

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 June 2014

Public Authority: Cambridgeshire County Council

Address: Shire Hall
Cambridge
CB3 0AP

Decision (including any steps ordered)

1. The complainant requested information submitted to Cambridgeshire County Council (the Council) by two local community transport associations in relation to applications made to the Council's community transport fund. The Council provided the information requested but made a number of redactions on the basis of section 43(2) of FOIA. The complainant disputed these redactions.
2. The Commissioner's decision is as follows:
 - The information redacted from the documents APP1 and APP4 is exempt from disclosure on the basis of section 43(2) of FOIA and in all the circumstances of the case the public interest favours maintaining the exemption.
 - The information redacted from the document APP3 is not exempt from disclosure on the basis of section 43(2).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Provide the complainant with an unredacted copy of document APP3.
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 10 October 2013 the complainant submitted the following request to the Council:

'Could I please have a copy of HACT'S [Huntingdonshire Association for Community Transport] and FACT'S [Fenland Association for Community Transport] actual applications for the Community Transport fund?'

6. The Council responded under its reference number FOI 3348 on 7 November 2013 and provided the requested application forms, APP1, APP2 and APP3 and a spreadsheet APP4 which provided information about what the grant sought under APP1 would cover. The response explained that a small amount of information had been redacted on the basis of section 43(2) of FOIA.
7. The complainant contacted the Council on 12 November 2013 in order to ask for an internal review of the application of section 43(2).
8. The Council informed him of the outcome of the internal review on 10 December 2013. The review upheld the application of section 43(2).

Scope of the case

9. The complainant contacted the Commissioner on 11 December 2013 in order to complain about the Council's decision to withhold information on the basis of section 43(2) of FOIA. The complainant's submissions to support this complaint are referred to in the analysis below.
10. The information which the Council has sought to withhold has been redacted from the forms APP1, APP3 and the spreadsheet APP4.¹

¹ The complainant also submitted two linked complaints to the Commissioner about other related requests he had made to the Council. The Commissioner's findings in respect of those complaints are set out in decision notices FS50511196 and FS50510473.

Reasons for decision

APP1 and APP4

11. Section 43(2) of FOIA. states 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).'

12. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner believes that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.

13. In relation to the commercial interests of third parties, the Commissioner does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, the Commissioner expects that arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns.

14. The Council explained that the information withheld from these two documents relate to the set-up of HACT and include breakdowns of their start-up costs and likely income with the first year of operation.

15. Based upon submissions it received from FACT, HACT's sister organisation, the Council argued that disclosure would be likely to prejudice HACT's commercial interests for two reasons. Firstly, it argued that this information would allow other providers to see what HACT had identified as being key to launching a new community service, based upon the success of their sister organisation, FACT, and use this insight to set up similar services in direct competition with HACT.
16. Secondly, as a charitable organisation, HACT will apply for funding from other avenues, not just the Council. The Council suggested that HACT would face significant competition for such funding, particular from central funds. It argued that releasing such a detailed breakdown of how HACT intended to launch would give potential competitors for other funding streams a great deal of insight into how HACT operate, allocate funds and intend to provide their services which would provide those competitors with an advantage and create an imbalance in the market in favour of competitors. The Council argued that HACT has a commercial interest in being able to compete effectively for funding and placing this information into the public domain would be likely to have an adverse effect on their ability to do so.
17. The complainant advanced a number of reasons why he believed that disclosure would not prejudice the commercial interests of either FACT or HACT.
18. Firstly, he argued that as HACT stated on its application form that it did not duplicate any similar service it was difficult to see – if it had no competitors – how its commercial interests would be prejudiced.
19. Secondly, he argued that each funding bid and its supporting information was unrelated to any future bid and thus could not be used to prejudice any individual organisation's future bids for funding.
20. Thirdly, the complainant argued that FACT and HACT cannot have commercial interests. This was on the basis that their fleet of vehicles was operated under a permit issued under section 19 of the Transport Act 1985. Such permits are given to organisations who operate without a view to making a profit and exempt such organisations from having to hold a public service vehicle operator's licence when providing transport for a charge.
21. Finally, the complainant argued that the withheld information related to an application for a grant and was not concerned with the provision of goods and services. In other words, the complainant suggested that the information related to a 'gift' rather than a commercial activity.

22. With regard to the first limb of the test set out above, the Commissioner is satisfied that HACT (and indeed FACT) can have commercial interests. Although they are charitable organisations and do not seek to make a profit, in the Commissioner's view this does not preclude them from having commercial interests both in respect of the purchase of any goods and services and indeed in the sale of the same. In terms of the specific information that has been withheld in relation to these requests, the Commissioner is satisfied that both organisations can be said to have a commercial interest in relation to securing funding via grant applications. This is because in the Commissioner's opinion an organisation's commercial interests can be said to be harmed if its ability to secure funding is threatened. It is not the case that such funding has to be secured simply through the sale of goods in a competitive environment, but could extend to the application for funding from other sources, as is the case here.
23. With regard to the second limb of the test, the Commissioner is prepared to accept that there is a causal link between disclosure of the withheld information and harm to HACT's commercial interests. In reaching this conclusion the Commissioner finds both lines of argument advanced by the Council to be convincing.
24. In terms of its first line of argument, the Commissioner would agree that if an organisation decided to set up a rival community transport organisation it is logical to argue that it may well allow such providers a valuable insight into what HACT identified as vital to launching such a service. In reaching this finding the Commissioner would emphasise that although there were no competitors to HACT's service at the point the application was submitted this does not mean that there is an absence of such competition given that other organisations could enter the market.
25. In terms of the Council's second argument, the Commissioner would accept the complainant's point that each bid application has to be considered on its merits and the nature of each bid, both the amount of funds sought and the purpose of such funds, may well be very different. However, the information that has been redacted from APP1 and APP4 relates to HACT's overall activities rather than operations that are specific simply to this grant application. In the Commissioner's opinion it is reasonable to argue that disclosure of such information could be used by bidders for future funding to inform their own bids in light of intelligence gathered from the redacted information. That is to say, such bidders could establish how HACT allocated its internal costs, based on the success of its sister organisation FACT, and use such information to inform its own activities and future bid.

26. With regard to the third limb of the test, the Commissioner is satisfied that disclosure of the withheld information represents a real and significant risk of prejudice occurring to HACT's commercial interests. He has reached this finding given the detailed nature of the information that has been withheld and because in his opinion such information would be of direct use to any organisation that sought to set up as a rival provider. The Commissioner believes that the likelihood of prejudice occurring is also increased given that HACT's interests could also be undermined by rival organisations using this information to inform their bids for access to grant funds from other sources.

Public interest test

27. Section 43 is a qualified exemption and therefore the Commissioner must consider the public interest test contained at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information redacted from APP1 and APP4.
28. With regard to the public interest in maintaining the exemption, the Council acknowledged that there is a public interest in scrutinising the awarding of public funding to an organisation. However, it argued that it was reasonable that a line is drawn between such information and the information that has been redacted. Such information goes beyond the awarding of public funding into disclosing details about the inner workings of the organisation bidding for the funding.
29. The complainant submitted detailed submissions to the Commissioner to support his view that there was a compelling public interest in the disclosure of the information he had requested not just for this specific request but also in relation to other information he had requested from the Council. The Commissioner has summarised these submissions below. Whilst not all of the submissions relate directly to this specific request, a general understanding of the complainant's concerns in relation to FACT's and HACT's relationship with the Council is necessary to understand why he believes that there is a compelling public interest in disclosure of this specific information.
30. The complainant alleged that FACT was working outside its legal remit and thus illegally taking away business from the local taxi industry. The complainant suspected that the Home to School contracts awarded by the Council to FACT may have been subject to corruption. The complainant alleged that FACT had potentially been trying to hide information about its activities in inconsistent or potentially even false accounts. He argued that it was too much of a coincidence that much of the information that was being withheld by the Council in response to these requests would also likely to be the information that would shed

light on these allegations. In such circumstances, the complainant argued that there was a compelling interest in the withheld information being disclosed so that the public could better understand and scrutinise FACT's (and its sister organisation, HACT's) relationship with the Council.

31. The Commissioner agrees with the Council that there is a strong public interest in HACT (and FACT) being able to compete equally with other organisations when submitting bids for future funding grants. Nevertheless, the Commissioner recognises the complainant's strongly held concerns in relation to this subject matter, and he acknowledges that disclosure of the information redacted from APP1 and APP4 could make the Council's relationship with FACT, and in particular how FACT uses public funds, more transparent. However, in the Commissioner's opinion disclosure of the particular information which has been redacted would not directly address the specific concerns raised by the complainant. Therefore in light of the strong public interest in allowing organisations to compete equally for grants, the Commissioner has concluded that the public interest favours maintaining the exemption.

APP3

32. The Council explained that the information redacted from this document contained information about the predicted growth of FACT which forms an integral part of its forward business plan. The Council argued that FACT/HACT had spent considerable time and resources establishing their work model and releasing the finer details into the public domain is likely to have an adverse effect on their commercial interests.
33. The Commissioner accepts that the nature of the prejudice envisaged by the Council falls within the definition of the exemption contained at section 43(2) and therefore the first limb of the test described above is met. However, the Commissioner is not persuaded that the Council has managed to identify a sufficiently clear or specific way in which the prejudice to the organisation's interests would be likely to occur; rather the suggestion that disclosure would have such an effect is somewhat speculative. In reaching this view the Commissioner would emphasise that the information redacted from APP3, when compared to that redacted from APP1 and APP4 is more limited in nature, and although it does contain some specific figures, it is not at all clear how disclosure of such figures would actually provide other bidders with a competitive advantage in any future funding round. Again, this in contrast to the information redacted from documents APP1 and APP4. The Commissioner has therefore concluded that the information withheld from APP3 is not exempt from disclosure on the basis of section 43(2). Such information must therefore be disclosed to the complainant.

Right of appeal

34. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. 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.
36. 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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