

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 July 2016

Public Authority: West Yorkshire Fire and Rescue Service

Address: Oakroyd Hall
Bradford Road
Birkenshaw
West Yorkshire
BD11 2DY

Decision (including any steps ordered)

1. The complainant has requested information for valuations received by West Yorkshire Fire and Rescue Service for certain sites, including a proposed new fire station. West Yorkshire Fire and Rescue Service applied section 43(2) of the FOIA, on the grounds that disclosure would prejudice commercial interests.
2. The Commissioner's decision is that West Yorkshire Fire and Rescue Service has applied section 43(2) (commercial interest) of the FOIA appropriately.
3. The Commissioner does not require West Yorkshire Fire and Rescue Service to take any steps as a result of this decision.

Request and response

4. On 6 July 2015 the complainant wrote to West Yorkshire Fire and Rescue Service (WYFRS) and requested information in the following terms:

"To request a copy of the valuations West Yorkshire Fire Authority have received for the site of (a) Shipley Fire Station, (b) Idle Fire Station and (c) the proposed new fire station on Valley Road."

5. WYFRS responded on 16 July 2015. It confirmed that it held the requested information but was not disclosing it, explaining that under

Local Government Act 1972 (LGA) paragraph 3 Financial and Business Affairs, it did not have to disclose the information.

6. Following an internal review WYFRS wrote to the complainant on 12 August 2015. It upheld its application of the Local Government Act 1972 and explained that it was also applying sections 43(2) (commercial interests) and section 41 (in confidence).

Background

7. WYFRS explained that the procurement of the land in question is for the purposes of constructing a new fire station to replace two other fire stations – one in Idle and one in Shipley West Yorkshire, as part of its approved Integrated Risk Management Plan. Procurement of the one-acre site is on the basis of a land exchange with Incommunities, a social housing provider for Bradford Council, for the development of social housing on the existing Idle and Shipley Station sites.
8. Furthermore, WYFRS explained that although the land would be exchanged under value, under section 128(1) of the LGA,¹ the Secretary of State issued a general consent in 2003 permitting sales at undervalue of up to £2 million, if an authority considered that by doing so it would help secure the promotion or improvement of the economic, social or environmental well-being of the area. WYFRS also explained that the acquisition of the land and the construction of a fire station to replace the Idle and Shipley ones would complete its Integrated Risk Management Plan.

Scope of the case

9. The complainant contacted the Commissioner on 24 August 2015 to complain about the way his request for information had been handled. He explained that there appeared to be large discrepancies in the valuations of the site. He also explained that WYFRS was throwing away money despite being strapped for cash and that taxpayers had a right to know what was happening to their money.

¹ <http://www.legislation.gov.uk/ukpga/1972/70/section/128>

10. During the Commissioner's investigation, WYFRS confirmed that it was no longer relying upon section 41 but was still relying upon section 43(2).
11. The Commissioner will therefore consider the way WYFRS handled the request, including its application of section 43(2).

Reasons for decision

Section 43(2) – commercial interests

12. Section 43(2) provides an exemption from disclosure if the information would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
13. In order for a prejudice based exemption to be engaged the Commissioner considers that three criteria must be met:
 - the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed, has to relate to the applicable interests within the relevant exemption;
 - the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - it is necessary to establish whether the level of likelihood of the prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
14. The term 'commercial interests' is not defined in the FOIA. In his guidance on section 43 (Freedom of Information Act Awareness Guidance No 5)² the Commissioner considers that:

²https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

"... a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services".

15. The Commissioner considers that the valuations of the sites fall within the scope of the exemption, as they relate to a commercial activity ie the potential sale of land.
16. The Commissioner will go on to consider the prejudice that disclosure would cause and the relevant party or parties that would be affected.

Whose commercial interests and the likelihood of prejudice

17. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.
18. WYFRS explained that it considered that disclosure of the information would prejudice both its commercial interests and that of Incommunities.

The nature of the prejudice

Prejudice to WYFRS' commercial interests

19. WYFRS explained that it was operating in a small, strong and very competitive market and that disclosure would put it at a competitive disadvantage. It also explained that negotiations were ongoing at the time of the request.
20. It argued that disclosure of the valuations would enable other future potential vendors/buyers to gain a bargaining advantage in negotiations to the detriment of its commercial interests. It also explained that it had not disclosed any information to parties outside of the negotiations, including prices. It also argued that the requested information needed to be withheld until the negotiations and the sale/transfer of the land in question, were completed. WYFRS also explained that if the transaction did not take place, it would use the valuations in any future negotiations. WYFRS explained that it would have to procure alternative land in the locality and dispose of the land it was selling.
21. Furthermore, WYFRS argued that disclosure would hinder its future commercial activity, as there was a risk it would be viewed as a contracting party unable to maintain confidence while negotiations were

ongoing and commercially sensitive. In support of this, it pointed to a previous decision notice of the Commissioner's reference number FS50534430³ which dealt with the sale of land and the impact of disclosure on both the public authority (Suffolk Coastal District Council) and third parties. It states:

"...the Commissioner also accepts that releasing the information would be likely to hinder the Council's future commercial activity. This is because of the likely risk that the Council would be viewed as a contracting party unable to keep confidential matters as such when matters are still ongoing and/or commercially sensitive. Such a negative view of the Council may well result in fewer commercial parties being attracted to the Council for financial activity. "

22. The Commissioner notes that in his previous decision notice, the public authority had not stipulated whether disclosure would or would be likely to, prejudice commercial interests and that he had therefore considered whether disclosure would be likely to prejudice commercial interests. In the present case, WYFRS has stipulated that disclosure would prejudice both its and Incommunities' commercial interests.
23. WYFRS also explained that whilst negotiations were ongoing, they were treated as confidential and confirmed that the valuations had not been disclosed to any other parties.
24. In addition, WYFRS argued that until the negotiations were completed, disclosure of the valuations would prejudice its commercial interests as the requested valuations were part of complex financial arrangements which related to the value of land and payments between the parties.
25. WYFRS must be able to demonstrate that the prejudice claimed is 'at least more probable than not'.
26. The Commissioner has considered the arguments regarding disclosure of the requested information causing prejudice to WYFRS' commercial interests. He accepts WYFRS' arguments that as negotiations were ongoing at the time of the request, if the transaction did not go ahead, disclosure would give potential buyers an unfair commercial advantage.

³ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1043398/fs_50534430.pdf

27. The Commissioner also accepts disclosure at the time of the request would risk WYFRS being viewed as a party that could not maintain confidentiality during negotiations and therefore its future commercial activity. He is therefore satisfied that disclosure would prejudice the commercial interests of WYFRS and that there is a causal link between disclosure and the potential prejudice claimed.
28. The Commissioner therefore accepts that section 43(2) is engaged in relation to the valuations and WYFRS' own commercial interests.

**Prejudice to the commercial interests of third parties
(Incommunities)**

29. WYFRS explained that disclosure of the information would prejudice the commercial interests of Incommunities, as it was operating in a small, strong and very competitive market. It argued at the time of the request, negotiations were ongoing and that disclosing the information would have an adverse effect on Incommunities commercial interests. In support of this argument it pointed to the previous decision referred to in paragraph 21 regarding the impact of disclosure on a third party, which upholds this. It states:

"At the time of the request and refusal this phased property development was ongoing and releasing the information would likely have an adverse effect on the companies' commercial interests. "

30. WYFRS also explained that if the pending sale of land does not go ahead, Incommunities would have to procure alternative land in the locality and dispose of the land it was selling. WYFRS argued that disclosure would enable other future potential vendors/buyers to gain a bargaining advantage in negotiations, to the detriment of Incommunities' commercial interest.
31. As already explained, the Commissioner has to consider whether the prejudice claimed is 'at least more probable than not.' The Commissioner accepts the arguments that while negotiations are ongoing, disclosure would prejudice Incommunities' commercial interests. He also accepts that disclosure would enable Incommunities competitors to gain commercially valuable information which could be used by its competitors if the present transaction does not go ahead.
32. The Commissioner accepts that there is a causal link between the disclosure of the valuations and the prejudice to Incommunities commercial interest.
33. Therefore, the Commissioner accepts that section 43(2) is engaged in relation to the valuations and Incommunities' commercial interests.

34. The Commissioner will go on to consider the public interest arguments.

The public interest test

35. Section 43(2) is a qualified exemption and is therefore subject to the public interest test ie whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

36. WYFRS argued that the public interest in maintaining section 43(2) outweighed the public interest in disclosure. It explained that there is a strong public interest in protecting the established principle of confidentiality in commercial negotiations between the parties regarding complex land transactions and public finances.

37. WYFRS also argued that there must be reasonable certainty in relation to confidentiality and the financial and business affairs of both itself and others. Furthermore, WYFRS explained that if this was not the case, the principle of confidentiality would be undermined together with its ability to negotiate in a full and frank manner.

38. WYFRS also argued that as negotiations were ongoing, it was not in the public interest to disclose the requested information at this time.

39. In addition, WYFRS also argued that the price paid for the land will be publicly available from the Land Registry once the transaction had been completed and this would go some way to satisfying public interest.

Public interest arguments in favour of disclosing the requested information

40. WYFRS acknowledged the public interest in transparency and accountability regarding agreements entered into by public authorities. It also acknowledged that there is a public interest in ensuring that there is a fair, competitive environment.

41. The complainant argued that as a considerable amount of public money was involved, the public had a right to the requested information.

Balance of the public interest arguments

42. The Commissioner has considered the public interest arguments from both parties, including the public interest in transparency.

43. He notes the complainant's argument that as a considerable amount of public money was involved, the public had the right to see the requested information.
44. However, the Commissioner notes WYFRS' explanation that it is possible to sell land at an undervalued price (as explained in paragraph 8), if doing so would help secure the promotion or improvement of the economic, social or environmental well-being of the area. He also notes that WYFRS is in negotiations with Incommunities, which is a social housing provider for Bradford Council.
45. The Commissioner also accepts that there is a need for confidentiality until negotiations have been completed. He notes that the price paid regarding the land in question will be made public once the transaction has been completed. The Commissioner agrees that this will go some way to satisfying the public interest.
46. The Commissioner has weighed the public interest in avoiding prejudice to the commercial interests of WYFRS whilst negotiations are ongoing. His conclusion is that the public interest in avoiding this prejudice is a strong factor and so considers that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Conclusion

47. Taking all of the above into a count, the Commissioner is satisfied that section 43(2) has been applied appropriately in this case and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Section 17 - refusal of a request

48. Section 17(1) provides that if a public authority is going to withhold information it must state the fact, specify which exemption it is relying upon and if it not apparent, explain why the exemption applies.
49. As WYFRS did not explain which exemption it was relying upon initially, the Commissioner considers that it has breached section 17(1). However, he notes that WYFRS rectified this in its internal review.

Other matters

50. WYFRS explained that the LGA does not act as a statutory bar on disclosure under the FOIA as considered in a previous decision notice (FS50517099).

51. However, WYFRS explained that it had treated the information as exempt information under paragraph 3 of Schedule 12A of the LGA which deal with the financial or business affairs of any particular person (including the authority holding the information).
52. The Commissioner considers that WYFRS can use the LGA to show that information is confidential for its own purposes. However, for the purposes of the FOIA, the Commissioner will only consider any exemptions cited.

Right of appeal

53. 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

54. 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.
55. 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

Jon Manners
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