



Llywodraeth Cymru
Welsh Government

Our ref: ATISN 10465

Date: 2 August 2016

Dear ,

Request for Information – ATISN reference 10465 – internal review

Following our disclosure letter to you dated 22 June, on 5 July 2016 you requested an internal review in light of the response, specifically:

1. ICO guidance suggests that the third party should be consulted with before claiming commercial confidentiality - can you confirm this was done, and Mitel Networks indicated they still believed the information to be commercially sensitive?
2. Please review the likelihood of prejudice being caused. It is 6 years since the contract was signed, so I would expect any commercial confidentiality to have been reduced by the passage of time (pricing strategies, amounts etc. have altered significantly since then). ICO guidance states "Market conditions will change and some information, such as those relating to costs, may very quickly become out of date."

I have established that Mitel were not originally contacted to establish their views on whether Section 43, commercial interests should be engaged.

As part of the review I have sought the views of Mitel and specifically on the point as to whether given the passing of time, any commercial interests they might cite (or any other exemptions) are negated to any extent since the original signing of the lease document.

I have upheld your complaint in part. The full lease agreement documents are now being released to you, albeit with some redactions (as follows).

Document 1 – page 39.

The home address of J A Evans and signatures have been withheld under Section 40 (2) of the Freedom of Information Act (2000).

Section 40 of the Freedom of Information Act sets out an exemption from the right to know if the information requested is personal information protected by the Data Protection Act 1998 (DPA). Personal data is defined in Section 1(1) of the DPA as:



“personal data” means data which relates to a living individual who can be identified from those data; or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

We have concluded that, in this instance, the information requested contains third party personal data. Under Section 40(2) of the FOI Act, personal data is exempt from release if disclosure would breach one of the data protection principles. We consider the principle being most relevant in this instance as being the first.

The first data protection principle.

This states:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

(a) at least one of the conditions in Schedule 2 is met, and (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

We consider that the home address and signatures of the third parties clearly falls within the description of personal data as defined by the DPA and that its disclosure would breach the first data protection principle. The first data protection principle has two components:

1. Personal data shall be processed fairly and lawfully and
2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met

Guidance from the Information Commissioner’s Office (Personal information (section 40 and regulation 13) v 1.3) states (at p11):

- *The starting point is to consider whether it would be fair to the data subject to disclose their personal data. The key considerations in assessing this are set out in the section on Fairness below.*
- *If disclosure would not be fair, then the information is exempt from disclosure.*

This approach was endorsed by the Court of Appeal in the case of Deborah Clark v the Information Commissioner and East Hertfordshire District Council where it was held:

“The first data protection principle entails a consideration of whether it would be fair to disclose the personal data in all the circumstances. The Commissioner determined that it would not be fair to disclose the requested information and thus the first data protection principle would be breached. There was no need in the present case therefore to consider whether any other Schedule 2 condition or conditions could be met because even if such conditions could be established, it would still not be possible to disclose the personal data without breaching the DPA” (paragraph 63).

In this instance, we believe that the individuals concerned would have no expectation that this information would be made public. Thus, we believe release of this information would be unfair and so breach the first data protection principle. For that reason, the information is being withheld under section 40(2) of the Freedom of Information Act. This is an absolute exemption and not subject to the public interest tests.

Document 2 – paragraph 6.1, administration fee.

Taking into account the views of Mite, I have concluded that Section 43(2) is engaged in relation to this information.

Section 43 is a public tested exemption; that means, in order to withhold information under it, it has to be shown that the public interest in withholding the information outweighs that in releasing.

As previously stated, the Welsh Government recognises the inherent public interest in openness and transparency that release of the information would engender. Release of the information would also serve the public interest in terms of openness and transparency within government, particularly in ensuring transparency and accountability by disclosing how the Welsh Government spends public money and that the money is invested wisely.

However, I believe that releasing information on pricing into the public domain would be likely to put this company at a commercial disadvantage within a competitive market. Mitel Networks is a private company and disclosure of the requested information would place Mitel Networks at a commercial disadvantage when in negotiations with other potential users of the service in that it would undermine the competitiveness of their products/service and allow potential competitors to obtain a commercial advantage; competitors would have access to a level of information such as commercial payments and pricing strategies not otherwise available. Therefore I believe that release of this information would be likely to prejudice Mitel's commercial interests and, in the absence of any stronger public interest in favour of its release, it is accordingly withheld from release under s43(2) of the Freedom of Information Act.

If you remain dissatisfied with this response, you have the right to complain to the Information Commissioner. The Information Commissioner can be contacted at:

Information Commissioner's Office,
Wycliffe House,
Water Lane,
Wilmslow,
Cheshire,
SK9 5AF.

Yours sincerely

Marcella Maxwell
Deputy Director, Organisation Design and Change