

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 December 2012

Public Authority: London Borough of Southwark

Address: PO BOX 64529
London
SE1P 5LX

Decision (including any steps ordered)

1. The complainant has requested details of payment requests submitted by Breyer Group PLC, and payments made by London Borough of Southwark (the "council") in relation to work carried out under contract.
2. The Commissioner's decision is that the council has failed to demonstrate that the exemption for prejudice to commercial interests is engaged.
3. The Commissioner requires the public authority to disclose the withheld information to the complainant.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. The council is the landlord for Vauban Estate in Bermondsey and Breyer Group PLC ("Breyer") were awarded the contract for carrying out extensive refurbishment works to the entire estate, which concluded in September 2011. Artcom UK Ltd ("Artcom") is a subcontractor of Breyer which was engaged to complete various works on Vauban Estate.

Request and response

6. On 24 April 2012, the complainant wrote to the council and requested information in the following terms:

"Will you please supply us with copies of any payment requests sent to you by Breyer Group PLC in respect of the works on certain Cold Water Tank and Soil and Vent Pipe works on the Vauban Estate, 1-102, Blocks 1 to 4 in or about late 2010/early 2011.

Will you also please supply us with copies of any documents you hold, confirming how much was paid by you to Breyer in respect of each of these items?"

7. The council responded on 24 May 2012. It stated that the cost of compliance would exceed the appropriate limit and confirmed that the request was being refused under section 12(1) of the FOIA¹. The council also stated that, were it possible to comply with the request within the cost limits, the information would be likely to be exempt under the prejudice to commercial interests exemption (section 43(2)).
8. Following an internal review the council wrote to the complainant on 9 July 2012. It stated that it now considered that it could respond to the request within the appropriate limit and that section 12(1) was, therefore, no longer applicable. The council confirmed that it was now withholding the information under the exemption for prejudice to commercial interests (section 43(2)).

¹ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 sets the appropriate limit (the time spent on locating, retrieving and extracting requested information) for authorities such as the council at £450.

<http://www.legislation.gov.uk/ukxi/2004/3244/contents/made>

Scope of the case

9. On 18 July 2012 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
10. The Commissioner agreed with the complainant that his investigation would be confined to a consideration of whether the council correctly applied the commercial interests exemption to the withheld information.

Reasons for decision

11. 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.
12. 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."²
13. The council has stated that the withheld information is directly related to commercial activity both on the part of the council and Breyer and that this commercial activity is conducted in a competitive environment. It has explained that, in October 2011, a five year housing investment programme was agreed by the council cabinet, which involves the spending of £326 million on major works programmes across the borough to council owned homes. As part of this process, the council must select providers to deliver works and no individual company has a monopoly in this field.
14. Having viewed the withheld information, which includes details of costings of services provided to the council by Breyer, the Commissioner

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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

is satisfied that it relates to a commercial interest. However, it will only fall within the scope of the exemption if its disclosure would be likely to *prejudice* a commercial interest. The Commissioner has gone on to consider the nature of the prejudice which the council has argued that disclosure would create.

The Nature of the Prejudice

15. In investigating complaints which involve a consideration of prejudice arguments, the Commissioner considers that the relevant test is not a weak test, and a public authority must be able to point to prejudice which is "real, actual or of substance" and to show some causal link between the potential disclosure and the prejudice. As long as the prejudice is real and not trivial, its severity is not relevant to engaging the exemption – this will be factored in at the public interest test stage.
16. The council considers that disclosure of the information would be likely to result in prejudice its own commercial interests and to the commercial interests of Breyer.
17. 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.
18. 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 request³.
19. The council confirmed that it did consult with Breyer at the time of the request and sought its views on whether the information should be disclosed. The Commissioner has had sight of the relevant correspondence and notes that Breyer considers that the information should be withheld under the exemption for prejudice to commercial interests.

Prejudice to negotiations and prejudice to potential legal undertakings

20. The council has argued that disclosure of the information would be likely to result in prejudice to negotiations regarding final payments under the

³ <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

contract and prejudice to potential legal action between Breyer and Artcom and between the council and Breyer.

21. The council has explained that, whilst the main, measured works have been agreed, the loss and expense claim is still being negotiated with Breyer. If this is not resolved then the council may then enforce the contract and may go to adjudication.
22. The council has stated that Breyer is currently in dispute with their subcontractor, Artcom in relation to the value of their account. The disclosure of the information would result in the subcontractor holding information which might prejudice Breyer's commercial interests in any forthcoming legal action. The council has also argued that disclosure may prejudice any potential legal action it might bring against Breyer, should negotiations break down. The council considers that this, in turn, would be likely to result in prejudice to its commercial interests.

Analysis

23. The Commissioner notes that the council has asserted that disclosure of the information would be within the context of a competitive environment. According to the argument proposed, which is often applied within the confines of this exemption, release of the information would allow competitors to access details of specific sums awarded for contractual services and, in future tendering exercises, calibrate their own service provision charges to undercut the current provider. So, in this instance, the disclosure of details of Breyer's charges for services would be likely to result in prejudice to its ability to progress its commercial interests in any future negotiations.
24. However, in this case, the perceived threat to the council's and Breyer's commercial interests has been specifically identified as Artcom, not a direct competitor but a subcontractor of Breyer. This represents a different dynamic and the Commissioner's initial view is that the council has not provided a sufficient explanation of why Artcom's access to the information would be likely to result in prejudice to its own or Breyer's commercial interests. The Commissioner has considered this further below, in the context of the potential legal dispute between Breyer and Artcom
25. The council has not explained how the disclosure of the withheld information would, in this specific instance, provide competitors of Breyer with a commercial advantage. The Commissioner does not consider that negotiations between the parties and a potential dispute around the settlement of the account are relevant arguments for withholding the information within the context of this exemption. Both the council and Breyer will have already had sight of the information and

the council has not explained how a competitor accessing the information, in the specific context of the described negotiations, would be able to utilize it in a way which would impact on these events.

26. In relation to the council's references to potential legal action between itself and Breyer, the Commissioner is not satisfied that this is a relevant consideration. Whilst it is clear that legal action can result in financial implications for affected parties, he considers that this is not something which can necessarily be identified with parties' commercial interests. As the council has not explained why it considers it is capable of being identified in this instance, the Commissioner has discounted this part of the council's argument.
27. In relation to Breyer's dispute with Artcom, the council has explained that this relates to the value and validity of variations and that disclosure of the withheld information would provide Artcom with an advantage which would prejudice Breyer's commercial interests in the context of legal action.
28. As noted above, the Commissioner understands the general principle that, in a competitive commercial environment, information which is in the possession of one company, which gives it a commercial advantage over its rivals can, if disclosed more widely, result in the advantage being lost and there being a likelihood that prejudice will occur. However, the Commissioner is concerned that, in this case, the council has attempted to transpose this generic argument into a hypothetical scenario, namely, the potential effects of disclosure in the context of potential legal action.
29. Whilst the Commissioner accepts that it might well be that disclosure of the information has some impact on the interaction between Breyer and its subcontractor, Artcom; he does not consider that the council has provided enough detail about the nature of any such effects and how they might result in prejudice to Breyer's commercial interests. The Commissioner considers that references to potential legal action in this context are too remote, too removed from the nature of the information and, arguably, not relevant to the scope of the exemption.

Conclusion

30. The Commissioner has set out his position that the prejudice test is not a weak test and that any ascribed prejudice must be "real, actual or of substance" and authorities must be able to show some causal link between the potential disclosure and the prejudice.
31. In cases where an authority has failed to explain the nature of an implied prejudice and failed to demonstrate the causal link between any

such prejudice and the disclosure of information, the Commissioner is not obliged to generate relevant arguments on an authority's behalf.

32. In this instance, the Commissioner considers that the council has failed to properly explain the nature of the prejudice which would be likely to result from disclosure of the requested information and link this back to the exemption claimed. He has, therefore, concluded that the council has failed to demonstrate that the exemption is engaged. As he does not consider that the exemption applies, the Commissioner has not gone on to consider the public interest arguments.

Right of appeal

33. 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

34. 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.
35. 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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