commercial interests of any party (including the public authority holding it).

    - In all the circumstances, the weight of the public interest in maintaining the exemption outweighs the public interest in disclosure.

12. The first issue for the Commissioner to assess, therefore, is whether disclosure could result in the prejudice that the exemption is designed to protect against. If this is not found to be the case, the exemption is not engaged and there is no requirement to go on to consider the public interest factors associated with disclosure.

13. Adopting the now standard approach set out by the Information Tribunal in *Hogan*[1], the Commissioner considers that the framework for assessing the test of prejudice involves the consideration of three questions; (1) What are the applicable interests within the exemption? (2) What is the nature of the prejudice being claimed and how will it arise? (3) What is the likelihood of the prejudice occurring?

[1] http://www.informationtribunal.gov.uk/DBFiles/Decision/i42/MrCMHoganandOxfordCityCouncilvInfoComm17Oct06.pdf

14. OCCA is an initiative began and managed by a partnership involving Ravi Zacharias International Ministries (RZIM) and Wycliffe, a Permanent Private Hall of Oxford University. It offers courses through which students can learn more about Christian Apologetics, a field which aims to offer a Christian counter-claim to secularism in modern society.

15. Wycliffe has argued that disclosure of the disputed sections of the partnership agreement would be likely to prejudice its own commercial interests. This is because, in Wycliffe's view, the release of key data in relation to a past agreement could affect its ability to enter into future negotiations for comparable arrangements on favourable terms. On this basis, the Commissioner is prepared to accept in principle that the prejudice being claimed is relevant to the exemption set out at section 43(2).

16. The next step for the Commissioner is to consider the nature of the prejudice being claimed and how it will arise. For this condition to be satisfied, a public authority must be able to point to prejudice which is real, actual or of substance and show there is a causal link between the proposed disclosure and the prejudice.

17. Wycliffe has argued that the timing of the request is critical for finding that the information is commercially sensitive. This is because at that stage it was planning to enter into a debate with third parties that could have a significant impact on the way it operates and the scale of its ambitions. Wycliffe considers that to release the disputed information at the time of the request would leave it at a disadvantage when taking part in the imminent negotiations.

18. As an adjunct to this argument, Wycliffe has stated that the information contained at sections 4.1(b) and 4.3 refers to its plans for future development and strategy. To disclose this information now would be likely, according to Wycliffe, to affect the commercial interests of all the parties connected with OCCA's future development, which includes RZIM.

19. Wycliffe has further claimed that the release of the information could lead to unhelpful conjecture at a point at which it will be entering negotiations that will affect its future. In respect of sections 4.1(b) and 4.3, Wycliffe has suggested that this information could be taken out of context and, in so doing, upset its relationship with other involved parties. In the case of section 7, Wycliffe has indicated that the release of the financial terms could lead to public speculation about how its fees are spent.

20. The Commissioner accepts that there may be circumstances where the disclosure of commercial information will impair the ability of a party to

enter into future commercial negotiations. This will normally be the case where the information relates to an activity in a competitive environment, or where there would be damage to a party's reputation, or both. However, neither of these issues have been shown to apply here.

21. The Commissioner acknowledges the importance that Wycliffe has placed on the information and the need for keeping this information confidential. Notwithstanding this, however, he has reminded himself that an evidential burden rests with the public authority not only to demonstrate that potential disclosure could be prejudicial but also that the prejudice corresponds with the relevant exemption being claimed.

22. It is the view of the Commissioner that the principal argument of Wycliffe fails to demonstrate a causal link between the commercial interests of any party and the content of the disputed information itself. This finding, it must be stressed, in no way ignores the fact that at the time of the request Wycliffe was entering into negotiations that would be likely to affect its future strategy and development. Yet, the Commissioner considers that Wycliffe has not been able to connect these negotiations with the specific information in question and any prejudice that might arise. Significantly, Wycliffe has not indicated how the information would hold any commercial currency when carrying out its negotiations.

23. Furthermore, the Commissioner has placed little weight on Wycliffe's argument that the release of the disputed information could lead to unhelpful speculation. This is because the argument does not address the fundamental question of how the commercial interests of it, or any other party, would be damaged by the public having access to the information. In order to justify the application of section 43(2), it is not enough to say simply that the exposure of information could lead to unwelcome attention.

24. Moreover, even if Wycliffe had managed to show that the disputed information could reasonably be linked with the commercial interests of a party, the Commissioner observes that Wycliffe has not explained how the partnership agreement could have a bearing on future commercial events, given that the most recent revision of the partnership agreement dates back to August 2010.

25. On this point, the Commissioner agrees with Wycliffe that the timing of disclosure can be of critical importance. However, this is only to the

extent that the requested information has value in the market conditions as they stand at the time of a request. Ultimately, as the Commissioner has highlighted in his guidance on section 43[2], these conditions can change and some information, such as those relating to costs, may very quickly become out of date. Bearing this in mind, it is by no means clear how the disputed information could retain the commercial sensitivity advanced by Wycliffe.

26. For the reasons set out above, the Commissioner has found that none of Wycliffe's arguments meet the second part of the prejudice test. Ultimately, the emphasis of FOIA is on transparency and therefore the onus is on a public authority to justify why any information should not be made publicly available. It is the Commissioner's decision that Wycliffe's arguments have not indicated how disclosure would lead to the prejudice described by section 43(2) and so, on this basis, he has decided that the exemption is not engaged.

Procedural requirements

27. In addition to the consideration of Wycliffe's decision to refuse the disclosure of all the requested information, the complainant has also asked the Commissioner to make a finding on a procedural issue connected to the complaint.

28. The Commissioner has decided that Wycliffe breached section 17(7) of FOIA by the way in which it responded to the complainant's application for information. This section states that a notice confirming the refusal of a request should –

    (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

    (b) contain particulars of the right conferred by section 50 of FOIA (which sets out the right to ask for a decision by the Commissioner).

[2] 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.ashx

29. Wycliffe has accepted that it failed to inform the complainant of its complaints procedure in this case with the resultant breach of section 17(7). However, the Commissioner is grateful for Wycliffe's assurance that it will take steps to avoid a similar breach in the future.

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 ……

Gerrard Tracey
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