

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 18 July 2011

Public Authority: London Borough of Southwark Council
Address: 160 Tooley Street
London
SE1 2QH

Summary

The complainant requested a copy of the authority's approved business plan for the current financial year (2009/2010) with a company called Fusion Lifestyle, which delivers leisure services on its behalf. The council responded initially claiming that the information was exempt under section 43(2) of the Act. After an initial investigation into whether relevant information was held the Commissioner ordered the council to reconsider its position in his Decision Notice ref: FS50295557. The council then reconsidered the request and provided the complainant with the majority of the information. However it withheld one section of the business plan on the basis that the exemption in section 43(2) applied.

The Commissioner's decision is that the council was correct to apply section 43(2) and that the public interest rests with maintaining the exemption in this instance.

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 Lifestyle. 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 17 January 2010 the complainant made a complaint to the Commissioner and asked him to consider whether the information which he had asked for should have been disclosed to him.
9. Following the Commissioner's investigation of that complaint he issued Decision Notice FS50295557 on 4 November 2010 which found that further relevant information was held by the council, and required it to consider that information for disclosure to the complainant.
10. On 13 December 2010 the council responded. It provided a copy of the majority of the information to the complainant however it withheld the

profit and loss section of the business plan under the exemption in section 43(2) of the Act.

11. The complainant asked the council to review that decision on 27 December 2010. The council responded on 11 January 2011. It stated that the information was exempt for the same reasons.

The Investigation

Scope of the case

12. The Commissioner has limited his decision to whether the information requested should have been disclosed to the complainant. Other issues regarding this case were addressed within his Decision Notice ref: FS50295557.

Chronology

13. Following the Decision Notice in case ref: FS50295557 the council kept the Commissioner informed of its response to the complainant. It informed him when it had provided its response to the complainant.
14. A number of exchanges took place between the parties and the Commissioner, which culminated in a council response to the Commissioner on 24 March 2011; providing a copy of the withheld information together with its, and Fusion's arguments for the information being exempt under section 43(2).

Analysis

Substantive Procedural Matters

Exemptions

Section 43(2)

15. The council initially informed the complainant that the information he had requested was exempt under section 43(2).
16. Section 43(2) provides that information is exempt from disclosure under the Act where a disclosure would, or would be likely to prejudice the commercial interests of any party.

Identifying the applicable interests within the relevant exemption

17. The council stated that the relevant interests were the commercial interests of Fusion.

Considering the nature of the prejudice

18. The information which has been withheld is the profit and loss section of the business plan relating to the performance of Fusion over the period. Fusion argues that a disclosure of this information would allow its competitors a competitive advantage both as regards its existing contracts and also its future tenders. It states that it has a number of contracts to provide leisure services with other local authorities in the area.
19. It argues that a disclosure of this information would enable its competitors to either compete on similar or better terms, thus undermining its commercial position.
20. It states that this would prejudice Fusion's position in relation to its existing contracts with local authorities and also prejudice its ability to compete and win other public sector contracts. This in turn would undermine Fusion's business strategy and have a material and adverse impact on its continued success. This would fundamentally affect the long term viability of Fusion.
21. The Commissioner notes that Fusion provided further arguments in support of other areas of the business plan being withheld, however the council made a decision that those sections could not be withheld under the Act and so disclosed these to the complainant.

Would prejudice be likely to occur?

22. The council stated that, based on Fusion's responses to the questions it asked, it considered that prejudice was likely to occur. Fusion had stated that "the likelihood of prejudice is extremely high". The Commissioner has considered the test for "would be likely"
23. In respect of the likelihood of prejudice occurring, Fusion stated:

"the public sector leisure market is an extremely competitive market. The market is made up on private sector contractors and "non profit distributing organisations" such as Fusion. The margins are extremely narrow. Each bidder is, therefore, seeking to articulate its "added value".

However, price is the key for public sector contracts. Disclosure of Fusion's business plan would mean disclosure of Fusion's commercial offer. Fusion has been successful in winning contracts for local authority projects following competitive tender. Disclosure of this information would be of great interest to Fusion's competitors and would be exploited to the detriment of Fusion."

24. It stated this however in respect of the disclosure of the entire business plan. As previously noted, the council in fact decided that the vast majority of the plan could be disclosed, only withholding the profit and loss section of the plan. It has therefore already disclosed the amount of grant which was recorded in the business plan.
25. The Commissioner is however satisfied that the disclosure of the profit and loss section would be prejudicial to the commercial interests of Fusion. This section provides the core financial information on the provision of the services to the local community, and its disclosure would provide valuable information to Fusion's competitors about its running costs.
26. The profit areas of the table do not provide information which would highlight profitable areas to potential competitors. A simple trading income figure is provided rather than a breakdown of the profitable areas of business. This would not therefore allow competitors to copy any processes or areas to their own competitive advantage. It does, however, detail the costs of providing the service, albeit at a high level. How a contractor minimises its costs in order to produce a lower tender price is a valuable 'commercial secret' of the contractor and any disclosure of costing information which might allow such an analysis would be commercially advantageous to its competitors. For instance it is possible competitors could analyse the costs of maintenance or salaries and compare these to their own costs. The Commissioner is therefore satisfied that a disclosure of the information could be prejudicial to Fusion.
27. Section 43(2) is subject to a public interest test to ascertain whether the information should be disclosed in spite of the fact that the exemption is applicable. The test to be applied is whether the public interest in maintaining the exemption outweighs that of disclosing the information.

The public interest in disclosing the information

28. The council has contracted out one of its core functions to a private third party. The Commissioner had identified the following public interest factors in favour of disclosing the information.

- The general public interest in transparency and accountability– Fusion carries out an important function on behalf of the council in providing leisure and sporting activities to the community.
- Disclosure would aid in identifying whether the business model of the contractor is best suited to the needs of the community
- That the costs and profits of the contractor best suit the needs of the community, and from this, whether best value is therefore achieved.

29. The Commissioner has borne in mind the fact that the only information which has been withheld is the profit and loss section of the business plan which relates to one year. He has also borne in mind that some elements of the contract have also been provided to the complainant, and that this is to an extent of greater relevance to the overall transparency of the contract which the council entered into with Fusion.

The public interest in maintaining the exception

30. The counter arguments relate to:

- the strong public interest in commercial confidences being maintained,
- the likelihood of commercial damage being caused to Fusion through a disclosure of information which is commercially sensitive,
- the level or severity of the harm that would be caused
- the actual value of the information being disclosed to the general public.

The balance of the public interest

31. The Commissioner has considered the public interest in maintaining the exemption compared to that in disclosing this information. There is a strong public interest in the council being transparent and in disclosing one of the factors which it considered when deciding to pay the amounts requested by Fusion for the grant. This is because the grant which the council provides to Fusion each year is based on Fusion's

- business plan for the year ahead, taking into account its trading income and its status as a not for profit organisation.
32. The Commissioner considers that a disclosure of the information would not provide the public with a significantly greater understanding of the decision of the council to provide the grant. The withheld information is one section of the business plan for 2007/2008. It is purely the profit and loss accounts of Fusion for the year. The council has disclosed the overall cost to the council of Fusion providing the service to the community, and has also disclosed the remainder of the business plan, which outlines the intended improvements in services which Fusion intends to deliver.
 33. The council's decision to award the grant is based on obtaining best value, which takes into account the appropriateness of the overall services being provided as well as the pricing.
 34. Information which would shed light on this would be available from the contract, the other areas of the business plan which have already been disclosed (such as the cost to the council), and the tendering documents which were submitted. Users will also be able to gauge the quality of services which are provided by Fusion if they use the facilities on a regular basis.
 35. However, the Commissioner discounts any argument that knowing what profits Fusion makes from the contract would not be of value to the general public in terms of accountability.
 36. The Commissioner recognises that although Fusion is a not for profit organisation, its primary role is not to make profits for the benefit of shareholders or individuals. Rather, any profits it makes would be used for the purposes which Fusion is set up to accomplish. The Commissioner recognises that any profits or losses which are made may impact upon the provision of services, or require additional grant to be paid by the council to cover the loss. That additional grant would need to be paid for by taxes. Any profits made could be utilised to provide lower costs to the taxpayer, provide a wider coverage of services, or better quality services to the public.
 37. A disclosure of the levels of costs versus profits might therefore shed light on whether Fusion could reduce its costs or maximise its profits to provide better value to the community in one of the above ways. Put simply, if Fusion's accounts can be used to demonstrate that it, or another service provider, could minimise costs further without disrupting or providing services of a lesser quality, then this may impact by either allowing the council grant to be lowered, or service

bettered in some way through the additional funds which are freed. This might be used for instance to lower prices for those using the facilities or to provide additional services.

38. The Commissioner has weighed this against the potential damage to the company's economic interests if the information is disclosed. The Commissioner recognises that the viability argument submitted by Fusion must in part relate to a scenario where it loses contracts and tenders because other service suppliers recognise that they can offer savings on Fusion's costs, or can make more profit from the services being provided, (for instance by being able to attract more use of the facilities). Fusion's tenders may therefore fail when in competition against these other suppliers because the other contractors could use those figures as a basis to provide a more competitive tender to the authority concerned. This will clearly be prejudicial to the commercial interests of Fusion, however overall it may prove beneficial to the authority and to the community.
39. Disclosing the information could also provide additional transparency as to whether the contract actually achieves best value or not if the accounts could be compared to other organisations of a similar nature providing similar services in similar circumstances. Costs and profits could be compared to give an overall picture of the effectiveness of Fusion's management of the leisure facilities.
40. However, the Commissioner notes that the above arguments have much greater relevance to not for profit organisations. In similar circumstances regarding a private business he would be unlikely to conclude that the public interest rests in disclosing information about the profits and losses of a contractor from one part of its business dealings (i.e., its contract with a single local authority). In such a scenario he would generally find that the information necessary to provide transparency and accountability rests in a disclosure of the overall cost to the council for the provision of the service, together with any information which is necessary to show what services or level of services are expected from the contractor for that cost. This information has already been disclosed in this instance.
41. In the case of private businesses the individual costs and profits of the contractor from the contract would be commercially sensitive information but it would to an extent be irrelevant in deciding whether the council has achieved best value from the contract. The market will establish a 'value' for the service to be provided, and whether a contractor is able to make substantial profits from tendering at around that value is a matter for the contractor rather than the public. Should a private contractor make substantial profits from a contract it is free

to use those as it sees fit. The council would not be at fault in agreeing a contract at those rates providing it has obtained best value for the service overall when compared to the other tenders or contracts which were being offered, and providing it was a suitable function to outsource at that cost.

42. The central difference which separates such a scenario from this case is that not for profit organisations are limited to the degree they can use any profits, and so inefficiencies on behalf of the organisation can affect the levels of cost or services provided by the supplier. That would not be the case with a private supplier.
43. The Commissioner therefore recognises that ordering the disclosure of the information in this case would be likely to interfere with the current 'level playing field' which Fusion currently has as a not for profit organisation when competing with the private sector for public authority business. A disclosure of the information would allow private businesses to consider Fusion's costs and profits and take advantage of that information whereas Fusion would be unlikely to be able to do so for private suppliers.
44. The Commissioner must therefore consider whether the additional transparency which would result as a disclosure of this information would outweigh the balance of the public interest in maintaining a level playing field for Fusion and other not for profit organisations. His decision in the particular circumstances of this case is that the balance of the public interest lies in protecting the level playing field and maintaining the exemption.

The Decision

45. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

46. The Commissioner requires no steps to be taken.

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

48. 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.
49. 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 18th day of July 2011

Signed

**Gerrard Tracey
Principal Policy Advisor**

**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

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(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."

Commercial interests.

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)."