

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 August 2022

Public Authority: The Board of the University of Suffolk
Address: Waterfront Building
Neptune Quay
Ipswich
IP4 1QJ

Decision (including any steps ordered)

1. The complainant requested parts of a parking contract and details of the tendering exercise. The Board of the University of Suffolk ("the University") provided some information but relied on section 43(2) of FOIA (commercial interests) in order to withhold the remainder.
2. The Commissioner's decision is that the University has failed to demonstrate that section 43(2) of FOIA is engaged and is therefore not entitled to rely on this exemption to withhold information from the contract. He also considers that the University holds no information about the tendering exercise. The University breached section 10 and section 17 of FOIA in responding to the request.
3. The Commissioner requires the University to take the following steps to ensure compliance with the legislation.
 - Disclose an unredacted copy of section 7 of the contract to the complainant.
4. The University 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.

Request and response

5. On 29 July 2021 the complainant requested information of the following description:

"[1] I am requesting under the Freedoms of Information Act a copy of the contract between Ipserv Ltd. and University of Suffolk for the management of 'The University Car Park' Long Street, Ipswich, Suffolk, IP4 1LQ.

"[2] I also request evidence to prove that the contract was put out for tender before being offered to Ipserv."

6. On 2 September 2021, the University responded. It claimed that the entire contract was exempt under section 43 of FOIA and therefore withheld it.

7. The complainant queried this approach on 3 September 2021, arguing that it was unlikely that the entirety of the contract was commercially sensitive. The University reaffirmed its reliance on section 43 on 8 September 2021 but, despite having claimed the entire contract was commercially sensitive, it then stated that, were the complainant to be more specific in his request, it might be able to disclose relevant sections.

8. On 9 September 2021, the complainant contacted the University again in the following terms:

"You can redact the commercially sensitive parts including how much Ipserv pays yourselves or how much you pay Ipserv to operate, or how much you receive per PCN issued.

"As a public-funded body, I believe that the public has the right to see how much public money is earned or spent.

"I request to see the parts of the contract that contains details that directly relate to motorists using your car park including the requirement to display a permit, how to obtain a permit, grace periods, loading/unloading, the ability to issue charges, the ability to commence court claims, and that the contract complies with Sections 43 and/or Sections 44 of the Companies Act 2006.

"I also request proof that the contract was put out to tender before being offered to Ipserv Limited."

9. After several more exchanges, the University disclosed one section (section 7) from the contract on 25 October 2021 – but it withheld some

of the clauses within that section which it still deemed to attract section 43.

10. The complainant formally requested an internal review on 29 October 2021. The University sent the outcome of its internal review on 16 November 2021. It upheld its original position.

Scope of the case

11. The complainant contacted the Commissioner on 16 November 2021 to complain about the way his request for information had been handled.
12. It is evident from the University's submission that it treated the complainant's correspondence of 9 September 2021 as a narrower version of element [1] of the original request of 29 July 2021 – evidently considering it had met its FOIA obligations in respect of the earlier request.
13. The Commissioner, for reasons that will be explained below, has concerns about the University's overall handling of the request. Nevertheless, he accepts that the correspondence of 9 September 2021 did have the effect of narrowing the scope of the request.
14. The Commissioner considers that the scope of his investigation is to determine whether the University is entitled to rely on section 43 of FOIA and whether it holds any further information within the scope of the request.

Reasons for decision

Section 43 – commercial interests

15. Section 43(2) of FOIA states that

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”
16. The exemption can be engaged on the basis that disclosing the information either “would” prejudice commercial interests, or the lower threshold that disclosure only “would be likely” to prejudice those interests. For the Commissioner to be convinced that prejudice “would” occur, he must be satisfied that there is a greater chance of the prejudice occurring than not occurring. To meet the threshold of “would be likely to” occur, a public authority does not need to demonstrate that

the chance of prejudice occurring is greater than 50%, but it must be more than a remote or hypothetical possibility.

17. In the Commissioner's view it is not sufficient for a public authority to merely assert that prejudice would be likely to occur to another party's commercial interests to engage the exemption. Nor is it sufficient for the other party to assert that such prejudice would be likely to occur. The public authority must draw a causal link between disclosure of the information and the claimed prejudice. It must specify how and why the prejudice would occur.
18. The withheld information falling within scope is section 7 of the contract which is entitled "Enforcement" and sets out the powers of the "supplier" (Ipserv) and the "customer" (the University). The Commissioner accepts that this is the section of the contract that deals with the matters the complainant raised in his correspondence of 9 September.
19. The University has withheld clauses 2 and 3 of this section which deal with provisions for a grace period. It has also withheld subclause 4(a) which, in broad terms, deals with Ipserv's enforcement powers under the contract.

The University's position

20. At the outset of the investigation, the Commissioner contacted the University to set out the scope of the investigation and ask a series of detailed questions aimed at understanding the University's use of section 43. These questions were aimed at understanding why the University considered that commercial prejudice would result, as well as its assessment of the public interest balance.
21. The University's complete explanation for the commercial prejudice that might occur was as follows:

"Following consultation with Ipserv and their governance team it was determined that clauses 7.2 and 7.3 were commercially sensitive in that they provided information of the grace periods for the car park which could result in a loss of income.

"It was further believed that sharing the requested information would be likely to give a competitor an unfair advantage (clause 7.4), for example, around being able to offer more parking for the same price potentially undermining future procurement exercises."
22. In fairness to the University, it had also consulted Ipserv on disclosure and provided copies of that consultation to the Commissioner. Ipserv stated that its commercial interests would be prejudiced because:

“the knowledge of the grace period could result in lost income – a user of the car park could ensure that they do not pay for the full length of their stay, knowing that the contract means they could not be penalised.

“[sub-clause] 7.4 is commercially sensitive as other operators may take advantage of the knowledge of the contract terms to bid for the contract on improved terms.”

The Commissioner's view

23. In the Commissioner's view, the University has not adequately demonstrated why any party's commercial interest would be harmed by disclosure – indeed it has not actually (despite being asked) confirmed exactly whose commercial interests it considers would be harmed.
24. Turning to the grace period first, the Commissioner notes that Ipserv's published Terms & Conditions already specifies the length of the grace period.¹ He can therefore see no good reason why disclosure of this information would cause commercial prejudice.
25. Turning to sub-clause 7.4, whilst the Commissioner recognises that Ipserv has put forward a specific example of how prejudice could be caused (which the Commissioner has omitted from this decision notice so as not to inadvertently reveal the actual information that has been withheld), the Commissioner is still not persuaded that this information engages the exemption.
26. Whilst the withheld information may not be in the public domain, it is highly generic and the Commissioner considers that a motivated person would be likely to be able to deduce it from information in annual accounts of the University and Ipserv (although several of the University's annual reports are missing so the Commissioner has been unable to verify this).
27. In any case, the Commissioner is unconvinced that Ipserv's competitors are genuinely unaware of the withheld information or that it would be of significant material assistance to them – because of how generic it is.
28. The Commissioner is therefore not satisfied that section 43 is engaged and the University must disclose this information.

¹ <https://www.ipserv.co.uk/car-park-terms-and-conditions/university-of-suffolk-campus-car-park-terms-and-conditions/>

Tendering exercise – held/not held

29. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, he will consider any reason why it is inherently likely or unlikely that information is not held.
30. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
31. The University explained to the Commissioner that it did not hold any information about a tendering exercise because no tendering exercise had been carried out. Because of the value of the contract, it was not required to put out a tender and had not done so.
32. The Commissioner has checked the appropriate regulations and agrees that it is unlikely that a contract of this size would have required a tendering exercise. Therefore, in the absence of any evidence that the University did carry out a tendering exercise, he is satisfied that, on the balance of probabilities, the University does not hold this information.

Procedural matters

33. Section 17 of the FOIA states that when a public authority wishes to withhold information or to neither confirm nor deny holding information it must:
 - (1) within the time for complying with section 1(1), give the applicant a notice which—
 - (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.
 - (3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such

time as is reasonable in the circumstances, state the reasons for claiming—

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
 - (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- (4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.
34. Section 10 of FOIA requires a public authority confirm or deny holding information and communicate all non-exempt information within 20 working days of the date of receipt.
35. The University claimed that it did not receive the request until 30 July 2021 – however the metadata from the request shows that it was sent on 29 July 2021. The Commissioner’s guidance notes that a working day lasts up until midnight so, even if the request was submitted outside of normal working hours, it would still have been received by the University on the day it was sent.²
36. However, in this case it is immaterial whether the request was received on the 29 or 30 July as, even allowing for the bank holidays in early August (Scotland) and late August (rest of the UK), the University failed to provide a response of any sort until after the 20th working day.
37. That alone would be sufficient for the Commissioner to record breaches of both section 10 and section 17 of FOIA. However, he has identified further deficiencies in the University’s response.
38. Firstly, when a public authority receives a request for information, it has a duty to communicate any information that is not covered by an exemption. The University’s subsequent responses confirm that

² <https://ico.org.uk/media/for-organisations/documents/1165/time-for-compliance-foia-guidance.pdf>

(notwithstanding the Commissioner's finding above) not all the information within the scope of the request was covered by section 43.

39. The University should not have asked the complainant which parts of the contract he was particularly interested in – it should have identified those parts of the contract that were not covered by section 43 and disclosed those elements.
40. As the University failed to identify non-exempt information when it first responded to the request, it would have breached section 10 of FOIA even had the response been issued in a timely fashion.
41. Secondly, the Commissioner notes that the University's refusal notice failed to explain why section 43 was engaged or provide details of the public interest test. The refusal notice did not set out why prejudice would occur, nor did it explain what had led it to conclude that the balance of the public interest favoured maintaining the exemption.
42. The Commissioner considers that the University's procedural handling of the request was poor and it therefore breached both section 10 and section 17 of FOIA in responding.

Right of appeal

43. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

44. 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.
45. 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

Roger Cawthorne
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