

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 December 2011

Public Authority: Lincolnshire County Council
Address: County Offices
Newland
Lincoln
LN1 1YL

Decision

1. The complainant requested copies of all tender applications for the council's contract to provide services to the sensory impaired.
2. The Commissioner's decision is that by withholding the information under sections 43(1) and 43(2) the council did not deal with the request for information in accordance with the Act.
3. The Commissioner requires the authority to:
 - (a) disclose all sections of the successful tender application other than the apportionment of costs within the pricing schedules. The disclosure is to include the successful bidder's capability statement.
 - (b) disclose the total budget costs for each of the pricing schedules.
4. He requires the authority to disclose the information within 35 calendar days of the date of this decision notice.
5. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Freedom of Information Act and may be dealt with as a contempt of court.

Request and response

6. On 14 December 2010 the complainant requested the following information from the council:

"I would like to see all of the tender application forms for the recent tender for the sensory impairment contract as I believe some details were not fulfilled by some of the applications."

7. The contract was for the countywide provision of services for adults and children with sensory impairment needs. Its duration was three years with provision to extend for a further two.
8. On 17 January 2011 the council refused disclosure of the information under s43 of the Act.
9. The council's internal review of 17 February 2011 upheld its refusal to disclose the information. The review specified the exemptions at s43(1) and s43(2) on grounds that the information was a trade secret or that disclosure would be likely to prejudice the commercial interests of the bidding companies.

Scope of the case

10. The complainant contacted the Commissioner to complain about the council's withholding of the information.
11. On 10 May 2011 the Commissioner asked the council for copies of the tender applications in order to determine the appropriateness of the exemptions that had been applied. The council provided him with the information on 2 June 2011.
12. The complainant later revised her request and asked for disclosure of the successful application only.
13. The successful application was from the company 'Bid Services'. Bid Services is a registered charity working with deaf people. For purposes of tendering for the sensory impairment contract the company had combined its services with those of two other companies: 'Deafblind UK' and 'Beacon Centre for the Blind'. These companies are also registered charities.
14. The invitation to tender comprised four sections:

- (1) Instructions to Tenderers and Conditions of Tender
- (2) Deed of Agreement and Service Specification
- (3) Existing Contractor TUPE Information
Employment Particulars for Existing Contractor Employees
- (4)
 - (i) Formal Tender Submission
 - (ii) Service Model
 - (iii) Staffing Structure
 - (iv) Pricing Schedule A (Adults & Children Support)
 - (v) Pricing Schedule B (Supporting People)
 - (vi) Method Statements
 - (vii) Form of Tender
 - (viii) Qualification of Offer
 - (ix) Collusive Tendering Declaration
 - (x) TUPE Declaration

Bid Services also attached a 14 page "capability statement" as part of its submission under section 4 (vi).

15. Sections (1), (2) and (3), of the tender application were not exempted from disclosure by the council. The Commissioner notes that section (3) does not contain personal information. He therefore sees no reason why the first three sections of the tender application should not be released in their entirety. He has also been given no reason why subsections (i), (vii), (viii), (ix) and (x) of section (4) of the application should not be released.
16. This decision notice therefore only addresses the information supplied by Bid Services in relation to subsections (ii) (iii) (iv) (v) and (vi) of section (4) of the application. This includes the capability statement supplied by the company as part of its application.

Reasons for decision

17. Section 43 of the Act states that:

"(1) Information is exempt information if it constitutes a trade secret.

(2) 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)."

18. The trade secret exemption is class-based. This assumes that any disclosure of information falling within the scope of the exemption will be commercially harmful. The second exemption is prejudiced-based. This requires a test as to whether disclosure would or would be likely to be commercially harmful. Both exemptions are subject to the public interest test.
19. Because the council had not identified which parts of the information were caught by which exemption the Commissioner asked for clarification.
20. With regard to the second exemption, the council had maintained in its refusal notice that disclosure 'would be likely to' prejudice the commercial interests of the company. However, it had not explained how that likelihood might arise. He therefore asked the council why disclosure was considered likely to prejudice the company's commercial interests.
21. He also asked the council to ensure that its response took into account the Information Tribunal's view that 'likely to prejudice' meant that the possibility of prejudice should be real and significant.¹ He specifically advised the authority that the causal relationship between potential disclosure and the likelihood of prejudice needed to be demonstrated.
22. The council replied that the pricing schedules had been identified as a trade secret by the company and accordingly the first exemption applied to that information. The council supplied the Commissioner with a copy of a letter to that effect from the company dated 31 May 2011.
23. The council also said the company had identified three items of information that were commercially sensitive. These were its service model, its staffing structure and its method statements. The council indicated that the company's view was that this information should be withheld under the second exemption. From the Commissioner's own reading of the company's letter, however, the indication from Bid Services was that it believed these items were subject to both exemptions.
24. The council declared that its own view that the service model, staffing structure and method statements should be described as a trade secret.

¹ [John Connor Press Associates Ltd v Information Commissioner \(EA/2005/0005\)](#)

The authority said this was because of the innovative and unique nature of the product which Bid Services believed gave the company a competitive edge.

25. In considering the matter the Commissioner has taken into account the civil procurement policy and guidance of the Office of Government Commerce (OGC). The OGC has been re-named as the Efficiency and Reform Group (ERG). The ERG refers in its publications² to the OGC guidance. Whilst primarily aimed at central government departments the guidance has application across the wider public sector in relation to civil procurement.
26. The disclosure policy concerning a supplier's approach to work in tender documentation is outlined in annex A of version two of the guidance.³ In the case of successful bids the working assumption of the guidance is that this information should generally be disclosed unless it reveals a unique approach that could be considered a trade secret.

Pricing schedules

27. There are two pricing schedules. Schedule A relates to the adults and children support services element. Schedule B is for the supporting people element.
28. The Commissioner asked the council to explain the reasons why parts of the information should be considered a trade secret. The council replied that the company had confirmed that the pricing structures were intended for use in future submissions.
29. In the Commissioner's view this does not provide an adequate explanation as to why the pricing schedules should be classed as a trade secret. The nature of a trade secret is examined later in this notice.
30. He considers, however, that the exemption at s43(2) applies to the pricing schedules as disclosure would be likely to be commercially

² [Cabinet Office ERG Guidance Note December 2010 - "Publication of Tender Documentation" and Guidance Note January 2011 - "Publication of New Central Government Contracts"](#)

³ [FOI \(Civil Procurement\) Policy and Guidance – Version 2.0 \(November 2008\)](#)

detrimental to the company. They contain a breakdown of service and staffing costs within ceilings fixed by the council. In the Commissioner's view disclosure would reveal the company's method for apportioning such costs. In doing so it would be likely to reveal its pricing strategy. The Commissioner considers that if this information was released into the public domain it could enable competitors to undercut the company when bidding for contracts of a similar nature elsewhere in the UK.

31. The Commissioner informed the complainant of his finding in relation to the company's costed proposals and at that juncture in the investigation the complainant withdrew her request for that part of the information. Consequently the Commissioner has not gone on to consider the public interest test in relation to the exemption.
32. The complainant's withdrawal did not include the total budget costs for the service. The total budget costs allocated by the council for the service were made publicly available in its invitation to tender forms. Consequently, they are not exempt from disclosure under the Act.

Service model, staffing structure and method statements

33. The service model contains broad outlines of the services that will be provided by the company. The staffing structure shows where the service fits within the company's overall staffing structure.
34. There are nine method statements. These were required by the council to enable it to assess how the bidding companies would deliver the service. Each method statement was limited by the council to 1000 words and relate to the following areas:

- Contract implementation plan including transition
- Transfer of staff under TUPE provisions
- Plans for service delivery
- Referral process
- Staffing and management
- Partnership working
- Understanding service user needs
- Monitoring and performance management
- Added value

Bid Services also referred the council to its capability statement as part of its 'Added value' statement.

Section 43(1) - trade secret

35. Bid Services indicated in its letter of 31 May 2011 that its service model, staffing structure and method statements should be subject to the trade secret exemption. It maintained that the information contained descriptive data which illustrated the uniqueness and specific quality levels of the product it was offering. It said these descriptions would be reflected in other tender submissions and disclosure would significantly damage the company's ability to be competitive.
36. The company said it was the level and manner in how it described the processes adopted in its service delivery that was commercially sensitive and that it was not widely distributed. It submitted that its 'Added value' method statement detailed innovative practices which would damage its competitive edge if disclosed.
37. The council in its correspondence with the Commissioner said the information should be considered a trade secret on the basis of the unique and innovative nature of the product which Bid Services believed gave it a competitive edge over its rivals.
38. The term 'trade secret' is not defined in the Act. It is a term familiar from the common law to describe certain information confidential to business although no statutory definition has emerged.
39. A trade secret has been described in the Court of Appeal as '*information used in a trade or business of which the owner limits the dissemination or at least does not encourage or permit widespread publication and which if disclosed to a competitor would be liable to cause real (or significant) harm to the owner of the secret*'.⁴
40. The Court of Appeal has also described trade secrets as '*secret processes of manufacture such as chemical formulae ... or designs or special methods of construction ... and other information which is of a sufficiently high degree of confidentiality as to amount to a trade secret*'.⁵
41. The above description of trade secrets requires that the information is protected by the law of confidence. In this regard the Commissioner

⁴ In *Lansing Linde Ltd v Kerr* (1991) 1 WLR 251, 260

⁵ In *Faccenda Chicken Ltd v Fowler* (1987)1 Ch 117

notes that the council did not establish (or indeed submit) that the information in this instance is confidential.

42. The Commissioner's own guidance on the matter⁶ advises that the following considerations be taken into account when determining whether information is a trade secret:

(i) Is the information used for the purposes of trade?

(ii) Would its release cause commercial harm?

(iii) Is the information already known?

(iv) How easy would it be for competitors to discover or reproduce the information for themselves?

43. With reference to the first consideration, the information describes how the company proposes to deliver its service. The information itself is not used in the actual process of delivery to the user. In this respect the information is not used for purposes of trade. However, the Commissioner recognises that the application was created for the purpose of securing the contract to operate the service and in that limited sense may be regarded as used for the purpose of obtaining trade.

44. In relation to the second consideration – *'Would release of the information cause commercial harm?'* - the company expressed two views in its letter of 31 May 2011 to the council. The company's predominant view was that disclosure 'would' result in harm. It also said that disclosure was 'likely to' result in harm. In correspondence with the Commissioner, the council said that the company had confirmed only that disclosure of the information was 'likely to' have a significant impact on its ability to successfully compete in future procurement. However, there are no thresholds of likelihood to cause prejudice in relation to disclosure of a trade secret. If information is a trade secret it is axiomatic that its release 'would' cause commercial harm. Notwithstanding the company's assertion that disclosure would result in commercial prejudice (and discounting the council's attribution of the lower threshold of likelihood to the entirety of the company's consideration of the matter) neither the company nor the council

⁶ Freedom of Information Act Guidance No.5

explained sufficiently how disclosure would result in that outcome. This is despite the Commissioner having specifically asked the council in his letter of 10 May 2011 to ensure that the causal relationship between release of the information and any commercial harm was clearly demonstrated.

45. In the Commissioner's view, a large proportion of the withheld information is material targeted to promote the company's declared abilities. Whilst the Commissioner recognises that self-marketing by a bidding company is intrinsic to such applications for tender, it is difficult to see how its disclosure would result in commercial harm. In promoting itself the company refers to its particular history and selective experiences in supporting the sensory impaired. In this regard the Commissioner does not accept that rivals would gain competitive advantage by replicating such material as their own individual histories and experiences will be entirely different.
46. With regard to the company's reference to the level and manner in which it described its processes of service delivery, the Commissioner considered whether disclosure of the composition and style of the documentation itself would result in harm. The assumed risk from such disclosure would be if rivals believed that duplicating the presentation of the application would increase their chances of success in future bids for other contracts. Instead the Commissioner considers that successful bids for tender will depend upon a company's demonstration that it is capable of meeting the specification set by the contracting authority and that it can do so in a cost effective manner. Also different tenders throughout the UK will have differing specifications. In his view, merely copying the presentation of another's application would be insufficient in meeting the different sets of responses required by authorities elsewhere. In any event, replicating the presentation in this instance would not assist in the necessary demonstration of cost effectiveness. The presentation does not contain any cost proposals. The Commissioner also considers that authorities which invite such tenders for contract would have sufficient expertise to differentiate between a company that evidences the required skills and one that simply copies another's presentational style.
47. The third consideration of the Commissioner's guidance – *'Is the information already known?'* - has a bearing on the second. In the Commissioner's view the service provided by the company will be made visibly apparent to service users as well as to their families and carers upon receipt of its delivery. If people are able to assimilate the information from the actual delivery then it would seem to follow that merely disclosing its description would have no detrimental

consequence. The participation of service users in the company's service delivery is acknowledged by Bid Services itself. Its letter of 31 May 2011 says that the processes adopted in delivering its service are fully communicated with service users and involve their full input. The Commissioner also considers that information about the wider service would be disseminated and imparted through common interest exchange and discussion within the community networks of the sensory impaired. Information about staffing of the service would be routinely known by the staff from all the three charities involved in its delivery as well as by the organisations, agencies and individuals with whom the service came into contact.

48. The company said in its letter that it uses the same information on a regular basis in other procurement exercises. If this is the case it seems to the Commissioner that the information will have been distributed and will continue to be distributed well beyond a narrow circle. Due to the very frequency of distribution the information cannot be considered to have been 'closely guarded'. In that respect it is difficult to see how it can be considered a trade secret. To put the matter in perspective the Commissioner has considered the analogy of Coca Cola. Few would doubt that its recipe was a trade secret. However, in marketing their product the manufacturers of Coca Cola would never consider disclosing the formula to even one prospective outlet let alone distribute it to many on a regular basis.
49. With regard to the fourth consideration, much of the service provision described in the documentation relies on recognised methods of working with the sensory impaired. These are familiar to all professionals in the sector. It is not difficult for others to reproduce these elements of the service. Indeed many will already be using the same methods.
50. The council did not make the Commissioner aware of any specific information within the documentation that it considered might reveal innovation or uniqueness of the service offered. Instead the council's blanket suggestion was that all 39 pages of the application and 14 additional pages of capability statement should be considered a trade secret.
51. This general claim to uniqueness has not been supported by the provision of any evidence. The Commissioner notes that a reference to innovation in relation to one aspect of the service was made in the company's 'Added Value' statement and that this was referenced by the council in its response to the Commissioner's queries. However, neither the company nor the council has explained why that particular aspect of the proposed service should be considered innovative.

52. Having considered the arguments put forward by both the council and the company the Commissioner has concluded that the information does not constitute a trade secret on the grounds submitted. As he does not accept that the exemption at s43(1) is engaged he has not proceeded to consider the public interest test in respect of the exemption.

Section 43(2) – prejudice to commercial interests

53. The service model, staffing structure and method statements were also considered by both the council and the company to be exempt under s43(2).

54. In order for the exemption at s43(2) to be engaged the causal relationship between disclosure and the resulting prejudice must be demonstrated. The Information Tribunal has stated that any reliance on 'prejudice' should be rejected if this relationship is not demonstrated.⁷

55. The Commissioner specifically advised the council on 10 May 2011 that the causal relationship between disclosure and the likelihood of prejudice required demonstration.

56. The council had maintained in its refusal notice that disclosure 'would be likely to' prejudice commercial interests. Its internal review had claimed exemptions on grounds that the information constituted a trade secret or that its disclosure 'would be likely to' prejudice commercial interests. During the Commissioner's investigation the authority ceased reliance on the second exemption altogether. The council suggested instead that the information should be more accurately described as a trade secret. (The trade secret exemption has been addressed earlier in this notice.)

57. If a public authority holds the view that an exemption is inappropriate then it generally follows that the information cannot be withheld by the authority under that exemption. Whilst observing the council's change of opinion with regard to the appropriateness of the second exemption, the Commissioner has considered the company's own view of the matter before reaching his decision. In support of the exemption at s43(2) the company maintained that descriptive data contained within the information illustrated the uniqueness and specific quality levels of the product offered. It said that the descriptions would be reflected in other tender submissions and that disclosure would damage the company's

⁷ [Hogan v Information Commissioner and Oxford City Council \(EA/2005/0030\)](#)

ability to be competitive in such exercises. As indicated earlier in this notice the company's view was that disclosure 'would' result in prejudice whilst it also said that disclosure was 'likely to' result in that outcome. The council informed the Commissioner that the company had only confirmed the latter threshold of prejudice as being likely in the event of disclosure.

58. The 'would be likely' limb of the exemption places a lesser evidential burden than that for 'would prejudice'. The Information Tribunal stated that in considering the test of 'would be likely to prejudice' the 'chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk'.⁸ In considering the 'would prejudice' limb, the Commissioner considers that prejudice must be at least more probable than not. The burden of evidence is therefore stronger than it is when considering whether prejudice is 'likely'.
59. The claim to uniqueness of the services offered by the company in its application has not been supported by any evidence. Similarly, the company's reference to specific quality levels of the product has been unsupported by any explanation as to what it meant by this. From his own review of the documentation the Commissioner has been unable to determine what these quality levels might be. He considers that even if specific quality levels of the service could be ascertained from the information it has not been demonstrated to him how prejudice would likely arise from their disclosure. Whilst descriptions contained within the information may be replicated in other tender submissions by the company it has not shown how disclosure of those descriptions would be likely to damage its competitive ability.
60. In the Commissioner's view the lesser threshold of disclosure being 'likely' to cause prejudice has not been met. It follows therefore that the higher threshold of 'would prejudice' submitted in the company's letter of 31 May 2011 cannot apply.
61. In the absence of any argument from the council or the provision of any evidence from the company to support the proposition that commercial prejudice would be likely to arise from disclosure, the Commissioner has concluded that the exemption at s43(2) is not engaged. As the

⁸ [John Connor Press Associates Ltd v Information Commissioner \(EA/2005/0005\)](#)

exemption is not engaged there is no requirement to consider the public interest test in relation to the exemption.

62. As indicated earlier in this notice, the FOI civil procurement policy and guidance of the OGC assumes general disclosure of a successful bidder's approach to work unless its release should reveal a trade secret. As the Commissioner has already concluded in this notice that the information in this instance does not constitute a trade secret, his decision with regard to the exemption at s43(2) is in keeping with that guidance.

Right of appeal

64. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

65. 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.
66. 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

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