Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 27 May 2010

Public Authority: Leeds City Council
Address: Civic Hall
Calverley Street
Leeds
West Yorkshire
LS1 1UR

Summary

The complainant requested information about a winning bid for a childcare voucher scheme. The council provided most of this information but withheld the administration fee which the council will be paying under section 43(2) of the Act. The Commissioner has investigated and found that section 43(2) is engaged but that the public interest in maintaining the exemption does not outweigh the public interest in disclosure of the information.

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's company took part in a tendering exercise to provide a childcare voucher scheme to Leeds City Council. The complainant's company was unsuccessful in its bid and following this the complainant made requests for information to Leeds City Council to attempt to understand the decision further.

3. The childcare voucher scheme is a government supported scheme where parents can purchase childcare vouchers from their gross salary up to a maximum monthly amount of £243. As this amount comes off the gross salary, the employee makes a saving by avoiding paying income tax on that proportion of their salary. The employer can either make its own saving reduction in their National Insurance contributions or it may decide to pass that saving onto the employee as well, that is at the discretion of the employer.

4. There are a range of childcare voucher providers who supply childcare vouchers which can be redeemed at any approved childcare provider. An employer has to enter into a contract with one of these suppliers if they want childcare vouchers to be available to their employees.

5. Childcare voucher providers make a profit by charging the employer a percentage of the total monthly value of all childcare vouchers being purchased by its employees. For instance, if an employer has 1000 employees each purchasing £200 of vouchers per month then that equates to a total £200,000 of vouchers per month. If the childcare vouchers providers' fee is 5% then their administration fee for that month would be £10,000.

The Request

6. The complainant made the following request for information from Leeds City Council (the council) on 24 June 2009:

> "In the interests of equity, please could you provide evidence that the winning tender stayed within the 5,000 word limit?
>
> Please could you also provide me with specific information on any aspects of service or other points of detail which were included in the winning tender but lacking from our response? Please also state the number of words that the winning tender used in their response to each of these categories, as well as in those categories where you have indicated in your feedback that we gave a good response.
>
> Please could you confirm that the presentation from the winning tenderer also stayed within the 10 minutes time limit?
>
> Please could you provide me the name of the winning tenderer and also provide details of the administration fee associated which the Council will be paying."

7. The council responded on 14 July 2009 providing the complainant with the information requested in the first three requests and providing the complainant with the name of the contractor. However, the council refused to provide the complainant with the administration fee under section 43(2) of the Act.

8. The complainant requested an internal review of this decision on 20 July 2009.

9. The council carried out an internal review and communicated the findings to the complainant on 4 August 2009. The internal review upheld the council's application of section 43(2) to withhold the administration fee.

The Investigation

Scope of the case

10. On 17 August 2009 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

    - In order for full transparency to be maintained, public authorities should be willing to disclose the fee quoted by the winning tender.

Chronology

11. The Commissioner began his investigation by writing to the council on 14 September 2009. In this letter he asked the council to provide him with a copy of the withheld information.

12. The council responded on 9 October 2009 providing the Commissioner with details of the administration fee which was previously withheld.

13. The Commissioner wrote to the council on 26 January 2010 seeking further arguments from the council to support its reliance on section 43(2) of the Act.

14. The council responded on 3 February 2010 providing the Commissioner with further detailed arguments.

15. The Commissioner wrote again on 11 February 2010 asking the council to provide more background detail regarding the childcare voucher scheme and for information regarding the length of the council's contract with the winning tender.

16. The council responded on 23 February 2010 and provided the Commissioner with more information about the childcare voucher scheme in general and details of its contract with the winning tender.

Analysis

Exemptions

Section 43(2) 'Commercial Interests'

17. The council has argued that the administration fee being withheld is exempt by virtue of section 43(2). Section 43(2) provides that information is exempt 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).

18. The council argue that disclosure of the administration fee would prejudice the winning bidder and the council. The council have specifically stated that they are relying on the "would" prejudice limb of section 43(2) rather than the "would be likely to" prejudice limb. "Likely to prejudice means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote whereas "would prejudice" places a much stronger evidential burden on the public authority and must be more probable than not.

19. Following the Information Tribunal decision in Hogan v ICO (EA/2005/0026, EA/2005/0030), the Commissioner uses a three step test to indicate whether prejudice would or would be likely to occur from the disclosure of the information in question.

    1. Identify the prejudice in the exemption
    2. consider the nature of the prejudice in question
    3. consider the likelihood of the prejudice in question occurring.

<u>1. The applicable prejudice within section 43.</u>

20. The council argues that disclosure would prejudice the commercial interests of it and the commercial interests of the winning bidder by allowing competitors to see the administration fee offered by the firm and enable them to undercut in the future. This would in turn affect the

council's commercial interests by discouraging firms to bid for council contracts if they understood that their pricing information would be made public.

2. The nature of the prejudice in question.

21. The council argue that if several childcare voucher providers were competing for the same contract and one childcare voucher provider knew what fee the other providers were charging, they would almost be certain of winning that contract by undercutting the percentage fees of their competitors. This would give them an unfair advantage in that procurement process.

22. In addition the council argue that disclosure would prejudice the commercial interests of the council as providers would become wary of making bids to the council and could decide to concentrate their efforts on private sector employers seeking these services, where the bidders could protect their price information more effectively. In the longer term that would reduce the pool of bidders available to the council.

23. The council also argue that it has a commercial interest in protecting the integrity of its procurement process. The Public Contracts Regulations provide a framework for dealing with procurement including the disclosure of information to bidders and to the public in accordance with principles of fairness and transparency.

24. The council explained that the level of service and support that childcare voucher scheme providers give is very similar because essentially they offer the same service which is to give employees childcare vouchers and to make sure the employer has the right information to make the correct deductions from employee salaries. As there is relatively little difference in the service offered by childcare voucher providers the deciding factor in a procurement exercise is often the percentage fee (administration fee) that the company charges. The higher the percentage the more expensive the company and the less likely they are to win any new contracts or retain existing ones.

25. The childcare voucher scheme is supported by Her Majesty's Revenue and Customs (HMRC) which sets out the guidelines on how the schemes should operate. The scheme is open to all employers but the scheme will operate in the same way from one council or local authority to another simply because they follow the same HMRC guidelines. There will only be slight differences which will probably be around local administration arrangements and the interactions with payroll systems. Therefore, a childcare voucher provider will be able to submit almost identical bids for every contract that it tries to secure.

The biggest factor likely to distinguish one provider from another is their fee.

26. The council further explained that its current contract with its childcare voucher provider was for an initial period of 13 months with the option to extend for up to a further 2 years by mutual agreement without having to re-tender. The initial 13 month period is set to expire on 30 June 2010. The council said that it was not currently aware if any other councils had contracts out to tender but as childcare voucher schemes are very popular it would anticipate that at any given time there will be a number of councils or local authorities across the UK that have their childcare voucher scheme out to tender.

27. The council explained that it had consulted its childcare voucher servicer provider to seek their views regarding the disclosure of the administration fee and they had confirmed that they considered that disclosure would prejudice their commercial interests:

> "The childcare voucher industry is an extremely competitive environment with up to 8 providers competing for every public sector contract advertised. Within these tenders the weighting for price is generally 50% of the scoring, we feel that disclosure of this information would prejudice our commercial interests in future tenders and would provide an unfair advantage to the company requesting the information if they then wish to undercut us during any forthcoming tender."

28. The council explained that in this particular instance the tender was evaluated on 40% price and 60% quality and all 6 bidders that were invited to submit a bid did so demonstrating the competitive environment of childcare voucher providers.

3. The likelihood of the prejudice in question occurring.

29. In considering whether the disclosure of the information would have the prejudice outlined above, the Commissioner has taken into account the limited number of childcare voucher providers, the similarity in schemes from authority to authority and the fact that at least 40% of the bid was determined on pricing.

30. The Commissioner also notes that there appears to be only a small variety in the pricing structures across the different companies with most advertising a standard administration fee of 2.5%. However, it is important to note that this administration fee can vary depending on the size of the scheme being tendered for and it is possible that providers may decrease the fee in certain circumstances.

31. The way in which childcare voucher schemes are run from company to company does not vary considerably and the main variable from scheme to scheme is the administration fee.

32. The Commissioner does not accept that disclosure would or would be likely to prejudice the council. He does not consider that childcare voucher providers would be discouraged from bidding for public sector contacts because of the possibility of disclosure of their administration fee. Whilst he recognises that childcare voucher schemes are available to all private as well as public sector companies he does not believe that childcare voucher providers would stop bidding for public sector contracts if this type of information were to be disclosed. Public sector contracts are still attractive propositions for childcare voucher providers because of the stability of the contract as well as the likely size of the schemes. In addition by wining one public sector contract it is likely that the experiences gained would help in securing another as the experiences within one local council will be similar with the next unlike private firms whose needs are more likely to be varied.

33. The Commissioner is not persuaded that disclosure of the information "would" prejudice the commercial interests of the provider. He does not consider that the council have demonstrated that the prejudice that would occur would be more probable than not. Whilst he accepts that there would be likely to be some prejudice he does not consider that the evidence provided by the council is sufficient to engage this limb. The administration fee, whilst a crucial element of the bid process, is clearly not the only factor taken into account when awarding a contract. In viewing the council's response to the complainant in its refusal notice it is clear that more than simply the administration fee was taken into account. Tender forms were completed with up to 5000 words for each bidder separated into a number of categories such as 'Experience of delivering the scheme to organisations of a similar size' and 'HMRC compliance', with scores awarded for each category. In addition each bidder had to complete a 10 minute presentation. It is clear from this that whilst the administration fee may form a large part in determining the winning bid it is not simply a matter of the cheapest provider winning the contract. For these reasons the Commissioner is not persuaded that disclosure 'would' prejudice the commercial interests of the provider.

34. However, the Commissioner does consider the disclosure 'would be likely' to prejudice the providers' commercial interests. Whilst the administration fee is not the only factor considered when evaluating bids, it is a key part of the evaluation process and for this reason he considers that the probability of prejudice being suffered, whilst not more probable than not, is more than a hypothetical possibility and disclosure may very well prejudice the providers' commercial interests.

35. For these reasons the Commissioner accepts that section 43(2) is engaged. As sections 43(2) is a qualified exemption the Commissioner must now go on to consider if the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

Public interest arguments in favour of disclosing the requested information

36. The Commissioner considers that there is public interest in disclosing information about the spending of public money to ensure transparency and accountability. In relation to childcare voucher schemes there is a strong public interest in ensuring that as many employers, both public and private sector, take up the scheme and in doing so get the best value for money possible. Childcare voucher schemes benefit employees and encouraging more firms to take part in the schemes would be in the public interest.

37. The Commissioner considers that disclosing the administration fee may increase competition and drive prices down which in turn may encourage more employers to take part in the schemes. He also considers that there is a public interest in allowing the public to evaluate if the council have made the right choice in appointing a particular provider. As the council has explained a key element in determining the outcome of a tendering exercise is the administration fee, however there are other factors to be taken into account. If the public had more information regarding the bids including the administration fee they would be able to provide meaningful input into assessing whether the council had made the right decision.

Public interest arguments in favour of maintaining the exemption

38. The council has argued that there is also a strong public interest in protecting the legitimate commercial interests of bidders for public sector contracts and not exposing them to unfair practices by rival bidders in comparable procurement exercises. They also argue that there is a strong public interest in maintaining the integrity of public sector procurement exercises and in prospective bidders not being discouraged by the fear that they will not be on a level playing field with their competitors as a result of disclosure made in response to information requests.

39. The council consider that there is fierce competition amongst the providers of childcare vouchers and that price advantages are marginal which means that in this particular context greater weight should be

accorded to the public interest in protecting bidders, and protecting the integrity of the procurement process.

Balance of the public interest arguments

40. The Commissioner recognises that there is public interest in ensuring the council is able to continue to obtain the best value for money for its childcare voucher schemes as well as picking the best candidate overall and disclosing the administration fee in this case would assist in allowing the public to evaluate the council in this regard. He also considers that disclosure could drive prices down which would in turn encourage more employers to take part in a childcare voucher scheme which is in the public interest.

41. However, the Commissioner also notes that there are a limited number of childcare voucher providers (around 14) and the percentage administration fee does not vary considerably from one to the other. If this information is disclosed it could result in a 'levelling' effect where the prices of all move to the same level point and therefore reducing competition and the potential for councils to negotiate in future for more favourable rates. It is not in the public interest to reduce the ability of the council to negotiate the best possible deal on its scheme if the information were disclosed.

42. The Commissioner however considers that on balance the public interest in maintaining this exemption does not outweigh the public interest in disclosure of the administration fee. He considers that it is important that councils are transparent and accountable when it comes to spending public money and in the circumstances of this case he considers that the public need more information to ensure that the council is making the correct evaluation decisions when bids are received. Disclosing the administration fee would assist in allowing the public to assess whether the council obtained the best value for money and could also increase competition and drive prices down further for future contracts.

The Decision

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43. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

    (i) The council incorrectly applied section 43(2) to withhold the requested information.

Steps Required

44. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

    (i) Disclose to the complainant the administration fee which the council will be paying.

45. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

46. 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

47. 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

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.

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 27th day of May 2010

Signed ……

Gerrard Tracey
Principal Policy Adviser

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

Legal Annex

Commercial interests.

Section 43(1) provides that –
"Information is exempt information if it constitutes a trade secret."

Section 43(2) provides 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)."

Section 43(3) provides that –
"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2)."