

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 July 2014

Public Authority: London Legacy Development Corporation
Address: Level 10
1 Stratford Place
Montfichet Road
London E20 1EJ

Decision (including any steps ordered)

1. The complainant has requested information relating to the bid for the London Olympic Stadium by Tottenham Hotspur Football Club ("THFC"). This is held by the London Legacy Development Corporation ("LLDC") who are a public authority for the purposes of the FOIA. LLDC originally refused this under section 41 (Information provided in confidence) and upheld this at internal review. During the course of the Commissioner's investigation, LLDC made a further disclosure. It relied on section 41, section 40(2) (Unfair disclosure of personal data) and section 43(2) (Prejudice to commercial interests) as its basis for withholding the remainder.
2. The Commissioner's decision is that LLDC is entitled to rely on section 41 and section 40(2) as a basis for withholding the requested information.
3. No steps are required.

Request and response

4. On 9 June 2013 the complainant requested information of the following description:
 - "1. A copy of THFC's bid for the London Olympic Stadium;

2. All supporting papers relating to that bid, in particular those describing their proposals for redeveloping and re-modelling the Olympic legacy stadium, the timescales for opening their new stadium and the extent of their proposed operations from that site (including the operation of the Tottenham Hotspurs Foundation);
3. Their proposals for the refurbishment of the Crystal Palace Stadium for athletics and any guarantees of security offered in support of such commitments;
4. All correspondence and documents (including any statements or representations received from THFC, the Mayor or the GLA, the London Borough of Haringey or any other parties) relating to THFC's proposals and assessments, in terms of the wider Olympic legacy benefits or impacts of THFCs bid, and in particular in relation to their proposal for the consequential redevelopment of their existing stadium at North Tottenham in the event that their bid was successful, including the social and economic impacts on North Tottenham which would result from their removal from that area and any redevelopment of their existing stadium and other lands held by them in that area.
5. The financial terms offered by and the financial viability model in support of their bid".
5. On 17 July 2013, LLDC responded. It refused to provide the requested information. In relation to requests 1 – 3 and 5, it cited section 41 (information provided in confidence) as its basis for doing so. In relation to request 4, it cited section 12 (cost of compliance exceeds limit) as its basis for doing so.
6. The complainant requested an internal review on 14 August 2013 of LLDC's use of section 41 in relation to requests 1-3 and 5 and submitted fresh requests relating to request 4.
7. LLDC sent the complainant the outcome of its internal review on 15 October 2013. This was in regard to his requests of 9 June 2013. It upheld its original position in relation to requests 1 – 3 and 5 of 9 June 2013.

Scope of the case

8. The complainant contacted the Commissioner on 12 December 2013 to complain about the way his request for information had been handled. Based on the submitted correspondence, the Commissioner wrote to the complainant on 6 March 2013 and said that the scope of his investigation would be to consider whether LLDC was entitled to

withhold the information described in requests 1-3 and 5 of 9 June 2013. The complainant did not object to this.

9. During the course of the Commissioner's investigation, LLDC disclosed further information but argued that it was entitled to withhold the remainder under section 41 and section 43(2). It argued it was also entitled to withhold a small portion of the information under section 40(2).
10. Following that disclosure, the Commissioner has considered whether LLDC is entitled to rely on the exemptions it has cited as a basis for withholding the remainder of the information requested at requests 1-3 and 5 of 9 June 2013.

Reasons for decision

11. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and disclosure would constitute an actionable breach of confidence. This exemption is absolute and therefore not subject to a public interest test.

Was the information obtained from another person?

12. The Commissioner has read the withheld information and is satisfied that it was provided to LLDC by a third party, namely THFC. The Commissioner therefore accepts the first part of section 41 is met.

Would disclosure constitute an actionable breach of confidence?

13. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
 - Whether the information has the necessary quality of confidence;
 - Whether the information was imparted in circumstances importing an obligation of confidence and
 - Whether disclosure would be an unauthorised use of the information to the detriment of the confider.
14. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
15. The information was supplied to the Olympic Park Legacy Company (now LLDC) by THFC as part of its bid for use of the London 2012 Olympic Stadium. The Olympic Park Legacy Company issued a tender

exercise for this in August 2010. This exercise collapsed in 2010 but it was relaunched (although with a different legal construction) in 2011. THFC did not submit a bid as part of the 2011 tender exercise.

16. THFC's submission was subject to a confidentiality agreement albeit one that acknowledged that the Olympic Park Legacy Company (now LLDC) was subject to the requirements of FOIA.
17. The complainant drew attention to information apparently disclosed to him in error. As such, he asserted, it was now in the public domain.
18. In light of the above and having read the withheld information, the Commissioner has concluded that the information is not trivial and it has the necessary quality of confidence, regardless of whether some of it was inadvertently disclosed. The information was clearly given to LLDC in circumstances importing an obligation of confidence. The Commissioner notes that the confidentiality agreement has a clause which refers to FOIA, however, he does not think this constitutes an agreement between the parties to disclose the information automatically upon request under FOIA.
19. The third element of the test of confidence involves the likely detriment to the confider if the confidence is breached. The test under section 41 is whether disclosure would constitute a breach of confidence actionable by the person who provided the information or any by other person.
20. LLDC has contacted THFC about this matter. As noted above, THFC agreed to the disclosure of certain sections of the withheld information. However, THFC registered a strong objection to the disclosure of the remainder. In giving its views to LLDC, THFC acknowledged that the final decision on disclosure under FOIA rested with LLDC.
21. THFC had concerns about the commercial sensitivity of the information. It explained how, although the information was prepared for a bid made in 2010, it was still, in a number of respects, current information that it did not wish to share with its competitors. It explained how its competitors might use the information. To avoid inadvertent disclosure of the withheld information, the Commissioner does not propose to set out that explanation on the face of this notice.
22. In the Commissioner's view, the information forms part of the business model and other detail submitted in confidence to LLDC. Based on the explanation provided by THFC via LLDC and on a consideration of the withheld information, the Commissioner is satisfied that disclosure would be an unauthorised use of the information to the detriment of the confider.

Would a public interest defence be available?

23. As section 41(1) is an absolute exemption there is no public interest. However, case law suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. The duty of confidence public interest test assumes that the information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence. The Commissioner has therefore gone on to consider whether there would be a defence to a claim for breach of confidence.
24. In taking this approach it is important to consider the consequences of disclosing confidential information in order to properly weigh the public interest in preserving the confidence against the public interest in disclosure. People would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected and not easily overridden.
25. THFC is proposing now to expand its traditional home base at White Hart Lane in North London. The complainant's client is challenging a Compulsory Purchase Order ("CPO") lodged against his property. The complainant has asserted that, during the course of the CPO inquiry, the CPO inspector expressed an interest in seeing the withheld information to assist in his reaching a decision. The complainant asserts that a representative of THFC also expressed a willingness to disclose the withheld information during the CPO inquiry.
26. After LLDC made its partial disclosure, the Commissioner contacted the complainant to ask if the disclosure satisfied their complaint and, if not, to invite final submissions regarding the use of exemptions for the remainder of the information.
27. In his final submissions, the complainant reasserted what was apparently said at the CPO inquiry but also focussed on what he saw as the inappropriate withholding of figures regarding projected job creation. He argued that the disclosure of these would not have the prejudicial impact claimed. He also drew attention to references in the disclosed information to the proposed regeneration of Haringey in London (this is where his client is based). The CPO against his client's property is a consequence of the regeneration programme in Haringey. Furthermore, the complainant drew attention to references in the disclosed information to the proposed building of affordable housing which, he asserts, does not form part of the current regeneration programme for Haringey in respect of THFC's financial contribution.
28. The complainant, in short, wishes to compare what THFC said to LLDC in 2010 with what THFC is saying now as regards regeneration of the local area. He believes it would help his client's defence against the CPO action were he to see it. He argued that the merits of the CPO depended

on demonstrating a public benefit which outweighed the impact on individuals.

29. The Commissioner recognises the strength of the complainant's concerns about his client's position. He also acknowledges that the apparent transfer of the cost of affordable housing to the public purse adds weight to the public interest in disclosing information about any financial burden that THFC was apparently willing to shoulder.
30. However, the Commissioner also recognises the wider public interest in preserving the principle of confidentiality. He considers there is a strong public interest in a transparent CPO process but does not consider that the FOIA is the appropriate disclosure regime for that. It is for the CPO inquiry and any subsequent appeal process to determine what information is needed to assist deliberation.
31. Having reviewed the information and the arguments put forward by LLDC, the Commissioner has concluded that there is a strong public interest in maintaining the obligation of confidence. The Commissioner therefore considers the public interest in maintaining the duty of confidence outweighs the public interest in disclosure in this case.
32. Therefore the Commissioner finds that the remainder of the requested information has been correctly withheld in this case under section 41 of the FOIA. He has therefore not gone on to consider the application of section 43(2) FOIA.

Section 40(2)

33. LLDC applied section 40(2) to names, job roles and contact details within the withheld information.
34. Section 40(2) of FOIA states that personal data (which is not the personal data of the requester) is exempt if its disclosure would breach any of the data protection principles contained within the Data Protection Act ("DPA"). The term "personal data" is defined specifically in the DPA.¹

Does the requested information constitute third party personal data?

35. In determining whether information is the personal data of individuals other than the requester, that is, third party personal data, the Commissioner has referred to his own guidance and considered the

¹ <http://www.legislation.gov.uk/ukpga/1998/29/contents>

information in question.² He has looked at whether the information relates to living individuals who can be identified from the requested information and whether that information is biographically significant about them.

36. Having read the information to which section 40 has been applied, the Commissioner is satisfied this information is third party personal data. A person's name, where they work, what their role is and how they can be contacted relates to those individuals and is biographically significant about them.

Would disclosure contravene any of the DPA data protection principles?

37. The data protection principle that is normally considered in relation to section 40 is the first data protection principle which states that:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

at least one of the conditions in Schedule 2 is met, and

in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

38. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - particular circumstances of the case, e.g. established custom or practice within the public authority; and

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http://www.ico.org.uk/for_organisations/data_protection/the_guide/~media/documents/library/Data_Protection/Detailed_specialist_guides/PERSONAL_DATA_FLOWCHART_V1_WITH_PREFACE001.ashx

- whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
 - The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor, the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so, the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
39. Furthermore, notwithstanding the individual in question's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure to the public.
40. In considering 'legitimate interests', in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the individual in question, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.
41. LLDC accepted that, for example, it is publicly known that Daniel Levy is chairman of THFC. However, Mr Levy's contact details are not in the public domain and disclosure of them would be unfair and contrary to his reasonable expectations. The Commissioner agrees that there is not a compelling legitimate interest which outweighs Mr Levy's legitimate interest in limiting access to his contact details. In any event, a person who wished to contact Mr Levy can readily do so via THFC's main contact points. The Commissioner agrees with LLDC that other individuals named, who are in more junior roles than Mr Levy, would also reasonably expect that their names, job roles and contact details would be withheld. They are not employees of a public authority and therefore their names and other contact details would only be made available where there is a business need for providing them and given to those who need to have such access for business purposes.
42. The Commissioner also notes that the complainant expressed no particular interest in obtaining the names and other personal information available in the withheld information.

Section 40(2) - Conclusion

43. In light of the above, the Commissioner has concluded that it would be unfair and a breach of the first data protection principle to disclose the personal data contained in the withheld information. In reaching this view, he has given particular weight to the paucity of legitimate interests that might be served by disclosure.

Right of appeal

44. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. 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.
46. 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

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