

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 November 2012

Public Authority: The Water Services Regulation Authority
("Ofwat")

Address: Centre City Tower
7 Hill Street
Birmingham
B5 4UA

Decision (including any steps ordered)

1. The complainant has requested information related to an exercise carried out by Ofwat in which water companies provided costings for the supply of services to a particular site. Ofwat disclosed some information but withheld the remainder under section 44 of FOIA.
2. The Commissioner's decision is that Ofwat has correctly applied section 44 to the information that it has withheld.

Request and response

3. On 24 February 2012, the complainant wrote to Ofwat and requested information related to an exercise carried out by Ofwat in which water companies provided costings for the supply of services to a particular site. The request was in the following terms:

"... I request a summary of the findings of this costing exercise detailing covering

a) copies of summarised information (in the format of Excel spreadsheets and Word documents) from the costing exercise against all the headings analysed by ofwat. As a minimum this should include unedited copies of all papers (in the format of Excel spreadsheets and Word documents) provided to Ofwat's Self-Lay Group

b) copies of any internal papers, telephone/meeting notes and emails relating to considering the findings of this exercise and the actions Ofwat has subsequently taken.

This request is not time limited to 2009-10. If further analysis has been done since 2010 and papers/emails have been written, or spreadsheet analysis undertaken, copies of these should also be provided."

4. Ofwat responded on 22 March 2012. In relation to part (a) of the request, it explained that the information that it held had been provided to it by the water companies. Under section 206 of the Water Industry Act 1991, it was prohibited from disclosing this information without the consent of the water companies, unless certain exceptions applied, which it did not believe was the case. It provided some information for which consent had been given to disclosure by the relevant water companies. It withheld the remainder under section 44.
5. In relation to part (b) of the request, Ofwat informed the complainant that it did not hold any information, other than the minutes of a meeting that had previously been provided to him.
6. Following an internal review, Ofwat wrote to the complainant on 19 April 2012. It upheld its earlier decision.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. During the course of the Commissioner's investigation, the complainant accepted that Ofwat did not hold any information falling within part (b) of his request. However, he sought to challenge Ofwat's application of section 44 to the information that fell within part (a) of his request.
8. The Commissioner considered whether Ofwat was entitled to withhold, under section 44, the information that it had not disclosed to the complainant.

Reasons for decision

Section 44 – Prohibitions on disclosure

9. Section 44 of FOIA states that:

"Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,*
- (b) is incompatible with any Community obligation, or*
- (c) would constitute or be punishable as a contempt of court."*

10. Ofwat explained that disclosure of the withheld information was prohibited by section 206(1) of the Water Industry Act 1991 ("WIA"). Section 206(1) provides that

(1) Subject to the following provisions of this section, no information with respect to any particular business which—

(a) has been obtained by virtue of any of the provisions of this Act; and

(b) relates to the affairs of any individual or to any particular business,

shall, during the lifetime of that individual or so long as that business continues to be carried on, be disclosed without the consent of that individual or the person for the time being carrying on that business.

11. Ofwat contended that where the disclosure of information is prohibited by section 206(1) of the WIA, it is exempt from disclosure under section 44(1)(a) of FOIA. The Commissioner accepts that this is the case.

12. The Commissioner was informed by Ofwat that it has general duties under the WIA to:

- (i) keep under review the manner in which water companies carry out their functions (under section 27(1) of the WIA); and
- (ii) collect information with respect to the manner in which water companies carry out their functions with a view to it becoming aware of, and ascertaining the circumstances relating to, matters with respect to which any power or duty is conferred or imposed on it under any enactment (under section 27(2) of the WIA).

13. Section 206(1) of the WIA applies to information with respect to, and relating to the affairs of, any particular business that has been obtained "by virtue of" any provisions of the WIA. Ofwat explained that it had obtained information from water companies about how they would calculate payments for a typical infrastructure scheme (which relates to their affairs as a water company) by virtue of its functions under the

above provisions of the WIA (and, in particular, by virtue of its duties in section 27).

14. The complainant suggested that for section 206(1) to apply, Ofwat would need to be able to establish which of its information gathering powers had been used to obtain the information. However, Ofwat argued that it was not necessary for information to have been obtained through the exercise of its specific information gathering powers for the section to apply.
15. In *Mander Faw v Information Commissioner* (EA/2012/0034), the First Tier Tribunal had to consider similar arguments in relation to an equivalent statutory prohibition contained in section 393(1) of the Communications Act 2003. For information to fall within this section, it had to have been "obtained" by Ofcom from a third party. Commenting on the issue as to whether information voluntarily provided by third parties to Ofcom, as opposed to information provided to it as a result of it exercising its statutory powers, was information that had been "obtained", the First Tier Tribunal stated that:

"In the light of [the decision of the Employment Appeal Tribunal in Brennan v Bedford Borough Council (EAT/0317/03/SM)] and the clear statutory purpose of protecting Ofcom's ability to gather information in confidence the Tribunal is satisfied that "obtained" must in this content (sic) not be restricted to "obtained by use of coercive powers" but must be given its natural, broad meaning."
(para 15)

16. The Commissioner is consequently of the view that the meaning of "obtained" in section 206(1) of the WIA should be given a broad, rather than narrow, meaning so as to encompass information voluntarily provided to Ofwat by water companies. The information provided by the water companies in this case would therefore be information that was "obtained" by Ofwat under section 206(1).
17. Ofwat explained to the Commissioner that the prohibition in section 206(1) of the WIA did not apply where the business, to whose affairs the information related, consented to the disclosure. In this case Ofwat had contacted each water company to ask whether they would consent to the disclosure of the relevant information. Only two water companies consented to the disclosure of information and in both cases the consent was conditional on anonymisation. The information relating to these two companies was therefore provided to the complainant in an anonymised form. However, it informed the Commissioner that it had not received any other consents to the disclosure of the withheld information.

18. The complainant argued that, even if the withheld information fell within the scope of section 206(1), Ofwat was able to disclose it by virtue of its powers under section 206(3)(a) or (b) of the WIA. Ofwat accepted that it could (subject to any other legal restrictions) disclose information for the purposes set out in section 206(3)(a) or (b) of the WIA, but that it was not required to do so and it did not consider it appropriate to do so in this case.
19. The complainant informed the Commissioner that a summary of the withheld information was presented by Ofwat to its Self Lay Group and that it released information from the costing exercise to Defra. Defra had subsequently published some of this information on 10 July 2010 in its impact statement relating to charging for water and sewerage infrastructure within new developments. The complainant accepted that the information that had been released by Defra was high level information.
20. Ofwat accepted that at least part of the withheld information was shared in 2010, in an anonymised form, with members of its Self Lay Group (an advisory body established by Ofwat comprising representatives of self-lay organisations, developers, water companies and manufacturers). In its view, however, this limited disclosure did not amount to publication of the withheld information or its disclosure to the world at large. It was entitled to form advisory bodies and (subject to any other legal restrictions) share information with them for the purpose of facilitating the carrying out of its functions under the provisions of the WIA.
21. In relation to possible disclosures under the exceptions to prohibition ("gateways") contained in section 206(3)(a) or (b), Ofwat argued that the Commissioner's line to take on "Ombudsman's or regulator's statutory bars" made it clear that it was not for the Commissioner to question whether or not Ofwat had correctly applied its discretion to disclose information under section 206 of WIA. It also pointed to the view of the Upper Tier Tribunal in *OFCOM v Morrissey and the Information Commissioner* ([2011] UKUT 116 (AAC)2) at paragraph 63, on the Commissioner's powers to review the exercise of discretion by a regulator, that:

"In short, the task of the Commissioner is to make a decision whether, in any specified respect, a request for information made by a complainant to a public authority has been dealt with in accordance with the requirements of Part I of FOIA. That may well require a view to be taken on the construction of a potentially relevant statutory bar on disclosure in other legislation. In the circumstances of the present case it did not

extend to asking the questions which might be asked on the subject of reasonableness by a court of supervisory jurisdiction examining a challenge to OFCOM's failure to exercise powers available to it under the 2003 Act."

22. In considering Ofwat's position in relation to the application of section 206(3)(a) and (b), the Commissioner has to take account of the decision of the Upper Tier Tribunal referred to by Ofwat as it was concerned with the situation where a statutory bar includes gateways to disclosure which may be applied at a regulator's discretion. The Upper Tier Tribunal made it clear that, in such situations, it is not for the Commissioner to question whether a regulator applied their discretion under the relevant gateways correctly. The Tribunal confirmed that the correct channel for a person to challenge the use of discretion by a regulator in such circumstances was the administrative court.
23. Consequently, it follows that the Commissioner does not have the authority to question whether Ofwat applied its discretion under section 206(3)(a) and (b) correctly. He must therefore accept Ofwat's decision that, in its view, it was appropriate to disclose some of the withheld information to its Self Lay Group and to Defra but that it was not appropriate to disclose the withheld information, under the gateways provided by section 206(3)(a) and (b), in response to the complainant's request under FOIA.
24. Ofwat informed the Commissioner that the other gateways listed in subsections (3), (4) and (5) of section 206 of the WIA were clearly not relevant here because the complainant was not one of the persons or organisations referred to. The Commissioner accepts that this is the case.
25. In light of the above, there is no basis for the Commissioner to determine that Ofwat was incorrect to decide that none of the provisions in section 206 of the WIA provided it with lawful authority to disclose the information that had been requested. It therefore follows that his conclusion is that Ofwat correctly applied section 44 of FOIA in withholding the requested information.

Other matters

26. The complainant raised concerns with the Commissioner that Ofwat had not retained any internal documents falling within part (b) of his request. He believed that any such documents that may have been created, and then subsequently destroyed, could have been of importance. However, as the Commissioner has explained to the complainant, he does not have the authority under FOIA to make any

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determination as to what records a public authority should retain. Consequently this is not an issue on which he is able to make any comment or determination.

Right of appeal

27. 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

28. 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.
29. 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

Rachael Cragg
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