

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 September 2017

Public Authority: Competition and Markets Authority
Address: Victoria House
Southampton Row
London
WC1B 4AD

Decision (including any steps ordered)

1. The complainant submitted a request to the Competition and Markets Authority (CMA) for information concerning a referral made to it by the Competition Appeal Tribunal. The CMA refused to confirm or deny whether it held any information falling within the scope of the request on the basis of section 32(3) (court records) of FOIA. The Commissioner has concluded that the CMA is entitled to rely on section 32(3) and is not obliged to confirm or deny whether it holds any information falling within the scope of the request.

Request and response

2. The complainant submitted the following request to the CMA on 25 January 2017:

'We.....request the following information in support of our current proceedings-

1. *The confirmation that the CMA supports Talk Talk's basic proposition that BT's NDR (Non Domestic Rates) burden on services using its dark fibre would be less than the charge levied on other Communications Providers ("CP" s) using the same fibre;*

2. *The actual rates payment per annum that Ofcom has calculated and the CMA has or will verify in respect of BT's fibre services termed EAD- LA 1000 (for the avoidance of doubt a 1Gbps point-to-point connection), together with an estimate of the average length of an EAD-LA.*
 3. *The actual rates payment per kilometre attributable to the EAD 1000 main link charge, and that this link length is radial, and not actual.*
 4. *The number of 1Gbps or greater EAD circuits that Ofcom has used in order to apportion the central costs attributable to services used at benchmark for dark fibre pricing.'*
3. The CMA responded to the request on 22 February 2017. The CMA explained that the information requested would only be held by it (if indeed it was held) by virtue of being contained in a document served on the CMA for the purpose of particular appeal proceedings brought by CityFibre and TalkTalk in the Competition Appeal Tribunal (CAT), or in a document created for the purposes of those proceedings. As such the CMA explained that it was relying on sections 2 and 32 of FOIA as a basis to refuse to confirm or deny whether it held information falling within the scope of the request.
 4. The complainant contacted the CMA on 2 March 2017 and asked it to undertake an internal review of this decision.
 5. The CMA informed the complainant of the outcome of the internal review on 30 March 2017. The internal review explained that it did not consider request 1 to be a valid request for information as it simply sought confirmation that the CMA supports a particular proposition rather than seeking access to recorded information. In respect of requests 2 to 4 the CMA confirmed that it remained of the view that it was entitled to rely on section 32(3) of FOIA, by virtue of sections 32(1)(a) to (c) and 32(2)(a) and (b), to refuse to confirm or deny whether it held any information falling within the scope of these requests.

Scope of the case

6. The complainant contacted the Commissioner on 30 March 2017 in order to complain about the CMA's refusal of requests 2 to 4. The complainant provided the Commissioner with detailed submissions to support its view that it should be provided with information sought by these requests and the Commissioner has referred to these submissions below.
7. During the course of the Commissioner's investigation the CMA clarified its position in relation to its reliance on section 32. It explained that it

was no longer seeking to rely on the exemption contained at 32(3) on the basis that the information, if held, would fall within the exemptions contained at sections 32(2)(a) and (b). Rather, it was simply seeking to argue that section 32(3) applied on the basis that the information, if held, would fall within the exemptions contained at sections 32(1)(a) to (c).

8. In relation to this complaint it is important to note that the right of access provided by FOIA is set out in section 1(1) and is separated into two parts: Section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held. Both rights are subject to the application of exemptions.
9. As explained above, the CMA is seeking to rely on section 32(3) to refuse to confirm or deny whether it holds information falling within the scope of requests 2 to 4. Therefore this notice only considers whether the CMA is entitled, on the basis of this exemption, to refuse to confirm or deny whether it holds the requested information. The Commissioner has not considered whether the requested information – if held – should be disclosed.

Reasons for decision

Section 32 – court records

10. Section 32(1) of FOIA states that:

'(1) Information held by a public authority is exempt information if it is held only by virtue of being contained in—

(a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,

(b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or

(c) any document created by—

(i) a court, or

(ii) a member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter.'

11. Section 32(3) states that:

'(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of this section.'

The CMA's position

12. The CMA explained to the Commissioner that Ofcom is the regulator of the communications sector in the UK and, broadly speaking, its purpose is to optimise access to communication services and value for money. Periodically, Ofcom will review whether competition is working well in communications markets and if it is not, it will take remedial action.
13. Persons affected by any such remedial action may appeal to the CAT. Before determining the appeal, the CAT is required to refer certain specified price control aspects to the CMA for determination. Section 193 of the Communications Act 2003 requires the CAT to apply the CMA's determination when deciding the appeal, unless the CAT decides that that the CMA's determination would be set aside on an application of judicial review.
14. The CMA explained that when making its price control determinations, it answers the questions referred to it by the CAT on the basis of the arguments and evidence within the parties' pleadings. The scope of its determination is limited to the issues raised by the parties in the pleadings and the issues which are reflected in the reference to it by the CAT. The CMA explained that it does not conduct its own investigation; rather its function is akin to that of a judicial decision-maker within a wider set of judicial proceedings.
15. The CMA argued that the information it uses to determine a price control reference from the CAT, ie any information lodged with the CAT and information sent directly to the CMA, would fall within the scope of sections 32(1)(a) to (c). That is to say, any information received by the CMA from the CAT – a court for the purposes of section 32(4)(a) of FOIA - which forms part of the trial bundle would be exempt on the basis of section 32(1)(a) (documents filed with a court) and section 32(1)(c) (documents created by a court). Any information which had been sent to the CMA to carry out its price determination directly by the parties to enable the CMA to carry out its price determination would be exempt under section 32(1)(b) (documents served upon a public authority for the purpose of proceedings in a particular matter), the proceedings in question being the CAT appeal proceedings.
16. In relation to the specific circumstances of these requests, the CMA explained that, as set out in the refusal notice, the requested information (if held) would only be held by it because of the price control determination reference made to it by the CAT for the purpose of the particular appeal proceedings brought by CityFibre and TalkTalk.

17. On this basis the CMA therefore argued that the information falling within the scope of requests 2 to 4, if held by it, would be exempt from disclosure on the basis of sections 32(1)(a) to (c). Furthermore, the CMA explained that given the structure of the section 32 exemption, it was therefore entitled to refuse to confirm or deny whether the requested information was held by virtue of section 32(3) of FOIA. In relying on this exemption, the CMA noted that whilst it was a matter of public record that the CAT has referred an issue to the CMA in respect of the aforementioned proceedings, it is not a matter of public record whether the CMA holds, or does not hold, the specific recorded information that had been requested.

The complainant's position

18. The complainant provided the Commissioner with detailed submissions to support its complaint and the Commissioner has summarised the below.
19. The complainant explained that it was in a Central Valuation Tribunal in relation to the setting of the 2010 ratings assessment in respect of its liability to rates. It explained that it was also dealing with the Civil Appeals Office in relation to an appeal to re-open previous litigation dating back to 2009/10.
20. The complainant explained that on 10 April 2017 the CAT published the determination (the 'determination') of the CMA in the case of TalkTalk.¹ The complainant argued that the determination contained substantive and conclusive evidence that was essential to both parts of its own litigation. However, the complainant explained that it also needed access to the underlying evidence to this determination (including the information sought by requests 2 to 4 which are the subject of this complaint) in order to aid its litigation. The complainant emphasised that the CAT, the CMA and Ofcom had all refused it early disclosure of this underlying information.
21. The complainant argued that accessing the requested information was a necessary part of its right to a fair trial in the Central Valuation Tribunal and its rights to the peaceful enjoyment of property as the case involved what it believed was the over-taxation of a telecommunications network. The complainant argued that failure to access this information would therefore breach its rights under the EU Charter of Fundamental Rights (the 'Charter') and the European Convention on Human Rights ('ECHR').

¹ CAT reference case 1259/3/3/16

22. In support of this position the complainant drew the Commissioner's attention to a variety of case law which it argued made clear that the ECHR and/or Charter rights are superior to minor clauses in legislation which must not fetter fundamental rights granted by Parliament.² Rather those subsidiary clauses and their effect must be set aside. The complainant argued that this was the case in respect of this request as to not do so would have a direct effect of diminishing its rights. In essence, the complainant argued that the CMA's reliance on section 32(3) was wrong in law as its rights to that information to ensure fair proceedings in the Central Valuation Tribunal are superior to any reasons under FOIA for restricting access.
23. The complainant also provided the Commissioner with detailed submissions which, in its view, demonstrated the significance of the requested information to its own litigation in respect of proceedings at the Central Valuation Tribunal. The complainant argued that this underlined the importance of it being provided with the information it had requested.
24. Furthermore, the complainant argued that there was no doubt the CMA holds this information as this was referred to in the initial public proceedings in the CAT case in 2016 and moreover he alleged that Ofcom had confirmed that it held this information and passed it to the CMA as part of those CAT proceedings.
25. Finally, the complainant emphasised to the Commissioner that there was a very important principle at the centre of its complaint and it urged the Commissioner to consider the complaint in the widest possible basis, and not simply restrict this to the neither confirm nor deny issues linked to the CMA's application of section 32(3) of FOIA.

The Commissioner's position

26. Given the nature of the information requested and the relationship between the CMA and the CAT in respect of the TalkTalk and CityFibre proceedings, the Commissioner agrees with the rationale of the CMA's submissions and is satisfied that if – and she stresses if – the requested information were held by it, it would fall within the scope of the exemptions contained at sections 32(1)(a) to (c) of FOIA.

² In particularly, *Evans, R (on the application of) v Attorney General* [2015] UKSC 21 (26 March 2015) and *Brewster, Re Application for Judicial Review (Northern Ireland)* [2017] UKSC 8 (8 February 2017).

27. Furthermore, section 32(3) is clear that a public authority does not have to confirm or deny whether it holds the requested information if the information (if held) would fall within the scope of the exemptions contained at sections 32(1) or 32(2). In light of the Commissioner's findings in the preceding paragraph, it follows that she is satisfied that the CMA can rely on section 32(3) if it wishes to do to.
28. In reaching this conclusion, the Commissioner notes the complainant's suggestion that it is public knowledge that the CMA holds the requested information. She also notes the CMA's assertion to the contrary. However, section 32 is a class based exemption which means that information is exempt if it falls within the description of the information set out in the exemption. In theory then, a public authority could rely on a class based exemption even if the requested was available in the public domain. Consequently, in the Commissioner's view, even if it had been confirmed publicly that the CMA held the requested information, this would not prevent the information (if held) falling within the scope of the exemptions contained at sections 32(1)(a) to (c) nor would it prevent the CMA relying on section 32(3) to refuse to confirm or deny, under FOIA, whether it held this information if it wanted to do so.
29. With regard to the complainant's position, the Commissioner does not accept that the CMA's reliance on section 32(3) was wrong in law because its rights to that information to ensure fair proceedings in the Central Valuation Tribunal are superior to any reasons under FOIA for restricting access.
30. The Commissioner has reached this conclusion for a number of reasons. Firstly, FOIA provides a right of access that is both purpose and applicant blind; disclosure of information under FOIA is considered to be disclosure to the world at large not simply to particular parties. Consequently, determining whether an exemption applies, especially a class based exemption such as section 32, does not involve considering whether the information needs to be disclosed to assist a particular applicant in relation to ongoing proceedings and their rights in terms of access to information to assist in those proceedings. On this point, the Commissioner notes that the complainant indicated that it only intended to use the information for its own uses at the Central Valuation Tribunal and had no intention of publishing it further. Clearly, as indicated above if the requested information (if held) was disclosed under FOIA, it would be available to the world at large, not simply the complainant, and access to it could no longer be restricted.
31. Secondly, the Commissioner agrees with the point made by the CMA in its internal review where it suggested that the matter of the complainant accessing the requested information for the purposes of its case at the Central Valuation Tribunal is a matter for that Tribunal. The normal practice being for a party to a Tribunal proceeding to make such

representations to the Tribunal and if the Tribunal considers that there is information which it needs in order to reach a fair decision then it has powers to acquire the information from the other party.

32. Finally, the Commissioner does not agree with the complainant that the examples of case law cited by it support an approach of disregarding the application of section 32(3) of FOIA because of 'the hierarchy of European rights'. The theme of the cases highlighted by the complainant appears to be some aspect of ambiguity in the relevant legislation which necessitated consideration of the ECHR in order to determine how the domestic legislation should be interpreted and applied. In the circumstances of this case, the Commissioner considers there to be no such ambiguity in the wording of section 32 of FOIA. Furthermore, many of the cases cited by the complainant concerned the rights of particular individuals to specific remedies. As explained above, FOIA provides a right of access to information which is applicant and purpose blind and thus the needs of specific individual are not directly relevant. The Commissioner also notes that with the exception of the *Evans* case cited at footnote 2, none of the cases referred by the complainant concern the application of FOIA.
33. Furthermore, the *Evans* case did not consider the application of any exemptions in FOIA; rather it concerned the use of the ministerial veto provided for at section 53 of the legislation. As with the other case law cited, the complainant argued that the Supreme Court supported its view that the ECHR and/or Charter are superior to minor clauses in the legislation. That is not the Commissioner's interpretation of the *Evans* decision.
34. There were two issues to be considered by the Supreme Court in *Evans*. Firstly, whether the Attorney General was entitled to issue a certificate under section 53 of FOIA to veto the disclosure of the information requested by Mr Evans. Secondly, part of the requested information constituted environmental information and the right of access to this was provided by the Environmental Information Regulations (EIR) rather than FOIA. The EIR enacted the Council Directive 2003/4/EC ('the Directive'). The second issue was therefore whether the ministerial veto provided by section 53 of FOIA complied with the Directive.
35. In reaching its conclusion on this first issue that it is not reasonable for an accountable person to issue a section 53 certificate simply because on the facts he takes a different view from that adopted by a court after a full public oral hearing, the Court were accordingly of the view:

'That where, as here, a court has conducted a full open hearing into the question of whether, in light of certain facts and competing arguments, the public interest favours disclosure of certain information and has concluded for reasons given in the judgment that it does,

section 53 cannot be invoked effectively to overrule that judgment merely because a member of the executive, considering the same facts and arguments, takes a different view'.

36. The Court did not consider the ECHR and/or Charter in reaching this conclusion.
37. The Court stated that in light of its conclusion on this first issue, it was not strictly necessary to consider this second issue, namely the effect of the Directive though the Court felt that the point was of importance and so proceeded to deal with it. (Therefore the Court's reasoning on this second issue is arguably obiter.) The Court concluded that a certificate issued under section 53 of FOIA was incompatible with the wording of article 6 of the Directive. However, the pertinent point in respect of the complainant's appeal is the Court's comment at paragraph 107 of the judgment which explains that in light of this finding, ie that a certificate issued under section 53 of FOIA is incompatible with the Directive, there was no need to consider the effect of the Charter:

'In these circumstances, it is unnecessary to consider whether, as the Court of Appeal thought, the provisions of the European Charter provide another, or reinforcing, reason for the conclusion that the Certificate is unlawful in so far as it relates to environmental information, and I prefer to leave that issue open in this Court.'

38. The Commissioner therefore does not share the complainant's position that the Supreme Court in *Evans* found that the ECHR and/or Charter are superior to minor clauses in the legislation.
39. Furthermore, for the reasons set out above the Commissioner is satisfied that the CMA is entitled to rely on section 32(3) to refuse to confirm or deny whether it holds any information falling within the scope of the complainant's requests 2 to 4.

Right of appeal

40. 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

41. 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.
42. 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

Jonathan Slee
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