

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 November 2012

Public Authority: Northamptonshire County Council
Address: County Hall
Northampton
NN1 1ED

Decision (including any steps ordered)

1. The complainant has requested information relating to a contract awarded by Northamptonshire County Council (the "council") to Millbrook Healthcare. The council provided some information but withheld details of individual unit costings contained within the contract under the commercial interests exemption.
2. The Commissioner's decision is that the council has correctly applied the commercial interests exemption to the withheld information and that the public interest favours maintaining the exemption.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 27 February 2012, the complainant wrote to the council and requested information in the following terms:

"1. A signed copy of the contract, containing all completed appendixes, awarded to Millbrook Healthcare lot number 1.

2. Total monthly amounts invoiced by Millbrook Healthcare for LOT1, the ICES contract by NCC the lead agency since the contract was awarded.

3. Total monthly amounts credited by Millbrook Healthcare to NCC for equipment recycled back into Millbrook store since the contract was awarded."

5. The council responded on 22 March 2012. It disclosed some of the requested information but withheld elements of the information requested at part 1 of the request, namely individual unit costings, under the commercial interests exemption.
6. Following an internal review the council wrote to the complainant on 21 June 2012. It stated that it was upholding its decision to refuse part of the request.

Scope of the case

7. On 28 June 2012 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner's investigation has considered whether the council has correctly withheld elements of Part 1 of the request under the commercial interests exemption.

Reasons for decision

Section 43 – commercial interests

9. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.
10. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43. This comments that:

*"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."*¹
11. Having viewed the withheld information the Commissioner notes that this consists of the individual unit costings charged by Millbrook Healthcare ("Millbrook") for items provided to the council under the

¹ See here:

http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

contract. The Commissioner is, therefore, satisfied that the information falls within the scope of the exemption.

Whose commercial interests and the likelihood of prejudice

12. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.
13. The council has stated that, in withholding the information it considers that disclosure of the information would be likely to prejudice its own commercial interests and the commercial interests of Millbrook Healthcare.

The nature of the prejudice

14. The withheld information consists of a detailed list of prices charged by Millbrook for items under the contract with the council. The council has explained that the market within which Millbrook operates is extremely limited and the only competitive nature of the market is the prices of individual items.
15. The council has stated that the disclosure of details of these costings would jeopardise Millbrook's commercial position and would result in it taking action against the council for losses arising from a failure to obtain future contracts.
16. Part IV of the code of practice issued under section 45 of the FOIA (the "code") advises that, where a public authority receives a request for information which relates to the interests of parties other than the authority itself, that it would be good practice to consult with such parties prior to responding to the request².
17. The council confirmed that it did not consult with Millbrook at the time the request was originally received. Whilst the council considers that the withheld information affects its own commercial interests in addition to those of Millbrook, the Commissioner, nevertheless, notes the

² <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

council's practice in respect of the code's recommendations in this instance.

18. Following notification of the complainant to the Commissioner, the council contacted Millbrook and sought its views. Millbrook confirmed that it considered that the requested information should be withheld because its disclosure to a third party and subsequent use by a competitor could result in prejudice its commercial interests.
19. The council explained that, during the tendering process, each bidder presents their own prices as part of their bid. Prior to the bid being made, the council would not have seen or negotiated on the prices. During the tendering process the council produces a list of standard items that it wants bidders to produce quotes for. Given that bid evaluation is determined at the micro level of the competitiveness of bidders' costings for individual items, the council has argued that knowledge of these details would provide competitors with an advantage.
20. The council explained that disclosure of the unit price of just one item would be sufficiently critical enough to have an impact on a company's ability to win or lose a contract at tendering stage. Knowing which items are priced at what unit value at the stage of procurement for bulk provision is a very powerful lever during the tendering stages, and can be matched to the profiles of users thus enabling an advantage to be gained over competitors.
21. The council further explained that the four major companies are currently tendering for a local contract, across three of its neighbouring county boundaries and one crucial item price being revealed could sway the balance sufficiently one way or another for each company. Items procured and supplied are dependent on demand and individual needs including their weight capacity and other market forces e.g. replacement parts warranty, etc., which with this individual knowledge of pricing would affect a company's ability to remain competitive.
22. The Commissioner has considered the arguments provided by the council and referred to previous, comparable decision notices where he found that authorities had correctly withheld detailed breakdown of costings because disclosure would reveal companies' pricing strategies³

³ See: http://www.ico.gov.uk/~media/documents/decisionnotices/2011/fs_50303047.ashx and http://www.ico.gov.uk/~media/documents/decisionnotices/2011/fs_50380505.ashx

and result in competitors undercutting their tender bids. He has determined that disclosure of the information would provide competitors with an advantage which would be likely to prejudice its commercial interests. He has, therefore concluded that the exemption is engaged.

23. The Commissioner notes that the council has argued that disclosure of the information would also prejudice its own commercial interests by virtue of its partnership with Millbrook. The Commissioner considers that the council has not provided sufficient arguments to demonstrate what prejudice would be likely to be caused to the council by disclosure. However, as he has concluded that the exemption is engaged by dint of the likely prejudice to Millbrook he has discounted this factor.
24. As he has decided that the exemption is engaged, the Commissioner has gone on to consider the public interest test.

Public interest in disclosure

25. The complainant has argued that withholding information which would promote transparency and the free flow of information disables market forces and prevents a transparent competitive tendering process.
26. The complainant also made reference to other, generic public interest arguments in favour of disclosure, namely that access to the information would:
 - Further the understanding of, and participation in the debate of issues of the day;
 - facilitate the accountability and transparency of public authorities for decisions taken by them;
 - facilitate accountability and transparency in the spending of public money;
 - allow individuals to understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions.
27. The complainant has also alleged that the Millbrook contract is reported to be overspending by circa £1 million on a tender value that was quoted to come in around £2 million. The complainant considers that this provides a specific impetus for transparency and disclosure of the withheld information. The complainant has also suggested that the council may have entered into a contract which does not represent best value for public funding. In order to reassure that this has not happened, the complainant considers that disclosure of the information would satisfy the principles of transparency and accountability

Public interest in maintaining the exemption

28. The council has argued that public understanding and debate around the issues has been served by the disclosure to the complainant of the total monthly amounts invoiced by Millbrook.
29. In considering the public interest arguments in favour of maintaining the exemption the Commissioner has been mindful of his conclusions that disclosure of the withheld pricing breakdown information would be likely to cause actual prejudice to the commercial interests of Millbrook. He believes that there is a strong public interest in avoiding unwarranted prejudice to the commercial interests of third parties. As he has found that disclosure of the withheld information in this case would be likely to cause actual prejudice, he finds the public interest in avoiding this prejudice (by maintaining the exemption) particularly weighty.
30. In particular the Commissioner has again noted the limited nature of competition in the market for the services provided by Millbrook. He does not believe that it is in the public interest to give the other competitors in that market an unfair advantage over Millbrook in this case.

Balance of the public interest

31. In balancing the public interest arguments in this case the Commissioner has been particularly mindful that disclosure of the withheld information would be likely to cause actual prejudice to the commercial interests of Millbrook.
32. Whilst the Commissioner believes that the arguments in favour of accountability and transparency are particularly strong in situations involving the spending of large amounts of public money, this has to be weighed against the public interest in avoiding any unwarranted prejudice to the commercial interests of private companies. In this case the Commissioner believes that the withheld information would give a valuable insight into the pricing strategy of Millbrook. Given the highly competitive nature of this market, and the limited number of suppliers, the Commissioner believes that the disclosure of the withheld information at the time of the request would have given a significant advantage to Millbrook's competitors. He finds the argument that it is in the public interest to avoid such an unwarranted prejudice particularly weighty.
33. The council has argued that a lot of information has already been put into the public domain in order to inform public debate about the operation of its contract with Millbrook, and that this has promoted accountability. The council has argued that the public interest in increasing the accountability in the spending of public money has already been somewhat satisfied.

34. Although the Commissioner acknowledges that there is a public interest in helping inform the debate about the procurement of such service providers, he also believes that the effect that the disclosure of the withheld information would have on this public interest factor would be limited.
35. In relation to the complainant's argument that the Millbrook contract has been subject to overspend, the Commissioner considers that it is not necessary for the individual costings to be disclosed to assess whether this is the case. He considers that the disclosure of the total monthly amounts invoiced satisfies the public interest in ensuring that the council's expenditure is subject to due scrutiny.
36. Whilst the Commissioner believes that the disclosure of the withheld pricing breakdown information would increase transparency and help inform public debate, that beneficial effect would be somewhat limited and is counterbalanced by the potential effects of disclosure on Millbrook's commercial interests.
37. After considering these points the Commissioner has decided that the public interest in disclosure is outweighed by the public interest in maintaining the exemption. Therefore the withheld information relating to individual costings should not be disclosed.

Right of appeal

38. 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

39. 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.

40. 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

Andrew White
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