

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 June 2014

Public Authority: London Borough of Croydon
Address: Bernard Wetherill House
8 Mint Walk
Croydon
CR0 1EA

Decision (including any steps ordered)

1. The complainant has requested the estimated value of the fees to be paid, by the London Borough of Croydon (the council) to an auction house, in return for selling at auction some items from the council's collection of rare and valuable Chinese porcelain.
2. The Commissioner's decision is that the council correctly applied the section 43(2) FOIA exemption to all of the withheld information as disclosure would prejudice the interests of itself and the auction house. He proceeded to consider the balance of the public interest and decided that it would, however, be in the public interest for part of the information to be disclosed. For other parts of the withheld information, he decided that it would be in the public interest to maintain the exemption.
3. The Commissioner requires the council, to ensure compliance with the legislation, to disclose the information indicated as such in the confidential annex that accompanies this notice.
4. The public authority must take this step 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 1 November 2013, the complainant wrote to the council with a seven-part information request, relating to the then planned sale at auction of some items from the council's Riesco collection of rare and valuable Chinese porcelain. A number of items from the collection (the items) were sold at auction on 27 November 2013. Only one part of the complainant's information request was still unresolved at the time of his investigation and was investigated by the Commissioner:

What is the estimated value of the fees to be paid to the auction house?

6. The council responded to the information request on 28 November 2013. It said that the requested information was held but that the information was exempt from disclosure under the section 43(2) FOIA (Commercial interests) exemption.
7. Following an internal review the council wrote to the complainant on 27 January 2014. It affirmed its earlier decision to rely on the section 43(2) exemption and said that the balance of the public interest favoured maintaining the exemption.

Scope of the case

8. The complainant contacted the Commissioner on 28 January 2014 to complain about the way his request for information had been handled.
9. Following the sale of items from the collection at auction, on 27 November 2013 the auction house made public the total sums raised from the sale, including a premium paid by the buyers. When the complainant drew the council's attention to this, it told him, on 28 January 2014, that it had incurred no costs for the sale of the items.
10. The Commissioner has reviewed the withheld information, which comprises sections from a report to the council dated 30 July 2013 from its Cabinet member for Finance and Performance Management (the report). The Commissioner reviewed the report and decided that a fragment of its paragraph 3.4 was within the scope of the information request along with all of paragraphs 4.1 and 4.4. The relevant text is set out in a confidential annex to this notice.
11. The Commissioner has discussed with the council its reasons for applying the section 43(2) FOIA exemption to the withheld information.

During the course of his investigation, the council indicated a willingness to disclose paragraph 4.1 and, by implication, the relevant fragment of the text of paragraph 3.4. The council disputed whether paragraph 4.4 was within the scope of the request but considered that even if it was in scope, then it was exempt from disclosure by virtue of the section 43(2) exemption.

Reasons for decision

12. The Commissioner decided that, on a fair and reasonable reading of the information request for the value of the fees to be paid to the auction house, paragraph 4.4 of the report was within the scope of the request. He considered the application of the section 43(2) exemption to it and also to the text of paragraphs 3.4 and 4.1 of the report.

Section 43 – commercial interests

13. Section 43(2) 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).'

14. The Commissioner is satisfied that the information relates to a commercial interest. However, it will only fall within the scope of the exemption if its disclosure would, or would be likely to, prejudice a commercial interest. The Commissioner went on to consider the nature of the prejudice which the council has argued that disclosure would create.
15. 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 harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed must 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.
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, whether

disclosure 'would be likely to' result in prejudice or disclosure 'would' result in prejudice.

16. 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.
17. 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. In this matter the council told the Commissioner that the auction house had already said that it considered information regarding the value of its fees to be commercially sensitive.
18. With regard to the three-limb test for engaging a prejudice-based exemption set out at paragraph 15, the Commissioner is satisfied that the first limb is met because of the nature of the harm envisaged of prejudice to the commercial interests of both the council and the auction house by disclosing information from their confidential discussions about the fees that might be charged to auction the items. This information clearly relates to the interests which section 43(2) is designed to protect.
19. With regard to the second limb, the Commissioner is also satisfied that there is a causal link between disclosure of the withheld information about fees and the prejudice to the commercial interests of both the council and the auction house. The council said that disclosure would prejudice its ability to work with other commercial organisations in the future as they would be unwilling to enter into open dialogue with the council thereby prejudicing its ability to negotiate contracts in good faith and obtain value for money for its taxpayers. The Commissioner saw that disclosure would or would be likely also to prejudice the interests of the auction house, as the knowledge of its fee arrangements with the council would hinder its ability to compete and to negotiate freely and fairly with other organisations, public or private, in the future.
20. This is because it is broadly accepted that a situation of information asymmetry - where one party to a commercial transaction has more (or better) information than the other - is highly likely to distort the competitive buying process to the extent that the party in a position of having less (or worse) information is commercially disadvantaged.

Consequently, it is reasonable to argue that disclosure of the information could prejudice the commercial interests of both the council (if it seeks to tender for similar work in the future) and the auction house (if it tenders for comparable work in the future with other public authorities). Moreover, the Commissioner is satisfied that the resulting prejudice for both parties can be correctly described as being of substance given the value of the contract.

21. With regard to the third limb of the prejudice test the Commissioner notes that the council said that the exemption is engaged at the higher threshold, ie that disclosure would occur if the withheld information was disclosed. In relation to the contractor's commercial interests, the Commissioner has seen that the auction house had previously told the council that it considered that information about its fees was commercially sensitive and is satisfied that this higher threshold is met.

Public interest in disclosing the information

22. The complainant said that, after the auction, the auction house published on its website the amounts paid including the buyers' commission. Its published terms and conditions also indicated a scale of commission charges levied on buyers. The complainant said that the council would also have expected to pay a seller's commission to the auction house as well as other fees and disbursements. He said that the reported aversion of the auction house to publishing such figures on the grounds of commercial confidentiality was transparently untrue and he saw no reason for the council to withhold information of such public interest.
23. The council acknowledged that there is a general public interest in knowing how it obtains commercial services and their cost.
24. The Commissioner recognises that there is a public interest in making available for public scrutiny information about how public money is being spent. He expects public authorities to have regard for the need for there to be proper transparency, accountability and the furtherance of public debate in financial matters.

Public interest in maintaining the exemption

25. The council stressed the need for it to be able to negotiate the purchase of commercial services and to obtain and exchange information within agreed levels of confidence so as to enable it to formulate and implement commercial policy and activities. It said that, given the known views of the auction house, disclosure would prejudice its ability to work with commercial organisations in further transactions, as they would be unwilling to enter open dialogue with the council, thereby

prejudicing its ability to act and hindering its ability to negotiate future contracts in good faith and obtain value for money for the tax payer.

26. The Commissioner recognises the strong general public interest in not inhibiting the ability of public authorities and commercial organisations to negotiate freely and fairly within competitive markets such as that for the arrangement and conduct of auctions.

Balance of the public interest

27. In reaching his decision, the Commissioner has taken into account the submissions of both the complainant and the council and has reviewed the withheld information. He has also had regard to the views of the auction house reported to him by the council and other information provided to him by it in confidence. He has noted that the prejudice identified is at the higher level whereby disclosure 'would', rather than 'would be likely to', cause prejudice.
28. In weighing the balance of the public interest the Commissioner has considered the general public interest in transparency and accountability in the expenditure of public authorities and furtherance of public debate. The Commissioner recognises that there is a balance to be struck between the disclosure of information reporting action taken by the council on the public's behalf and the withholding of information which would have a damaging effect on its actions and cause detriment to the public.
29. The Commissioner has seen that, very shortly after its internal review of the decision to withhold the information, the council made public information relevant to the information in paragraphs 3.4 and 4.1. He has also had regard for its willingness, expressed during his investigation, to see the information at paragraph 4.1 made public. He recognised that the public interest in withholding the information was greater at the date of the request - which was made before the auction - rather than after it. Nevertheless, the council's subsequent disclosure of relevant information is part of the context for his consideration of the matter and indicates a relative weakness in the public interest case for maintaining the exemption. Moreover, disclosure would assist the council in meeting its public duty of transparency. Accordingly, for the information in those two paragraphs, the Commissioner decided that the balance of the public interest lay in disclosure both after the auction and at the time of the request.
30. As regards the information in paragraph 4.4, he saw that no part of that information has been made public and that there is no intention that it will be made public by either the council or the auction house.

Accordingly he decided that the balance of the public interest lay in maintaining the exemption for that information.

Right of appeal

31. 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

32. 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.
33. 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

Jon Manners
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