

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 December 2015

Public Authority: Manchester City Council
Address: Town Hall
Albert Square
Manchester
M60 2LA

Decision (including any steps ordered)

1. The complainant has requested information relating to a licensing complaint against a specific McDonalds. The Commissioner's decision is that Manchester City Council has correctly applied the exemption at section 30(1)(b) where information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct. The Commissioner does not require any steps to be taken.

Request and response

2. On 20 May 2015, the complainant wrote to Manchester City Council ('the council') and requested information in the following terms:

"Any documents, evidence and external and inter-departmental correspondence concerning the recent investigation into licensing hours at McDonald's 849a Princess Road by [name redacted] and others. It need not included the emails between myself and [name redacted]."
3. The council responded on 22 June 2015. It provided 13 email trails and confirmed that the Neighbourhood Delivery Team carried out visits to the premises on 25, 26 April and 2, 3 of May 2015.
4. The complainant requested an internal review on 23 June 2015.

5. The council provided its internal review response on 24 August 2015. It clarified that the email chains previously released related to a different branch of McDonalds, rather than McDonalds Princess Road as requested, and confirmed that the inspection dates provided were correct and did relate to McDonalds Princess Road. It also confirmed that the council does hold the information requested but refused to provide it citing the exemptions at sections 30(1)(b), 40(2) and 41 of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 31 July 2015 to complain about the way his request for information had been handled.
7. The Commissioner has first considered whether the council was correct to apply the exemption at section 30(1)(b) where information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct. This is because the council has stated that it considers the exemption at section 30(1)(b) applies to all of the withheld information.
8. As the Commissioner has found that the exemption at section 30(1)(b) applies to all the withheld information in this case, he has not deemed it necessary to consider the exemptions at sections 40(2), 41, and 42.

Reasons for decision

9. Section 30(1) provides that –

“Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of –

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct...”
10. The withheld information in this case is correspondence and notes relating to the complaint that the McDonalds at the Manchester Arena was operating outside of its licence.
11. The council explained that the Licensing Act 2003 ('the Licensing Act') regulates the sale of alcohol, the provision of certain types of entertainment and the provision of late night refreshment and that it is

designated as a licensing authority under section 3(1)(b) of the Licensing Act. It informed the Commissioner that late night refreshment includes the sale or offering for sale of hot food or hot drink to members of the public between 23.00 and 05.00 hours and where a premise wishes to provide late night refreshment this constitutes a licensable activity which accordingly requires a licence under the Licensing Act. Section 136(1) of the Licensing Act provides that the supply of late night refreshment without the appropriate licence constitutes an offence under as follows:

“136 Unauthorised licensable activities

(1) A person commits an offence if-

(a) he carries on or attempts to carry on a licensable activity on or from any premises otherwise than under and in accordance with an authorisation, or

(b) he knowingly allows a licensable activity to be so carried on.”

13. The council has the power, as the licensing authority, to investigate and prosecute section 136 offences under section 186(2)(a) of the Licensing Act.
14. The council confirmed that all of the requested information was specifically created in the course of an investigation into a possible offence under section 136 of the Licensing Act which was initiated out of a complaint that the premise was providing late night refreshment without a licence. It said that the information only exists as a result of the complaint and the subsequent investigation into the concerns that were raised.
15. The Commissioner understands that the investigation was complete at the time the request in this case was made. However, due to the phrase ‘at any time’, the Commissioner considers that is irrelevant for the application of section 30(1)(b) that the investigation was complete at the time of the request. What is relevant is whether the information was held at some point for the purposes of the investigations.
16. As section 30(1)(b) is a class-based exemption it is not necessary for the council to demonstrate that disclosure would prejudice any particular interest in order to engage the exemption.
17. Taking the above into consideration, the Commissioner is satisfied that that the information requested was held as part of an investigation being conducted by the council, with the potential for criminal proceedings to be instituted which the council has to the power to

conduct. He therefore considers the section 30(1)(b) exemption to be engaged in respect of the withheld information.

The public interest test

18. As section 30(1)(b) is a qualified exemption it is subject to a public interest test under section (2)(2)(b) of the FOIA. This favours disclosure unless;

“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information”.

19. The starting point is to focus on the purpose of the relevant exemption. With section 30(1)(b) this involves weighing the prejudice that may be caused to an investigation or prosecution, or more generally to the investigatory and prosecution processes of the public authority, against the public interest in disclosure. There is general recognition that it is in the public interest to safeguard the investigatory process. The right of access should not undermine the investigation and prosecution of criminal matters.

Public interest arguments in favour of disclosing the requested information

20. The Commissioner is mindful of the public interest in promoting openness and transparency in the discharge of a public authority's statutory functions. For example, disclosure of the requested information may enable the public to understand why a particular investigation reached a particular conclusion, or in seeing that the investigation had been properly carried out. In this case, disclosure would ensure that the council is held to account for this particular investigation into trading hours at a specific McDonalds.

21. The council said that in favour of disclosing the information it took into account the general public interest in transparency and accountability, the public interest in members of the public being satisfied that relevant processes/procedures have been properly followed by the council as a licensing authority, and the public interest in assisting individuals in challenging decisions taken by the council. It also said that it took into consideration the fact that the case was completed.

Public interest arguments in favour of maintaining the exemption

22. The council submitted the following arguments in favour of maintaining the exemption:

- The public interest in maintaining the integrity of the information as evidence of prior history in the event of future enforcement action. It explained that in cases such as this, where a prosecution has not been advanced at the time of the request, reports of further contraventions of a similar nature could lead to further investigation and possible enforcement action.
- The public interest in ensuring that transparency does not undermine or prejudice an authority's ability to properly investigate allegations of criminal offences and to take formal action such as prosecution where appropriate.
- The public interest in there being a safe space in which the investigatory process can take place, which does not automatically come to an end once an investigation is concluded or abandoned. Disclosure would provide detail about the method of investigation and techniques used (or not used) which could be used by those trying to avoid detection or prosecution.
- The public interest in maintaining a process which is fair to individuals who have been investigated but not prosecuted. Disclosure would be likely to undermine the preserve of the criminal courts in being the only forum for determining guilt in relation to allegations of criminal offences. Trail by press or social media is not the appropriate way to deal with alleged wrongdoing.
- The public interest in maintaining the spirit of co-operation with business and individuals who are subject to investigation by the licensing authority so as not to deter those business and individuals, or others in similar circumstances, from co-operating with the licensing authority.
- Release may hamper the gathering of intelligence from confidential sources, for example, informants and whistle-blowers.

Balance of the public interest arguments

23. As stated in paragraph 20, the Commissioner notes that section 30 is concerned primarily with preserving the integrity of certain proceedings and investigations which public authorities have the power or duty to conduct and therefore recognises that there is an inherent public interest in ensuring the ability of public authorities to carry out investigations.
24. In relation to the council's arguments regarding the integrity of the information in this case, the Commissioner considers that the information does not lose its relevance even though the investigation was concluded at the time of the request and did not result in a

prosecution being brought due to the potential for the information to be used in future proceedings. He does not believe that in all circumstances the older the information is the less risk of prejudice there is. There is always the possibility that the status of an investigation can change over time and that information has the potential of becoming relevant again. He has considered the complainant's assertion that it 'seems ridiculous to quote that a reason for not complying is the possibility of future action, when the same request has revealed that disgracefully no business has ever been prosecuted from such an investigation', but does not consider that because a prosecution hasn't taken place in the past, one will not occur in the future.

25. The council has said that with regard to this particular investigation, the complainant was kept updated as to progress and was provided with the appropriate degree of transparency to be assured that his complaint was being properly investigated. The Commissioner has not been made aware that any information about the specific investigation is publically available. Therefore, he considers that the withheld information would provide the public with knowledge of the council's actions and ensure that the council is held to account for this particular investigation. In view of this the Commissioner considers that the arguments in favour of releasing the withheld information deserve some weight.
26. The Commissioner considers that, on the one hand, due to the fact that the council did not deem criminal proceedings appropriate, there is less public interest in release of the information as compared to a situation where the investigation has found evidence of wrong doing. On the other hand, the Commissioner believes that the fact the information does not contain anything which would lead to the institution of criminal proceedings reduces the likelihood of harm occurring to the investigatory process through its disclosure. He considers that if the information was of greater significance to the institution of criminal proceedings, the greater the likelihood of harm to the investigatory process, should it be disclosed. However, as stated above, the council has submitted arguments in favour of maintaining the exemption which focus on the protection of the investigatory and prosecution processes of the council rather than the protection of a specific investigation or prosecution. There is public interest in a matter such as contravention of licensing requirements being investigated as thoroughly and efficiently as possible and in prosecutions not being prejudiced by the premature disclosure of information under the FOIA. It is important for public confidence in the activities of the council that its ability to discharge its statutory functions should be effective and unimpeded.
27. The council has indicated that disclosure could result in a trial by media situation which could undermine the whole investigations process. Although the Commissioner considers that trial by media is not in the

public interest, he notes that in this case the investigation was closed at the time of the request and therefore there was no requirement for a safe space for the council to operate in, in relation to this specific investigation, and no situation where media pressure could present problems for a specific judicial process.

28. In relation to the council's argument regarding not deterring individuals and organisations from co-operating with the licensing authority, the Commissioner considers that divulging information collected in the course of an investigation is likely to degrade trust between the council and the organisations it has the power to investigate which would prejudice the council's ability to conduct investigations. He considers that it is in the public interest to safeguard a co-operative investigatory process. He is also aware that whilst councils have significant enforcement powers, much investigatory and enforcement work is more successfully completed with the co-operation of the organisations involved and considers that the disclosure of the requested information could erode working relationships.
29. The Commissioner notes that the argument that release may hamper the gathering of intelligence from confidential sources, for example, informants and whistle-blowers, relates to the exemption at section 30(2) and therefore does not consider it relevant to this case.
30. The council has argued that the complainant may have a particular personal interest in the outcome of the investigation and is perhaps disappointed that no formal action was taken. It said that there is no evidence that the investigation in this case was not carried out appropriately and that the council complied with the Code for Crown Prosecutors. It explained to the Commissioner that this means that its decision to prosecute or not was made in accordance with that code and included consideration of the two stage including the evidential stage and the public interest stage. The Commissioner considers that when determining whether a public authority should disclose information in response to a request, the issue is whether it is in the public interest to disclose that information to the public at large. It should be made clear that the Commissioner's concern is not with the private interest of individuals. Whilst the requested information is clearly of interest to the complainant, this does not necessarily mean that there is a wider public interest that would be served by its release.
31. Having taken all of the above into consideration, the Commissioner considers that there is considerable public interest in matters such as contravention of licensing requirements being investigated thoroughly and efficiently ensuring that the best evidence is available to the council to inform its decisions. It is important for public confidence in the activities of the council that its ability to discharge its statutory functions

should be effective and unimpeded. He appreciates that disclosure would hold the council to account for this particular investigation but considers that this is somewhat met by the council confirming it has adhered to the Code for Crown Prosecutors. There will be cases where the balance of public interest will run in favour of disclosure but the Commissioner is not satisfied that this is such a case. In all the circumstances of this case the Commissioner is of the view that the public interest in maintaining the exemption outweighs the public interest in disclosing the information requested. The Commissioner therefore finds that the council was entitled to withhold the requested information under section 30(1)(b).

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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

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

Andrew White
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