

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 October 2013

Public Authority: Rotherham Metropolitan Borough Council
Address: Riverside House
Main Street
Rotherham
S60 1AE

Decision (including any steps ordered)

1. The complainant has requested copies of Rotherham Metropolitan Borough Council's ('the council') annual IT health checks. The Commissioner's decision is that the council is not entitled to rely on the exemption for health and safety at section 38 of the FOIA as a basis to withhold the requested information.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information.
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 20 February 2013 the complainant made the following request for information via the WhatDoTheyKnow website:

"Please can you provide a copy of the annual IT Health checks conducted on your behalf by outside contractors.

I would like to see the reports for the last 3 years. I expect that some

details will need to be redacted where the vulnerabilities still exist or they may compromise security.”

5. The council responded on 19 March 2013 and refused to provide the requested information citing the exemptions for personal data and health and safety at sections 40(2) and 38 of the FOIA.
6. The complainant requested an internal review on 20 March 2013. He clarified his request as follows:

“I am not requesting a complete release of all the data concerning the tests. A schedule showing what tests were carried out and when would be helpful. I am also requesting for at least summary information from each test to be provided with say the number of security issues found and their severity with some broad indication of which areas the issues lay with. I cannot see how the release of "executive summary" information is going to compromise the security of the Council's information.

I am happy that details of specific vulnerabilities should not be released and this either is removed or redacted as I said in my original request.”

7. The council provided an internal review response on 18 April 2013. in which the council maintained its original position and provided further details as to why it believes the exemptions apply.

Scope of the case

8. The complainant contacted the Commissioner on 24 April 2013 to complain about the way his request for information had been handled.
9. The Commissioner has not considered the exemption for personal data at section 40(2) of the FOIA. This is because, in its response to the Commissioner's enquiries, the council clarified that the requested information in itself is not personal data and the Commissioner considers that the section 40(2) exemption can only apply if the withheld information itself is personal data.
10. The Commissioner has considered the application of the health and safety exemption at section 38 of the FOIA to the requested information.

Reasons for decision

11. Section 38 states that information is exempt if disclosure would, or would be likely to, endanger the physical or mental health, or safety of, any individual. This is a qualified exemption, and is therefore subject to the public interest test.
12. The Commissioner considers that the term 'endanger' should be interpreted in the same way as the term 'prejudice' in other FOIA exemptions and his view was confirmed by the Information Tribunal in *PETA v ICO & University of Oxford*¹.
13. The Commissioner's approach to the prejudice test is based on that adopted by the Information Tribunal in *Hogan and Oxford City Council v ICO*² at paragraphs 28-34. This involves the following steps:
 - Identify the "applicable interests" within the relevant exemption
 - Identify the "nature of the prejudice". This means:
 - Show that the prejudice claimed is "real, actual or of substance";
 - Show that there is a "causal link" between the disclosure and the prejudice claimed.
 - Decide on the "likelihood of the occurrence of prejudice".
14. The council said that there is a strong likelihood that releasing this information would jeopardise the security of the council network and therefore put service users at risk. It explained that IT health checks are conducted on the council network and that the reports will contain sensitive information about its data and systems and disclosure will jeopardise the security of the network. It said that disclosing the IT health check information, even just the summary information from each test, the number of security issues found, their severity, and a broad indication of which areas the issues lay with, would disclose details of those areas of the council's IT infrastructure which warrant improvement which would give an indication of any vulnerabilities within the network and could be the basis of an attack which may lead to inadvertent disclosure of information or deliberate unauthorised access to the network.

¹ Appeal number EA/2009/0076

² Appeal number EA/2005/0026 and 0030

15. The council explained that its network holds a large amount of sensitive personal information relating to service users and staff. This information includes social services databases, children's files, adoption files, adult social services files, details of council residents, details on how to access properties of vulnerable persons (passwords etc), information regarding convictions, information on mental health issues, details of domestic violence incidents, files on asylum seekers, as well as a large amount of personal and financial information which could result in identity fraud. It said that;

"The consequences of disclosing information which could lead to a breach of our network security could result in extreme distress to service users. There is also a real threat of endangerment to vulnerable service users such as elderly people, those suffering from mental health issues, children in care etc. As the Council is part of the Government Connect network, compromising the security of our network may also impact on other public sector organisations."

16. Given the contents of the information on the council's network, the Commissioner accepts that the council's arguments in relation to the endangerment of individuals are relevant this exemption and that the subjects of the endangerment have been identified. Therefore the 'applicable interests' have been identified.

17. The Commissioner considers that the nature of the prejudice, that being a threat to the physical or mental health, or safety of, individuals is "real, actual or of substance".

18. The council did not provide the Commissioner with any further arguments as to the causal link between disclosure of the information and the endangerment to the physical or mental health, or safety of, any individual(s). However, the Commissioner considers that there is a logical connection between disclosure in this case and the threat of endangerment to individuals as it is conceivable that disclosure of the withheld information could lead to unauthorised access to the network which could in turn lead to the endangerment to service users. For example, if details of how to access a vulnerable person's property were known, that person's safety could be compromised.

19. Establishing the causal link means that the prejudice claimed is at least possible, ie there are circumstances in which it could arise. The next step in engaging the exemption is to consider how likely the endangerment is to occur.

20. In this case, the council stated that the endangerment 'would occur'.

21. The Tribunal in the aforementioned Hogan case stated that;

“there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not.” (paragraph 33)

22. As stated in the Commissioner’s guidance on the prejudice test³, the first limb relates to ‘would’ and the second to ‘would be likely’. ‘Would’ therefore means ‘more probable than not’; in other words, there is a more than 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so.
23. The council said that it acts quickly to resolve any security weaknesses identified in the IT health check and that its continued certification to the PSN connect mandates that it does so but to reveal the details and existence of historical weaknesses could lead to potential attacks against the network.
24. The council also said that it recently attended a presentation given by GovCertUK who are currently specifically warning all local authorities about the new wave of extremely sophisticated attacks on UK organisations which are specifically targeting data rather than trying to disrupt services. GovCertUK advised in strong terms that the council should not be publishing details about software versions, operating systems or versions of hardware as potential hackers are using such information to attack organisations in increasingly sophisticated ways.
25. The Commissioner recognises the seriousness of the council’s arguments, particularly given the nature of the information contained in the social care and welfare databases, and the potential ramifications were the security of such databases to be compromised. However, he has had to consider whether the disclosure of the information in this case would have the prejudicial effects argued by the council or whether that prejudice would be more probable than not were the information to be disclosed.
26. The Commissioner is not persuaded that the disclosure of this information would have the prejudicial effects argued by the council. This is because the council indicated that the IT security weaknesses acted upon had been resolved; the causal link appears to have three stages (disclosure could lead to a breach of the council’s network

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http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/the_prejudice_test.pdf

security which could lead to unauthorised access to data which could lead to endangerment); and the council have not provided persuasive arguments as to the likelihood of this occurring. The Commissioner therefore has no choice but to conclude that the exemption is not engaged. As he has found that this exemption is not engaged, the Commissioner has not gone on to consider the balance of the public interest.

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

Andrew White
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