Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **11 October 2019**

Public Authority: **Westminster City Council**
Address: **City Hall**
64 Victoria Street
London
SW1E 6QP

Decision (including any steps ordered)

1. The complainant has requested information on correspondence and minutes of meetings between Westminster City Council("the Council") and Pret a Manger ("Pret") related to the issues raised by The Real Bread Campaign's ("the Campaign") complaint.

2. The Commissioner's decision is that the Council appropriately withheld some of the information in the scope of the request in reliance of section 41(1) – Information provided in confidence and some of the information in the scope of section 43(2) – Commercial interests. However, she finds that the public interest favours disclosure of some of the information withheld under section 43(2). The Commissioner also finds that these exemptions are not engaged in respect of some of the withheld information. The exemption at section 21 – Information accessible to the applicant by other means is not engaged.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

    - Disclose the information as detailed in the Confidential Annex.

4. 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.

Background

5. The background to this request dates from 20 December 2016 when the Campaign submitted complaints to both the Advertising Standards Authority ("ASA") and Hackney Trading Standards. In January 2017 Hackney Trading Standards advised that the complaint had been passed to Westminster City Council as Pret's "Primary Authority"[1]. After much correspondence, the full chronology of which is online[2], the ASA issued its findings[3] on 18 April 2018. From this date the Campaign pursued its complaint of December 2016 with the Council until 7 August 2018 when it submitted an FOIA request.

Request and response

6. On 7 August 2018, the complainant wrote to the Council and requested information in the following terms:

"*Under the Freedom of Information Act 2000, I am formally requesting that Westminster City Council sends to me the following by email within 20 working days, please:*

1. Copies of all correspondence (in all media) between Westminster City Council and Pret a Manager related to the issues raised by Real Bread Campaign's complaint of December 2016.
2. Minutes of all meetings between Westminster City Council and Pret a Manager related to the issues raised by Real Bread Campaign's complaint of December 2016.
3. Copies of all internal and other correspondence and documentation related to the issues raised by Real Bread Campaign's complaint of December 2016.
4. Full details of all calls between Westminster City Council and Pret a Manager related to the issues raised by Real Bread Campaign's complaint of December 2016.

[1] https://primary-authority.beis.gov.uk/about

"Primary Authority is a different way of delivering local regulation, enabling local authorities to help businesses comply with regulations."

[2] *https://www.sustainweb.org/news/dec16_is_pret_making_a_prat_of_you*

[3] https://www.independent.co.uk/news/business/news/pret-a-manger-advert-ban-natural-food-claim-misleading-asa-a8309026.html

https://www.sustainweb.org/news/apr18_asa_bans_pret_natural_food_ads/

In the meantime, please answer these still outstanding questions:

• What is causing further delay in you fulfilling your duty to protect consumers in Westminster from Pret's misleading marketing messages in its branding and in its stores?

• What deadline have you given to Pret to remove either the artificial additives or these misleading messages"

7. The Council responded on 24 September 2018. It stated that in was refusing the request in reliance of section 41 – information provided in confidence.

8. The complainant requested an internal review of this response on 4 October 2018.

9. The complainant contacted the Commissioner on 7 December 2018 to complain about the way his request for information had been handled. Despite the complainant reminding the Council of his request for internal review, none was forthcoming.

10. The Commissioner wrote to the Council on the same day, 7 December 2018, reminding it of its responsibilities.

11. On 23 March 2019 the Commissioner again contacted the Council as still no internal review was forthcoming. The Council apologised and advised the Commissioner:

"..the Central Food team who have been involved in this case it appears that there may have been developments with [the complainant] in the last few months which may have already provided [the complainant] with the information he needs."

12. Following an internal review the Council wrote to the complainant on 3 April 2019 after 125 working days and following the Commissioner's intervention. It stated that the application of section 41 was upheld.

Scope of the case

13. The complainant remained dissatisfied with the Council's internal review and on 9 April 2019 the Commissioner confirmed to the complainant that she would investigate the way his request for information had been handled.

14. Following the Commissioner's request for the Council's submission on the application of section 41(1), the Council amended its response to include reliance on section 1, determining that some information is not

held, section 21 – Information accessible to the applicant by other means and section 43(2) – Commercial interests. The revised response was provided to the complainant on 20 May 2019.

15. The Commissioner reverted to the Council for further information in respect of its reliance on additional exemptions.

16. The Commissioner therefore considers the scope of her investigation to include the Council's application of sections 21, 41 and 43.

Reasons for decision

Section 1 – General right of access to information held

17. Section 1(1) of the FOIA states:

> "Any person making a request for information to a public authority is entitled-
>
> (a) To be informed in writing by the public authority whether it holds information of the description specified in the request, and
>
> (b) if that is the case, to have that information communicated to him."

18. At the time of the Commissioner's investigation, the Council explained to her that it did not hold information from January 2017 until "the summer 2017" because the case officer initially working on the matter had left the Council. It also confirmed that with respect to point 4 of the request, there is no record of any calls made between the parties.

19. The Council also indicated that it does not hold information on the imposition of a deadline on Pret, as referenced in the second un-numbered point of the request. It explained that this is because the Council does not have an enforcement role (as referenced in paragraph 29 below) and therefore did not impose a deadline on Pret. Pret proposed a timescale to which it has been working to "roll out the changes worldwide".

20. Following the Council's comments in respect of the information 'not held' the Commissioner asked for further detail in regard to the searches conducted by the Council, to confirm what information is held.

21. The Council explained to the Commissioner that the Pret liaison officer, at the time of the request, conducted searches of his own emails and shared network drives but he was unable to search previous case officers' mailboxes or their personal drives. However, the Council advised that it is not Council policy to store information 'locally', only in networked drives and mailboxes. The Council is unable to inform the

Commissioner on the search terms used by the officer conducting the searches at that time as he has subsequently also left the Council.

22. In response to the Commissioner's queries the Council's IT department conducted searches of its stored 'back-ups' for three officers who had worked with Pret between January and July 2017 and had since left the Council. It confirmed that the mailbox and personal drive of one of the officers had been deleted in accordance with the Council's retention periods. The IT department searched the mailboxes and personal drives of the remaining two officers using the search terms 'Pret' and 'Real Bread' for the appropriate period, prior to July 2017.

23. These further searches provided some additional results. The Commissioner is satisfied that the Council had identified all the information held in the scope of the request.

24. The Council advised the Commissioner that it also sought to withhold in reliance of sections 41(1)and 43(2).

Section 41– Information provided in confidence

25. Section 41 FOIA states:

"Information is exempt information if –

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

24. The Commissioner has considered the content of the withheld information. Initially the Council relied solely on section 41 to withhold the information it considered to be within the scope of the request. The Commissioner therefore has considered all the withheld information with regard to this exemption.

25. The withheld information provided to the Commissioner comprises the text body of correspondence falling within points 1, 2 and 3 of the request. The information forms an exchange of information between the parties and internally within the Council. Consequently some of the information has been provided from another person. The Commissioner's guidance is clear on this point:

"If the requested material contains a mixture of both information created by the authority and information given to the authority by another person, then, in most cases, the exemption will only cover the information that has been given to the authority."

26. Notwithstanding this position, if disclosure of the information created by the Council in response to the information provided by a third party would reveal the content of the information obtained from the other party then the exemption may also cover the material the Council generated itself.

27. However, having considered the information the Commissioner considers that some of the withheld information does not engage the section 41(1)(a) exemption.

28. For section 41(1)(b) to be met disclosure of the withheld information must constitute an actionable breach of confidence. The Commissioner's view is that a breach will be actionable if the following criteria are met:

- The information has the necessary quality of confidence. Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial; information which is of importance to the confider should not be considered trivial.

- The information was communicated in circumstances importing an obligation of confidence. An obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend upon the nature of the information itself and the relationship between the parties.

- Unauthorised disclosure would cause a specific detriment to either the party which provided it or any other party.

29. In respect of its application of this exemption, the Council explained its role as the Primary Authority for Pret:

"This means that the council acts in an advisory, not enforcement, capacity to the chain by liaising directly with their head office as a single point of contact (for dissemination by them to all their multiple outlets). This arrangement is a non-obligatory commercial service which is offered by the council which organisations sign up to in order to discuss relevant issues and receive advice, for a fee.

The council would reiterate that the enforcement of the ASA's ruling does not fall within its remit, nor has the council taken any statutory enforcement action against Pret. The information that Westminster City Council holds is strictly as a result of its advisory role to Pret as Primary Authority."

30. The Commisioner notes the above. Notwithstanding this, the Commissioner understands from the Council's explanation to her, that Pret considers the advice sought and given to them is in confidence and:

"not to be made available to the world at large by way of disclosure under FOI."

31. Pret explained its position on 22 May 2018 as follows:

"[details of the brand evolution programme, including the implementation timetable and end date are] provided in good faith, and strictly private and confidential."

In addition on 14 September 2018 Pret advised the Council:

"…whilst Pret was happy to discuss details of the brand evolution programme with WCC in face to face meetings it constitutes Pret's valuable confidential information….We appreciate that you do not wish to be seen to mislead the public, but we are firmly of the view that in these circumstances maintaining the confidentiality and privacy of the sensitive information Pret has disclosed must prevail."

32. The Commissioner accepts that some of the withheld information is not trivial as it comprises information relating to Pret's actions and response to the matters raised by the Campaign and the ASA's investigation. The information is important to the confider and therefore should not be considered trivial.

33. Although this specific information is not in the public domain, the Commissioner considers that the content, in respect of the actions to be taken, would not be unexpected by the public. Clearly Pret was obliged to make plans and changes to its operations pending/following the ASA's ruling.

34. The Commissioner understands Pret's expectations with respect to the information, as provided to her by the Council. She notes that the relationship is as a result of the advisory role of the Council, which is not an obligatory role. Pret provided the information with an explicitly stated obligation of confidence.

35. The Commissioner is satisfied that some of withheld information has the necessary quality of confidence as set out in the second criteria in paragraph 28.

36. In consideration of the third criteria the Council did not specifically identify a detriment to either itself or Pret. When the requested information is commercial in nature then the disclosure will only constitute a breach of confidence if it would have a detrimental impact on the confider. The Commissioner expects public authorities to provide an explicit case for detriment. Usually the detriment to the confider in such cases will be a detriment to the confider's commercial interests.The Commissioner has therefore deduced that Pret would consider the detriment to it would be a commercial or financial one. In this regard

she has, consequently, relied on the submission provided in respect of section 43(2). The submission refers to the detriment to Pret caused by its suppliers and competitors having access to information not available to Pret.

37. The final part of the test for engaging section 41 is whether the action for breach of confidence is likely to succeed.

38. Section 41 is an absolute exemption and therefore not subject to the conventional public interest test under section 2 of the FOIA. 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. Therefore the Commissioner considered whether there would be a public interest defence available, if the Council disclosed the requested information. 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.

39. The Commissioner is mindful of the wider public interest in preserving the principle of confidentiality and the need to protect the relationship of trust between confider and confidant. However, she is also aware of the public interest in transparency and disclosure of confidential information where there is an overriding public interest which provides a defence to an action for breach of confidentiality.

40. The Commissioner has accepted that the other criteria necessary to engage the exemption have been met in regard to some of the withheld information. Consequently she must now consider whether there is a public interest in disclosure which overrides the competing public interest in maintaining the duty of confidence.

41. This test does not function in the same way as the public interest test for qualified exemptions, where the public interest operates in favour of disclosure unless outweighed by the public interest in maintaining the exemption. Rather, the reverse is the case. The test assumes that the public interest in maintaining confidentiality will prevail unless the public interest in disclosure outweighs the public interest in maintaining the confidence.

Public interest defence arguments

42. Some weight should always be afforded to the general public interest in ensuring that public authorities remain transparent, accountable and open to scrutiny, for example where disclosure would:

- further public understanding of, and participation in the debate of issues of the day;

- enable individuals to understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions; or

- facilitate accountability and transparency in the spending of public money.

43. The Commissioner has considered the public interest in the specific circumstances of this case. She is aware of the significant media interest in Pret following the ASA's ruling as demonstrated by this[4] small selection of articles amongst many others. She is also aware of other matters concerning Pret which together have created circumstances which place the company's profile firmly in the public domain. The Commissioner also understands that Pret's actions with respect to taking action with food labelling has been publically criticised[5]. There are generally serious public concerns regarding the accuracy of food labelling and the importance and urgency of addressing these concerns.

44. The Commissioner considers that significant weight must be attributed to the public having the ability to understand the relationship between the Council and Pret and the impact of that relationship in actions affecting the public.

Arguments in favour of maintaining the confidence

[4] https://www.theguardian.com/commentisfree/2018/oct/12/pret-a-manger-marketing

https://www.independent.co.uk/news/business/news/pret-a-manger-lawsuit-cancer-natural-food-labels-glyphosate-a8554861.html

https://www.dailymail.co.uk/news/article-5627577/Pret-Manger-BANNED-advertising-food-natural-bread.html

https://www.thesun.co.uk/money/6073263/pret-a-manger-banned-from-advertising-its-food-as-natural-by-watchdog/

https://metro.co.uk/2018/04/18/pret-adverts-banned-products-arent-natural-7476326/

https://inews.co.uk/inews-lifestyle/food-and-drink/pret-adverts-banned-natural-ingredients/

https://www.bighospitality.co.uk/Article/2018/04/18/Pret-A-Manger-adverts-banned-over-natural-bread-claims

[5] https://www.theguardian.com/uk-news/2018/sep/28/pret-a-manger-gove-tighten-up-food-labelling-rules-teenagers-death-natasha-ednan-laperouse

45. When considering the public interest in favour of maintaining the confidence, the Commissioner has had regard to:

- the wider public interest in preserving the principle of confidentiality, and
- the impact of disclosure on the interests of the confider.

46. In the circumstances of this case the Commissioner has decided that the public debate surrounding accurate nutritional labelling is such that as much information as possible should be provided in order that those interested members of the public are fully aware of the relationships between public authorities and the actions of prominent organisations in the food sector. As acknowledged by Pret in paragraph 31 above the Council would not wish to mislead the public.

47. The complainant has patiently waited for the Council to respond over a prolonged period and has been provided with little explanation. The Commissioner has appended a confidential annex to this decision notice which sets out the information she has decided should be disclosed by the Council. This annex will be served only to the Council. The disclosure of the information identified in the confidential annex will enable a fuller picture of the interaction between the parties. This facilitates greater accountability and transparency.

48. The Commissioner is cognisant of the public interest in preserving the principle of confidentiality. She has taken account of this particularly in her decision not to order disclosure of some elements of the withheld information which is primarily focussed on Pret's global brand evolution programme timeframe.

49. The Commissioner acknowledges that some organisations may be discouraged from confiding in public authorities if they do not have a degree of certainty that their trust and confidence will be respected. The weight carried by this factor will depend upon on the context and, more specifically, how the relationship of trust operates to serve the public interest.

50. The Commissioner has considered the possible detriment to both the Council and Pret. The detriment she envisages in this case is a commercial one. In respect of commercial impact, this is most likely to carry weight if the breach of confidence would damage the confider's competitive position or ability to compete, for example where disclosure would:

- reveal information that would assist competitors;
- undermine the confider's future negotiations with the authority or other organisations; or

- negatively impact on the confider's relationship with the authority or other organisations.

51. The Commissioner is not satisfied that disclosure of the information set out in the confidential annex paragraphs 4 and 5 would assist Pret's competitors in any way nor could it undermine Pret's future negotiations with the Council or other organisations.

52. Pret must be aware of the need for appropriate transparency and accountability when in a relationship with public sector organisations. The Commissioner does not accept that disclosure would significantly undermine or negatively impact on Pret's future relationship with the Council.

53. Having reviewed the withheld information and the brief submission put forward by the public authority, the Commissioner has concluded that there is a strong public interest in disclosure of the information set out in paragraphs 4 and 5 of the Confidential Annex.

54. The Commissioner considers that the importance of the actions taken by the Council and Pret carries significant weight. The information she has identified for disclosure, in the confidential annex, provides a balance between informing the public whilst maintaining confidentiality in respect of limited information. She considers that strong public interest is such that any action for breach of confidence would be unlikely to succeed.

55. The Commissioner has therefore reached the view that the Council would be able to rely on a public interest defence in the circumstances of this case such that any action for breach of confidence is unlikely to succeed. Consequently the Commissioner has concluded that a public interest defence could be established and therefore the exemption is not engaged. Accordingly, her conclusion is that the information specified above is not exempt from disclosure under section 41 of the FOIA.

56. Having made her determination on section 41 the Commissioner has gone on to consider the application of section 43 to the withheld information including the information which she has determined not to be exempt from disclosure under section 41.

Section 43(2) – commercial interests

57. Section 43(2) of FOIA states that information is exempt information if its disclosure under the FOIA would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

58. In order for a prejudice based exemption, such as section 43(2) to be engaged the Commissioner considers that three criteria must be met:

    • Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed must relate to the applicable interests within the relevant exemption;

    • Secondly, 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. The resultant prejudice which is alleged must be real, actual or of substance; and

    • Thirdly, to establish whether the level of likelihood of prejudice being relied on by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

59. The Council explained Pret's view that disclosure of the withheld information would prejudice its commercial interests explaining the following:

    - If suppliers – e.g. those who are engaged by Pret to assist in implementation of the brand evolution programme are aware of the timetables to which Pret is working, they would be provided with additional leverage regarding price negotiations, particularly towards the end of the programme.

    - Competitors would be able to adapt their own plans around Pret's information and this position would not be reciprocal. Any refurbishment plans which they themselves have in the pipeline are likely to be made with Pret's information in mind. For example, a competitor could attempt to accelerate its own programme and publicise that their own store refurbishments have been completed more quickly than Pret's.

    - This would be likely to adversely affect Pret's negotiations with marketing, branding or design agencies, who are likely to factor into their pricing models that this category of work is no longer available to them, when tendering for projects.

60. With regard to the first criterion of the three limb test set out in paragraph 56, the Commissioner accepts that the harm alleged to occur, as described above, relates to the commercial interests which the exemption contained at section 43(2) is designed to protect.

61. The Commissioner considers that the second criterion of the test is met with regard to a limited amount of the withheld information on the basis that the timetable of the brand evolution programme has the potential to prejudice Pret's commercial interests.

62. The Council has not specifically stated the likelihood of the alleged prejudice occurring. In its revised response of 20 May 2019 to the complainant the Council explains that disclosure of the requested information "would be likely to prejudice Pret's commercial interests". In its submission to the Commissioner the Council advises that Pret considers that "disclosure would prejudice their commercial interests".

63. As the level of likelihood was not confirmed the Commissioner has considered the lower level of "would be likely" as this places a weaker evidential burden on the Council. This means that the test is whether there is a more than hypothetical or remote possibility of prejudice occurring. The Commissioner is satisfied that this level of prejudice has been met with regard to some of the withheld information.

The public interest

64. In considering whether there is an overriding public interest in providing the requested information, the Commissioner has considered the limited arguments put forward by the Council.

65. The Council advised the Commissioner:

"While the public interest inherent in disclosure is noted, it is considered that this is outweighed by the detriment to Pret in putting them at a commercial disadvantage to competitors who are not subject to FOI, and to their ability to negotiate contracts and procurements, specifically in respect of the brand evolution programme, including the implementation timetable."

66. The Commissioner considers that private sector organisations should be aware of public authorities' duties in respect of access to information legislation. As set out in paragraph 29, the Commissioner understands that Pret is not obliged to consult with the Council but chooses to do so in order to discuss relevant matters and receive advice, for which a fee is paid.

67. The Commissioner recognises that it is in the public interest to maintain the section 43(2) exemption in order to avoid a situation in which the commercial interests of private sector organisations are prejudiced as a

result of involvement with the public sector. She does not, however, consider that, in the circumstances of this case, the weight of that public interest is greater than that in favour of disclosure with regard to the information detailed in paragraph 4 and 5 of the Confidential Annex. She therefore finds that the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure in respect of the specified information.

Section 21 – information accessible to applicant by other means

68. Section 21(1) of the FOIA states that information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

69. The Council explained to the Commissioner that it considered that the two questions added to the numbered points of the request comprised information accessible to the applicant by other means. It explained:

"..the council considers that these have been addressed, at least in part, in ongoing email correspondence with the applicant outside of this FOI request. While the applicant has not been told the "deadline" itself, the council has communicated that one has been agreed, and that progress has been made against that deadline."

70. The Commissioner advised the Council that she does not consider that its communications with the complainant addressed his questions sufficiently to maintain that the requested information had been provided. The Council cited the following from 22 August 2018 as evidence of addressing his points;

"I do understand your frustration with the responses you have been getting from me to your emails – I have genuinely tried to explain our position but realise it is somewhat low on specifics while we continue to work with Pret.

I was hoping though that you have noticed that many of the stores are now using new wording on their product labelling, cups, napkins and signage generally?

We would welcome your thoughts on this and hope it helps demonstrate the progress that is taking place."

71. The Commissioner finds that the section 21 exemption is not engaged as the Council has failed to demonstrate that the specific information requested is accessible to the complainant.

Other matters

Section 45 - internal review

72. The FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe. In the Commissioner's view it is reasonable to expect most reviews to be completed within 20 working days and reviews in exceptional cases to be completed within 40 working days.

73. The complainant asked for an internal review of the outcome of his request on 4 October 2018. The Council did not provide the results of its review until 3 April 2019, some six calendar months later.

74. The Commissioner considers that a period of six calendar months to conduct the internal review is clearly excessive and not in accordance with the section 45 code. She considers this to be an unsatisfactory period of time.

Right of appeal

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

76. 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.

77. 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 .....

Gerrard Tracey
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Cheshire
SK9 5AF