

Freedom of Information Act 2000 ('FOIA')

Decision notice

Date: 7 July 2014

Public Authority: Department for Communities and Local Government ('DCLG')

Address: Eland House
Bressenden Place
London
SW1E 5DU

Decision (including any steps ordered)

1. The complainant has requested a copy of the service contract between DCLG and the Deposit Protection Service. DCLG provided some of the information within the scope of the request but applied the exemption where disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it) at section 43(2) of the FOIA. The Commissioner's decision is that DCLG has correctly applied the exemption. He does not require DCLG to take the any steps to ensure compliance with the legislation.

Request and response

2. On 1 June 2013, the complainant wrote to DCLG and requested information in the following terms:

"a copy of the service contract between HM Government (DCLG) and the Deposit Protection Service (DPS), which is part of Computershare Investor Services PLC. The FOI information request includes a copy of any schedules to the contract and any DCLG-approved changes to the contract since its effective date. The request also includes information on any defined performance metrics / service levels and the name of the UK government employee who is accountable / responsible for managing the contract on a day-to-day basis."
3. DCLG responded on 27 June 2013 provided some information within the scope of the request but refused to provide the remainder citing the

exemption at for commercial interests at section 43(2) of the FOIA as its basis for doing so.

4. The complainant requested an internal review on 15 July 2013, especially in relation to Schedules 11 and 16.
5. DCLG provided its internal review response on 13 September 2013 in which it maintained its original position.

Scope of the case

6. The complainant contacted the Commissioner on 31 December 2013 to complain about the way his request for information had been handled.
7. During the course of the investigation, DCLG reviewed its position and decided to release all of Schedule 11 and parts of Schedule 16.
8. The Commissioner has therefore considered whether DCLG was correct to apply the exemption at section 43(2) to the information redacted from Schedule 16.

Reasons for decision

9. Section 43(2) 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. In this instance DCLG has applied the exemption at section 43(2) to the information redacted from Schedule 16. Having seen the withheld information, the Commissioner notes that it covers aspects of banking arrangements, fraud prevention, IT technical architecture including security, back-up and recovery, financial development and costs, implementation and marketing. DCLG said that disclosure would prejudice both its own commercial interests, as it would prejudice its negotiating position in a competitive environment, as well as the commercial interests of Computershare, by revealing market-sensitive information of likely usefulness to its competitors. DCLG said that both these effects would occur, especially at the re-tendering stage.

11. The term 'commercial interests' is not defined in the FOIA. However the Commissioner has considered his awareness guidance on the application of section 43¹. 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."
12. The Commissioner considers that details of how a company will deliver a service relates to a person's ability to participate competitively in a commercial activity, and therefore the requested information does fall within the remit of section 43(2) FOIA.
13. 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.
14. In this case, DCLG considers that the prejudice "would" occur. The Commissioner must therefore consider how any prejudice to the commercial interests of DCLG or Computershare would be caused by the disclosure of the requested information.
15. In relation to DCLG's own commercial interests, it said that disclosure would prejudice future negotiations when the service concession agreements for running a tenancy deposit protection scheme are renewed as it would make it less likely that the provider, and other companies or individuals, would have appropriate confidence to provide the department with commercially sensitive information in the future and would consequently undermine the ability of the department to fulfil its role in ensuring the provision of tenancy deposit protection schemes that provide value for money. It explained that releasing the information would severely undermine any confidence that it will treat with care information provided to it by those competing for commercial contracts. DCLG said that if potential competitors held back from bidding rather than risk disclosure of information on the grounds that it might then be revealed to their competitors, it would damage the government's ability to get goods and services on the most favourable terms and get real

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http://ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.ashx

value for money when conducting tendering exercises for any type of service.

16. In relation to Computershare's interests, DCLG said that the information is commercially sensitive and disclosure could impact on the ability of Computershare to remain competitive. It explained that although these contracts have been let, there is activity in this market in future as bidders change and new bidders attempt to enter the market. DCLG is likely to start the procurement process for the new custodial tenancy deposit schemes early in 2015 and expects keen interest. It also explained that DCLG is necessarily quite prescriptive about how the service is provided, as there are legislative requirements governing most aspects, and companies will therefore be competing largely on their ability to provide the service in the most efficient manner; this means they will be particularly keen that their competitive advantage is not lost by release of their methodologies. It said that the withheld financial and business information could be used immediately by Computershare's competitors to refine their own models and thus gain an unfair competitive advantage; this is a competitive market, and it would be wrong to undermine any company's ability to participate competitively in a commercial activity.
17. When claiming that disclosure would prejudice the commercial interests of a third party, the Commissioner expects a public authority to consult the third party for its view. In this case, DCLG discussed the issues with Computershare who expressed the following views:
 - "a) The disclosure of the Redacted Information would have a major impact on the planned retendering of the contract, which we expect to take place during 2015. Computershare's ability to bid fairly, effectively and competitively would be prejudiced. Other bidders would have detailed knowledge of Computershare's business, including for example financial structures and the methods and processes employed by us in providing the Services.
 - b) If other bidders were to have access to the Redacted Information, it would enable them to tailor their own bids and effectively 'steal' Computershare's business methods and trade secrets, therefore giving them a significant competitive advantage against us. In this regard we note that, inevitably, Computershare's bid in the upcoming tender is likely to be on similar terms to the previous bid, as reflected in the Concession Agreement, such that the effects of disclosing the Redacted Information now are as significant as ever.
 - c) Given that Computershare would not have the same access to these other bidders' own information, this would undoubtedly result in an un-level playing field during the tender process. In short, Computershare's

ability to produce a competitive bid, and its chances of being successful in the tender, would be significantly damaged. This is particularly so given the highly competitive nature of this market, which would only heighten the harm caused by the disclosure of Computershare's information. This could result directly in Computershare losing an important part of its business and therefore cause it significant commercial damage.

d) The disclosure of the Redacted Information would also have a prejudicial impact on our commercial interests aside from the tender process. For example, our competitors may use the details concerning our business processes – with respect to the deposit protection scheme – to extract information about our wider business operations. The Redacted Information includes details on such topics as our banking arrangements, and the third parties with whom we hold commercial relationships:

e) In short, our legitimate competitive advantages – which we have built up through extensive investment over a long period of time – would be irreparably damaged.

f) The commercial and security interests of all parties, including Computershare, the Department and the public, in withholding this information [details of the security, fraud and money laundering prevention measures] from disclosure are therefore very clear.

g) In addition, the market's perception of and confidence in the effectiveness of our security measures is an important factor affecting the success of our business...so releasing the Redacted Information .. would have a significant impact on our ability to win and retain business.

h) We believe that there is a real and significant risk that the disclosure of the Redacted Information would prejudice our commercial interests, as set out above. In addition, we believe that it is far more probable than not that this prejudice would arise.

i) The scale and scope of the prejudice would be substantial. ...the availability of the Redacted Information to our competitors and their use of it in the upcoming retender process would significantly increase the likelihood of those competitors producing a successful bid at Computershare's expense. The proprietary value of the intellectual property we have created, would be heavily damaged by its disclosure, as would our position in the market which relies in large part on that property.

- j) The importance of confidentiality of the Redacted Information, and the prejudicial impact of disclosure on Computershare, the Department and public, remains as high now as at any other time.”
18. In his internal review request, the complainant has said that disclosure of the requested information would not be likely to prejudice the commercial interests of DCLG and will not affect adversely its bargaining position during contractual negotiations because the information being requested is already over 6 years old and the agreement is not due to expire until 2016, at which point the requested information would be nearly 10 years old. He said that given the dynamic nature of and significant changes occurring in the services industry, it is highly unlikely that a method statement written in 2006 would be at the standard of a "Good Industry Standard" in 2016 when the Department is expected to renew its agreement.
19. In response, DCLG said that it is likely to start the procurement process again for custodial tenancy deposit schemes early in 2015 and notwithstanding the fact that the information in question is now quite old, and that the tendering process is not due to start again for some eighteen months or so, it considers that disclosure of it now would be likely to prejudice commercial interests.
20. The Commissioner notes that Computershare's submission detailed at part b) of **paragraph 17** relates to the age of the information and how, because its upcoming tender is likely to be on similar terms to its previous bid, the age of the information does not impact on the prejudice occurring. The Commissioner also notes that although the information was initially created in 2006, it was revised in 2010.
21. The Commissioner must now determine whether the prejudice claimed is "at least more probable than not". His guidance on 'The Prejudice Test'² states that;
- “If an authority claims that prejudice would occur they need to establish that either
- the chain of events is so convincing that prejudice is clearly more likely than not to arise. This could be the case even if prejudice

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/the_prejudice_test.ashx

would occur on only one occasion or affect one person or situation; or

- given the potential for prejudice to arise in certain circumstances, and the frequency with which such circumstances arise (ie the number of people, cases or situations in which the prejudice would occur) the likelihood of prejudice is more probable than not.”
22. In relation to DCLG’s own commercial interests, the Commissioner considers that potential bidders could be deterred from competing for contracts in the future which could in turn prejudice DCLG’s ability to achieve quality and value for money in respect of goods and services. However, the Commissioner does not consider that DCLG has adequately established that there is a more than 50% chance of the disclosure causing the prejudice and therefore he does not accept that the prejudice ‘would occur’. Nevertheless, he does consider that the prejudice claimed is ‘real, actual or of substance’ and, having viewed the withheld information, accepts that there is a logical connection between disclosure and the prejudice occurring. He therefore considers that the appropriate level of probability of the prejudice occurring is ‘would be likely to’.
23. In relation to Computershare’s commercial interests, the Commissioner considers that disclosure would impact on the ability of Computershare to remain competitive. DCLG has explained that it is necessarily prescriptive about how the service is provided and companies will therefore compete largely on their ability to provide the service in the most efficient manner, through their own unique method of providing the service. The Commissioner agrees that access to this method by Computershare’s competitors through disclosure under the FOIA would result in the prejudice occurring albeit that the prejudice would only occur in this particular procurement situation.
24. As the Commissioner considers that the prejudice in relation to DLGC’s commercial interests is ‘real, actual and of substance’, and in relation to Computershare’s commercial interests is ‘more probable than not’, he therefore considers that section 43(2) of the FOIA was correctly engaged. As section 43(2) is a qualified exemption, the Commissioner has gone on to consider the public interest arguments in this case.

Public interest arguments in favour of disclosing the requested information

25. DCLG said that the public interest is, in general terms, served by the disclosure of any information, as it promotes the transparency and accountability of government and furthers the understanding of, and participation in, the debate of issues of the day. It said it can, as a general principle, facilitate the accountability of public authorities for decisions taken by them which in turn furthers public trust and confidence in good governance. It also said that it can help ensure that commercial activities, including the procurement process, are conducted in an open and honest way.
26. The Commissioner agrees with the above position and also considers that the public interest in disclosing the requested information in this case relates to DCLG's ability to demonstrate that Computershare is providing adequate banking arrangements, fraud prevention and IT structure.
27. In his internal review request, the complainant advanced the following public interest arguments in favour of disclosing the information:
 - A significant public cost is incurred to run the DPS and disclosing this information will increase public confidence in the integrity of how the DPS conducts its business.
 - Disclosing this information will help tenants and landlords better understand how to protect their interests, which leads to fewer tenancy deposit disputes and court cases and a better functioning and more efficient and effective private sector rental market.
 - Since the DPS is obligated to provide services to a "Good Industry Standard", the details of the method will be well known within the industry already. The extent of redactions, if any, should be limited only to those areas where the DPS exceeds "Good Industry Standards".

Public interest arguments in favour of maintaining the exemption

28. DCLG said there is a strong public interest in ensuring that there is genuine competition for public sector contracts. Releasing the information would undermine any confidence that DCLG will treat with care information provided to it by those competing for commercial contracts, and that it respects their concerns about undermining their ability to compete fairly in future. If potential competitors held back from bidding rather than risk disclosure of information on the grounds that it might then be revealed to their competitors, it would damage government's ability to get goods and services on the most favourable terms and get real value for money when conducting tendering exercises for any type of service.

29. DCLG also said that it would be wrong to undermine any company's ability to participate competitively in a commercial activity. It said that there is a very strong public interest in ensuring that companies are able to compete fairly and that it is a key part of our nation's economic model, and to undermine it could seriously damage the public interest.
30. DCLG also presented public interest arguments in relation to the 'wider public interest'. However, as these relate to costs and security for landlords and tenants, and the prevention of crime, rather than prejudice to commercial interests, the Commissioner cannot take such arguments into account.

Balance of the public interest

31. DCLG said that having looked at the benefits and disadvantage to the public interest of releasing or withholding the information, it can only conclude that it better serves the public to withhold it.
32. It also said that there is little clear public benefit in releasing the specific information that has been redacted. It said it may go some way to show that sufficient information was available to it to inform its decision regarding the contract and thus demonstrate some accountability in the spending of public money, but this was largely done following the actual tendering process, and the information in question mainly covers matter internal to Computershare's operations.
33. In relation to the complainant's public interest arguments, DCLG agreed that disclosing the information will increase public confidence in the integrity of how the DPS conducts its business. However, it did not agree that disclosing this information will help tenants and landlords better understand how to protect their interests, leading to a better functioning and more efficient and effective private sector rental market as the redacted information does not include anything that a landlord or tenant would need to know in order to understand the tenancy deposit protection requirements. DCLG did not agree that details of the method of providing services to a "Good Industry Standard" are well known within the industry already as the method for achieving the standards is for the company in question.
34. The Commissioner considers that there is a public interest in openness and transparency, and in accountability in relation to DCLG's ability to demonstrate that Computershare is providing adequate banking arrangements, fraud prevention and IT structure.
35. However, he also considers that there is a strong public interest in not disclosing information which would commercially disadvantage private companies nor disclosing information which would be likely to prejudice

DCLG's ability to achieve quality and value for money in respect of goods and services.

36. On balance, the Commissioner considers that in this case the public interest arguments in favour of disclosing the information are outweighed by the public interest arguments in favour of maintaining the exemption.

Right of appeal

37. 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

38. 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.
39. 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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