

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 October 2019

Public Authority: London Borough of Lewisham
Address: Laurence House
1 Catford Road
SE6 4RU

Decision (including any steps ordered)

1. The complainant submitted a request to the London Borough of Lewisham (the Council) seeking a copy of a report concerning the security of a particular site. The Council disclosed a redacted version of the report withholding parts of it on the basis of sections 38(1)(a) and (b) (health and safety) and section 42(1) (legal professional privilege) of FOIA, albeit that it subsequently disclosed the information which it had sought to withhold on basis of the latter exemption.
2. The Commissioner has concluded that the remaining withheld information is exempt from disclosure on the basis of sections 38(1)(a) and (b) (health and safety) of FOIA. However, the Commissioner has concluded that the Council breached sections 10(1) and 17(1) by failing to respond to the request within 20 working days.
3. The Commissioner does not require any steps to be taken.

Request and response

4. The complainant submitted a request to the Council on 22 February 2019 seeking a copy of a report entitled '*Arrangements for the provision of safety and security services on the Tidemill site*' and a copy of a letter dated 15 February 2019, sent by an official in the Council's Legal Services department to Peabody Developments Limited.¹
5. The Council responded to the request on 2 April 2019 and provided a copy of both documents. However, it explained that parts of the report had been redacted on the basis of section 38 (health and safety) of FOIA.
6. The complainant contacted the Council on the same day and asked it to conduct an internal review of the decision.
7. The Council informed him of the outcome of the review on 18 April 2019. The review concluded that sections 38(1)(a) and (b) of FOIA provided a basis to redact the name of the security contractor from the report. The review also explained that paragraphs 7.2 and 7.3 of the report had been redacted on the basis of section 42(1) (legal professional privilege) of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 28 March 2019 in order to complain about the Council's decision to redact information from the copy of the report it provided to him. During the course of the Commissioner's investigation the Council provided the complainant with a copy of the information which it had sought to previously redact on the basis of section 42(1) of FOIA.
9. Therefore, the scope of this decision notice is simply to consider whether the name of the security contractor is exempt from disclosure on the basis of sections 38(1)(a) and (b) of FOIA. For the avoidance of any

¹ The report relates to the safety and security of the former Tidemill School site and surrounding land. Following the closure of the school a community group had been granted a tenancy for use of the old school grounds but subsequently refused to hand the site back. The site became home to a number of 'outside' protestors who occupied the garden 24 hours a day until they were evicted in October 2018. The Council intends the site to deliver 209 homes.

doubt, this is the only information which the Council has sought to withhold on the basis of this exemption.

Reasons for decision

Section 38 – health and safety

10. Section 38(1) of FOIA states that:

'Information is exempt information if its disclosure under this Act would, or would be likely to—

*(a) endanger the physical or mental health of any individual, or
(b) endanger the safety of any individual.'*

11. In section 38 the word 'endanger' is used rather than the word 'prejudice' which is the term used in other similar exemptions in FOIA. However, in the Commissioner's view the term endanger equates to prejudice.

12. In order for a prejudice based exemption, such as section 38(1) 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 has to 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. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of 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. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather 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.

The Council's position

13. In its responses to the complainant the Council explained that it considered that there is a real and significant risk with regard to individuals working for the security contractor of endangering their safety if details of their company's name was in the public domain. The Council explained that it had a function to secure the health, safety and welfare of people at work under the Health and Safety Act 1974. Therefore, it argued that disclosure of any information that would prejudice the Council's ability to perform that function would engage the exemption. This also applies to contractors.
14. The Commissioner asked the Council to provide more specific submissions to explain why disclosure simply of the name of the security contractor would be likely to harm the health or safety of the individuals working at the site.
15. In response the Council explained that there had been criminal damage, which risks presented to the security staff who were on the site employed by the original provider of security services, County. The Council explained that the report sought by the complainant sets out how the provision of security services was then provided by Peabody, who used their contractor (ie the name of the contractor which is being withheld).
16. The Council explained that given the significant risks presented to County staff, Peabody, ie the developer, were (in the Council's view) understandably cautious about exposing its contractor's staff to any risk that could be avoided and asked for the name of its contractor to be withheld so that it was more difficult for those who presented risks to County staff to identify and present the same risks to the new contractor's staff. The Council explained that this is why it concluded that disclosure simply of the name of the security contractor would be likely to harm the health or safety of the individuals working at the site. The Council also provided the Commissioner with additional submissions to support its application of this exemption but she has not referred to these in this decision notice as they refer directly to the withheld information or other information which the Council considers to be sensitive.

The complainant's position

17. The complainant argued that there was no substantiation on the part of the Council to support its position that disclosure of the withheld information would harm the health or safety of any individual.

The Commissioner's position

18. With regard to the three limb test set out above, the Commissioner is satisfied that the Council's arguments relate directly to the interests which both exemptions are designed to protect, namely the physical health or safety of an individual. With regard to the second criterion the Commissioner notes that there is a history of criminal damage at the site and as the disclosed report notes, as of February 2019, there had been seven attempted breaches of the site. The Commissioner accepts that such previous action has presented a risk to the health and safety of the staff of the previous contractor. Moreover, based on the submissions provided to her by the Council the Commissioner is satisfied that there is a clear causal link between disclosure of this information and the risk of causing harm to the safety or physical health of the individuals employed by the new security contractor. Furthermore, the Commissioner is satisfied that there is a more than hypothetical risk of this harm occurring if the information was disclosed and therefore the third criteria is met.

Public interest test

19. However, section 38(1) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

Public interest arguments in favour of disclosing the withheld information

20. The complainant argued that there was a public interest in knowing which company was protecting the site given the amount of money spent on it; he suggested that the sums to date spent on the site by the Council exceeded £1m.

21. The complainant explained that there is a legal requirement to display notices if guard dogs are used - and they have been - and because of health and safety the public may need to contact the security contractor directly in an emergency and withholding the name of the contractor will compromise health and safety of the public.

22. The complainant also questioned whether the information was being withheld because the development was a controversial one.

Public interest arguments in favour of maintaining the exemption

23. With regard to the issue of guard dogs at the site, the Council explained that it had confirmed with Peabody that all statutory notices in relation

to having dogs at the site have been put up and are visible to the public. More broadly, the Council argued that as disclosure of the information would be likely to endanger the physical health and safety of the security contractors it was firmly of the view that the public interest favoured withholding the information.

Balance of the public interest test

24. The Commissioner considers the complainant's point that should the public need to contact the security contractors in relation to health and safety issues at the site their inability to know who the contractors are is not an unreasonable one. Furthermore, as the disclosed report explains, the Council intended to pay Peabody £163,187.45 (ex VAT) to provide security services at the site and the Commissioner accepts that there is clear public interest in the Council being open and transparent about which companies it is ultimately paying to protect the security of the site.
25. However, for the reasons set out above, the Commissioner is satisfied that disclosure of the withheld information would be likely to endanger the physical health and safety of the individuals working for the security contractor. In the Commissioner's opinion there is very significant public interest in ensuring that this does not happen and therefore despite the arguments in favour of disclosure, she has concluded that in the circumstances of the request the public interest favours maintaining the exemption.

Time for responding to request

26. Section 10(1) of FOIA requires a public authority to respond to a request promptly and in any event within 20 working days of the request. Section 17(1) of FOIA requires a public authority that is seeking to refuse to comply with a request on the basis that information is exempt must issue a requester with a refusal notice stating that this is the case within the same timeframe.
27. In the circumstances of his case the request was submitted on 22 February 2019 but the Council did not issue its response to the request, ie disclosing some information and withholding further information on the basis of section 38(1), until 2 April 2019. By failing to issue this response within 20 working days the Council breached both section 10(1) and section 17(1) of FOIA.

Right of appeal

28. 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

29. 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.
30. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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SK9 5AF