

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 January 2013

Public Authority: Central Bedfordshire Council
Address: Priory House
Monks Walk
Chicksands
Shefford
Bedfordshire
SG17 5TQ

Decision (including any steps ordered)

1. The complainant has requested a copy of the winning tender submission for a gas maintenance and service contract. Central Bedfordshire Council (the "council") refused the request under the commercial interests exemption.
2. The Commissioner's decision is that the council wrongly interpreted the scope of the request and that it failed to demonstrate that the commercial interests exemption is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with the requested tender submission, ensuring that any personal data as defined by the Data Protection Act 1998 is removed.
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.

Request and response

5. On 26 July 2012, the complainant wrote to the council and requested information in the following terms:

(In relation to tender reference OJEU Ref: 11/S 140-232244/EN, UK-Dunstable: repair and maintenance services of central heating)

"We wish to receive a copy of the tender submission from Robert Heath Heating Ltd. The information requested will be used as educational research for our graduate bid writers. We understand from previously requested submissions that RHH Ltd does not take any steps to protect their information.

Although s.40 of the FOI Act 2000 has not been quoted at the time of entering into the agreement, we request that any personal data relating to individuals is removed before this information is sent."

6. The council responded on 23 August 2012. It stated that the information was being withheld under the exemption for commercial interests.
7. Following an internal review the council wrote to the complainant on 12 September 2012. It stated that it was upholding its original decision to refuse the request.

Scope of the case

8. On 12 September 2012 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner agreed with the complainant that his investigation would focus on whether the council has correctly applied the commercial interests exemption.

Reasons for decision

Section 1 - scope of the request

10. Section 1(1) of the FOIA states:

"Any person making a request for information to a public authority is entitled-

- (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."*

11. The complainant's request for information explicitly states that any personal information contained within the requested tender submission should be removed before the information is provided. The Commissioner understands that this effectively means that any personal data as defined by the Data Protection Act 1998 (DPA) contained within the requested tender submission falls outside the scope of the request.
12. In investigating the council's decision to refuse the request under the commercial interests exemption (see below) the Commissioner was provided with a copy of the withheld information. He notes that this contains the personal data of a number of individuals and that the council has, therefore, wrongly interpreted the scope of the request.
13. The Commissioner finds that, in its handling of the request, the council breached section 1(1) of the FOIA.

Section 43 – commercial interests

14. 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.
15. 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
16. Having viewed the withheld information, which constitutes a tender submission for a gas maintenance and service contract, the Commissioner considers that the information 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.

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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

The Nature of the Prejudice

17. 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.
18. The council confirmed to the Commissioner that it considered that its own commercial interests and those of Robert Heath Heating Ltd. ("RHH") would be prejudiced by disclosure of the requested information.
19. 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.
20. The council confirmed that, in refusing the request, it was relying upon the "would prejudice" limb of the exemption.
21. 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.
22. In this case the council provided the Commissioner with evidence that it consulted with RHH and sought its views on whether the requested information should be disclosed. Having viewed the relevant correspondence the Commissioner notes that RHH did not wish for the information to be disclosed.
23. The Commissioner has gone on to consider the nature of the ascribed prejudice, as it relates to each party.

Prejudice to the council's commercial interests

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

24. The council has argued that, as a public authority which undertakes procurement exercises on a continuous basis, it has a duty to ensure it obtains best value for tax payers. Were it to disclose details of tender submissions the consequences would be to deter submissions from the type and quality of contractors that the council is seeking to attract.
25. The council has not provided the Commissioner with evidence which shows that the likelihood of this proposed effect would be more probable than not. The Commissioner acknowledges that where a public authority is purchasing goods or services it is important that it is not inhibited in its attempts to obtain value for money. This is a particularly relevant factor at a time when there is a public debate around the increasing role private companies have in delivering public services.
26. The Commissioner considers that, in general, public authorities should be wary of accepting arguments that the potential for commercial information to be released would reduce the number of companies willing to do business with the public sector, leading to reduced competition and increased costs. The Commissioner considers that an equally likely outcome of disclosure to that identified by the council might be that many companies may be prepared to accept greater public access to information about their business as a cost of doing business with the public sector. And the overall value of public sector contracts is a great incentive to tender for them.
27. The Commissioner considers that increasing access to information about the tendering process may in fact encourage more potential suppliers to enter the market. A better understanding of the process, the award criteria, knowledge of how successful bids have been put together, could also lead to improved bids being submitted in the future. This will lead to more competition and so decrease costs to the public authority. Indeed where a contract comes up for renewal, limiting this kind of information may well favour the current contractor and reduce competition.
28. Having considered the above, the Commissioner, therefore, notes that there is at least an equal likelihood that disclosure would enhance the council's commercial interests rather than inhibit them.
29. The Commissioner considers that, in relation to this argument, the council has properly explained how disclosure would result in prejudice to its ability to conduct tender exercises or provide evidence which demonstrates that the likelihood of such effects would be more probable than not. He is of the view that there is an equal likelihood that disclosure would result in the beneficial effects identified above and that the council's argument to the contrary does not carry sufficient weight.

30. The council has also argued that, were it to disclose the information, it would be at real risk of legal action from RHH who would seek damages from the council, resulting in public money being spent on legally defending its position or on paying compensation.
31. In relation to this argument, 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, or indeed provided any evidence that there is a real possibility that disclosure would result in litigation the Commissioner has discounted this part of the council's argument.
32. 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.
33. 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.
34. In this instance, the Commissioner considers that, in relation to its own commercial interests, the council has failed to properly explain the nature of the prejudice which disclosure of the requested information would cause and has not provided arguments which meet the evidential burden provided by the limb of the exemption it is relying upon. He has, therefore, concluded that, in relation to its own commercial interests, the council has failed to demonstrate that the exemption is engaged. He has gone on to consider the prejudice in relation to the commercial interests of RHH.

Prejudice to RHH's commercial interests

35. The council has argued that the way in which tender documents are drafted are as important in winning a contract as the content. It has stated that, as the requester in this case is a professional bid and tender writing consultancy, disclosure would, effectively, provide the requester with RHH's intellectual property in a very competitive market.
36. The council confirmed that it considered that the requester was clearly seeking the information to utilise for expansion of its business interests and increasing its own profits. As noted above, the council consulted with RHH during its handling of the request. The Commissioner has had sight of the relevant correspondence and notes that RHH considers that

the information is 'commercially sensitive' and, commenting on the motivations of the requester, directs the council to decline the request.

37. The Commissioner has separated out the various strands of the arguments provided by the council and looked at them in turn.
38. In relation to the council's ascribing of the tender submission as RHH's intellectual property, the Commissioner's guidance describes intellectual property (IP) rights as follows:

*"IP rights arise when owners are granted exclusive rights to certain intangible assets. Although there are many forms of IP rights the main ones relevant to requests will be copyright, database rights and copyright in databases. Copyright covers a wide range of recorded information, not just original literary works which include computer programs, original musical or artistic works."*³

39. The Commissioner takes the council's general point that there is a likelihood that the form which tender submissions take will vary. However, the the Commissioner has not been provided with an explanation why the council considers the withheld information is subject to copyright or is otherwise the intellectual property of RHH. The Commissioner also considers that arguments relating to intellectual property would have more relevance in the context of the 'trade secrets' exemption, provided by section 43(1) which the council has not cited.
40. In relation to arguments which refer to the identity of the requester and which speculate about their motivations, the Commissioner has referred to the Information Tribunal decision in *Berend v the ICO & London Borough of Richmond upon Thames (EA/2006/0049 & 50)*, which states that requests for information are "... applicant and motive blind and as such public authorities are not expected to go behind the phrasing of the request."⁴
41. However, whilst authorities are not ordinarily entitled to consider the potential motivations for requests, as disclosures made under FOIA are global disclosures, the Commissioner accepts that reasons for not

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http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_intellectual_property_rights.ashx

⁴ See paragraph 46:

<http://www.informationtribunal.gov.uk/DBFiles/Decision/i141/Berend.pdf>

providing information to a specific requester might be more broadly valid.

42. In this case, the council has argued that disclosure of the information would benefit RHH's competitors. However, it has not explained, with reference to the specific content of the information, the nature of the prejudice which disclosure would cause to RHH's commercial interests.
43. The Commissioner has also considered the timing of the request as, in a commercial environment, the timing of the disclosure will be of critical importance and the application of any exemption has to be considered in the circumstances that exist at the time the request is made.
44. It is generally accepted that information submitted during a tendering process is more likely to be commercially sensitive whilst the tendering process is ongoing compared to once the contract has been awarded. Arguments which suggest that competitors would be able to undercut a bid contained within a disclosed tender submission would only be relevant whilst a tender process is live. That is, unless an authority is able to provide arguments that a tender submission might be directly transferable to a different bid or that details of the disclosed submission would result in other prejudice being caused to a party's commercial interests.
45. In this case the Commissioner considers that, beyond very general, generic arguments, the council has not provided sufficient detail about the nature of the prejudice to RHH's commercial interests which would result from disclosure. He also considers that the council has failed to meet the evidential burden required to demonstrate that the likelihood of prejudice being caused by disclosure would be more likely than not to occur.
46. As he considers that the council has failed to provide arguments which link the requested information to the specific effects which disclosure is alleged to bring about and to link this to the application of the exemption, the Commissioner has concluded that the exemption is not engaged.
47. As the Commissioner has found that the exemption is not engaged he has not gone on to consider the public interest test.

Right of appeal

48. 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

49. 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.
50. 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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