

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 4 November 2010

Public Authority: London Borough of Southwark Council
Address: Corporate Records Office
London Borough of Southwark
Floor 9
Downstream Building
London
SE5 8UB

Summary

The complainant requested a copy of the authorities approved business plan for the current financial year (2009/2010) with a company called Fusion, which delivers leisure services on its behalf. The council responded initially claiming that the information was exempt under section 43(2) of the Act. Subsequently, during the Commissioner's investigation, the council changed its view and stated that it did not hold relevant information as there was no current approved plan for 2009/2010.

The Commissioner asked further questions relating to the way in which the council continued its relationship with the third party in question. After further correspondence with the council he established that there was an ongoing relationship between the parties based on the business plan for 2007/8, and that payments were being made on the basis of that plan together with a variation for inflation.

The Commissioner's decision is that the continuance of this agreement, with the agreed uplift, constituted the approved business plan for the year 2009/2010 at the time that the complainant's request was received. His decision is therefore that the council does hold relevant information, and that it is therefore under a duty to consider that information for disclosure as required under section 1(1) of the Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The complainant requested copies of a business plan between the council and a company called Fusion. Fusion manages leisure facilities within the borough under contract to the council. The council pays Fusion quarterly for the management of these facilities based on a contract between the parties agreed in 2000.
3. The complainant previously made a request for a copy of a contract between the council and Fusion dating from 2000. He received a redacted version of this in response.

The Request

4. On 12 July 2009 the complainant requested from the council:

"Would you therefore please let me have a copy, under the Freedom of Information Act, of Fusion's Business Plan for the current financial year that was approved by the Council."
5. On 22 July 2009 the council responded to the complainant. It stated that the information was exempt because section 43(2) of the Act applied (commercial interests).
6. On 20 September 2009 the complainant wrote back to the council asking it to review its decision to refuse to disclose the information to him.
7. The council responded on 22 October 2009 providing him with some of the information but stating that the remainder was exempt because section 41 of the Act applied (information provided in confidence) and also section 43 (2).

8. On 11 May 2010, after the Commissioner wrote to the council asking it to supply the withheld information to him, the council wrote to the Commissioner stating that it wished to change its decision on the request. It stated that after reviewing the request again it had realised that it does not actually hold relevant information. It explained that there was no current business plan for the 2009/10 at the time that the request was received because the contract was at that time being renegotiated. It also explained that the information which had been part disclosed and part withheld under sections 41 and 43 did not relate to the requested information but to an earlier information request made by the complainant in March 2009.

The Investigation

Scope of the case

9. On 17 January 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the council had responded properly to his request, and whether the information which he had asked for should have been disclosed to him.

Chronology

10. The Commissioner initially wrote to the council on 22 March 2010 and informed it that it had received a complaint. He asked it to supply copies of the relevant information which it held, together with further arguments in support of the finding that the information was exempt under section 43(2).
11. The council responded on 20 April 2010 asking for an extension to its deadline for responding. It subsequently responded on 11 May 2010 where it told the Commissioner of its error and changed its decision to state that it did not hold relevant information.
12. On 18 May 2010 it wrote to the complainant outlining its error and stating that no information was in fact held.
13. On 21 May 2010 the Commissioner wrote to the complainant and asked him if he was now satisfied with the council's response and wished to withdraw his complaint.

14. On the same date the complainant responded to the Commissioner stating that he did not.
15. On 23 May 2010 the complainant wrote again adding further information to his reasons for wishing to continue his complaint. He argued that his request would encompass the 2008/9 business plan if that was continuing whilst the negotiations were ongoing.
16. On 2 June 2010 the Commissioner wrote to the council asking if there was a plan in place from the previous year.
17. The council responded on 8 June 2010 stating that there was no 2008/9 plan but that there was a 2007/8 plan. It also restated that whilst the contract was being renegotiated no further business plans had been approved by the council.
18. The complainant wrote on 1 July 2010 providing further evidence in respect of the approved plan. He provided sections of the original contract between the parties (i.e. from 2000) which showed that the council should have paid Fusion some funds for that financial year by the time that it received his request. He sought a copy of the current agreement under which these payments had been made, as he argued that this would amount to the *"Fusion's Business Plan for the current financial year that was approved by the Council"* in the absence of a newly approved version.
19. On 9 July 2010 the Commissioner wrote back to the council asking it whether any payments had been between it and Fusion in the year, and if so on what basis.
20. On 13 July 2010 the council wrote back asking the Commissioner to clarify the Commissioner's understanding of the complainant's request. It argued that there was a difference between the business plan, which is what it had understood the complainant wanted, and a financial business plan. It therefore asked the Commissioner to clarify whether the complainant meant that he wanted a copy of the business plan, or the financial plan, which it considered to be a completely different document and which it had not initially considered. It argued that if the complainant was referring to a financial plan for the year 2009/10 then the Council would not hold this as Fusion were not required to submit such a document under the terms of the contract which is in place.
21. The Commissioner responded providing that clarification on 14 July 2010. He stated that the complainant wanted the agreement under which payments were being made to Fusion by the council.

22. The council provided its response to the Commissioner's questions on 28 July 2010.

Analysis

Substantive Procedural Matters

Were the initial response and the review adequate?

23. The council initially informed the complainant that the information he had requested was exempt under section 43(2). In the review it also relied on the same exemption as well as section 41. However the council subsequently withdrew that finding and stated instead that no information was in fact held.
24. The Commissioner therefore finds that the council breached section 1(1), and also section 10(1) for providing its revised position outside of the statutory time frame of 20 working days. The information it did consider was not the information which the complainant requested.

Is relevant information held?

25. The complainant wrote to the Commissioner providing sections of the 2000 contract between the parties. He had been provided with this in response to a previous request. He directed the Commissioner to a contractual stipulation in the contract that required the council to make payments on a quarterly basis to Fusion, and to agree the levels of payment that would be made in the following financial year prior to payments beginning. He therefore stated that a number of payments should have been made to Fusion during that financial year by the time that he sent his request, and argued that if that was the case then it was that agreement which should have been considered for disclosure to him in the absence of a newly approved agreement.
26. The Commissioner therefore wrote to the council and asked it whether any payments had been made during the financial year, and if so on what basis those payments had been made. He also asked the council to confirm whether an agreement had now been reached, and if so whether any payments that had been made had been revisited once that agreement was reached, specifically in order to correct the payments that had already been made earlier in the year.
27. The council responded stating that payments had been made with the financial year under the 2007/8 agreed plan, with an uplift added for

inflation. It further confirmed that new terms had been agreed in October 2009, but that the amounts which had been paid before that time had not been revisited.

28. The Commissioner therefore considers that at the time of the complainant's request there was an agreement in place to provide payments following the terms and management fee agreed for 2007/8, with an agreed uplift to account for inflation. His view is therefore that at the time of the request an approved plan was in place, albeit that there was an expectation that that would not be continued when an agreement on new terms was reached.
29. Given this the Commissioner's decision is that the council does hold relevant information and that it should therefore consider this for disclosure to the complainant under the terms of section 1 of the Act.

The Decision

30. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.
- It breached section 1(1) in that it did not consider for disclosure under that section of the Act the information it held.
 - The council breached section 10(1) for providing its revised position outside of the statutory time frame.

Steps Required

31. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- To consider the information falling within the scope of the complainant's request for disclosure under the terms of section 1 of the Act.
32. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

33. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

34. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

35. 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.
36. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 4th day of November 2010

Signed

**Anne Jones
Assistant Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1(1) provides that -

"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."