

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 February 2015

Public Authority: Thanet District Council
Address: PO Box 9
Cecil Street
Margate
Kent
CT9 1XZ

Decision (including any steps ordered)

1. The complainant submitted a number of requests to Thanet District Council (the Council) regarding the 'Dreamland, Scenic Railway' contract which it had put out to tender in 2011. The Council argued that the requested information was exempt from disclosure on the basis of section 43(2) of FOIA (commercial interests). The Commissioner has concluded that the withheld information is not exempt from disclosure on the basis of this exemption.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with a copy of the information he requested. The only information that does not need to be provided consists of the CVs submitted by one company in support of its tender application.¹
3. 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

¹ See the 'Scope' section of this decision notice for details regarding the information concerning the CVs.

pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

Request and response

4. The complainant submitted the following requests to the Council on 14 March 2014:

'Ref: FOI Request relating to Dreamland, Scenic Railway Tender by Gardiner & Theobald – 24.01.2011 to be returned by 04.02.2011...

...we are writing to request disclosure of information, under the Freedom of Information Act 2000, relating to the Scenic Railway tender by Gardiner & Theobald in 2011. We would be pleased if you could supply the following information at your earliest convenience:

- 1. The number of companies that were approached in relation to this matter.*
 - 2. The names of those companies that were approached.*
 - 3. A Schedule of prices received back from all companies that were approached.*
 - 4. The tender return analysis provided by Gardiner & Theobald to the Thanet District Council.*
 - 5. A copy of all the tender returns.'*
5. The Council responded on 8 April 2014. It confirmed that it held the requested information but that it considered it to be exempt from disclosure on the basis of section 43(2) FOIA.
6. The complainant contacted the Council on 14 April 2014 and asked for an internal review of this decision to be undertaken. On 16 April 2014 he provided the Council with submissions to support his view that the public interest favoured disclosure of this information.
7. The Council informed the complainant of the outcome of the internal review on 16 May 2014; the review upheld the application of section 43(2).

Scope of the case

8. The complainant contacted the Commissioner on 10 September 2014 in order to complain about the way his requests for information had been handled. He argued that the public interest favoured disclosure of the information he had requested.

9. The Commissioner has established that the contract tender to which these requests relate was publically advertised and companies were invited to submit bids for it. Consequently the Council explained that to use the language of the complainant's requests, no companies actually were 'approached' to submit tender bids. However, the Council has explained that it did receive tender bids from a number of companies and it considered such information to fall within the scope of the complainant's requests. The Commissioner has proceeded with this complaint on that basis.
10. During the course of his investigation the Commissioner established that as part of its tender application one company had provided the Council with a number of CVs of its staff and contractors. The Commissioner informed the complainant that regardless as to whether such information was exempt from disclosure on the basis of section 43(2) of FOIA he would consider such information to be exempt from disclosure on the basis of section 40(2) of FOIA, the personal data exemption.
11. The Commissioner therefore agreed with the complainant that he would not consider whether these CVs should be disclosed in response to his request. Instead this notice simply considers whether the remaining information which falls within the scope of his requests is exempt from disclosure on the basis of section 43(2) of FOIA.

Reasons for decision

Section 43(2) – commercial interests

12. 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).'

13. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers 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 – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers 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.
14. 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.

The Council's position

15. The Council argued that disclosure of the withheld information would be likely to prejudice its interests as well as those of the parties involved in the tender exercise.
16. In order to support this position the Council explained that the tender exercise in question was in fact cancelled and not concluded. Therefore no successful bidder was actually identified. However, the Council explained that it had embarked on a wider tendering project more recently concerning the Dreamland theme park which is where the Scenic Railway is located. It explained that this wider tender in relation to that project was only awarded in July 2014 (ie after the complainant submitted his request in March 2014). The Council explained that much of the information which was pertinent to the 2011 tender process (ie the one which is the focus of this request) was relevant to the current project and that the contract is in progress at present.
17. The Council explained that the withheld information was only provided, in confidence, to it as part of the closed tendering exercise which took place in 2011. It argued that it must be free to conduct its business in a commercial environment without fear that supplying information to the Council will ultimately lead to what it termed 'information breakout'. The Council argued that this would lead to it being disadvantaged in its dealings and reluctance on the part of outside companies to share information with it.

18. The Council argued that it believed that disclosure of the withheld information would also be likely to harm the commercial interests of the companies who submitted the tenders. The Council explained that it had contacted the companies in question in order to determine whether they had any specific issues regarding this request and the potential disclosure of the requested information. The Council confirmed to the Commissioner that the companies in question did not respond to the Council's enquiries.

The Commissioner's position

19. With regard to the three limb test the Commissioner is satisfied that the first limb is met given that the nature of prejudice envisaged to both the commercial interests of the Council and the companies who submitted tenders are clearly ones that fall within the scope of the exemption provided by section 43(2).
20. With regard to the second limb, the Commissioner is satisfied that there is arguably some causal link between disclosure of the withheld information and prejudice both to the Council's commercial interests and those of the third parties.
21. However with regard to the third limb, the Commissioner is not persuaded that the likelihood of prejudice occurring either to the Council's commercial interests or those of third parties is one that goes beyond being simply a hypothetical risk.
22. In respect of the third parties, the Commissioner accepts that in theory the disclosure of the bids submitted by these companies – along with the analysis of them by Gardiner & Theobald – has the *potential* to undermine their commercial interests. For example, disclosure could reveal information about their pricing of such projects or details of their own bespoke approach to such projects or indeed some other manner of information that they would consider to be commercially sensitive. This is precisely the reason why the Commissioner has concluded that the second limb was met, ie why there is some causal link between disclosure of the information and prejudice potentially occurring. However, the Council has not specified why particular aspects of the bid documentation, or the bid analysis, would actually be prejudicial to the companies in question. Given the significant amount – several hundred pages - and indeed the variety of the information that falls within the scope of the requests the Commissioner finds it difficult to accept that disclosure of every piece of this information would be likely to prejudice the commercial interests of the companies. Furthermore, and in the Commissioner's view, key to this decision, is the failure of the companies in question to provide the Council with submissions setting out why they consider their bids to be commercially sensitive. In the

absence of such submissions, and taking into account the volume and variety of withheld information, the Commissioner considers it reasonable to conclude that the Council's suggestion that disclosure would be likely to prejudice the commercial interests of the companies is a speculative argument.

23. In respect of its own commercial interests, it would appear to the Commissioner that the Council is seeking to argue that as a class of information, tender submissions - and by extension an analysis of such submissions - should be withheld on the basis of section 43(2). This is because taken to its logical extension this argument would suggest, disclosing copies of any or all tenders could put off potential future bidders. In *principle*, the Commissioner can understand the rationale underpinning this argument; if a public authority discloses information which a bidding company genuinely considers to be commercially sensitive then it is not implausible to suggest that companies could be more reticent in providing the public authority with similar information in the future. However, the Commissioner cannot, and does not, accept that the disclosure of tender documentation per se - without any consideration of its content or the broader circumstances of a particular case - would be likely to harm a public authority's commercial interests in this way.
24. As indicated above, the withheld information in this case is voluminous in nature and the quality in terms of its potential commercial sensitivity clearly varies throughout the information. Furthermore, the Commissioner considers that it is important to remember that the companies in question have not availed themselves of the opportunity to provide the Council with submissions that indicate which aspects, if any, of their tenders they consider to be commercially sensitive and their reasons for such views. In the Commissioner's opinion if the companies in question had genuine concerns about the disclosure of such information it would be reasonable to assume that they would have provided such submissions.
25. Consequently, in the particular circumstances of this case the Commissioner considers that it is also speculative to suggest that if this withheld information was disclosed other companies would be less willing to consider tendering for other contract opportunities offered by the Council. This is simply because it does not appear, on the basis of the submissions provided to the Commissioner, that disclosure of the withheld information would actually result in the provision of information which the companies in question consider to be commercially sensitive. Put another way, the Commissioner does not consider that it is plausible to argue that disclosure of this information will have some sort of chilling effect on the provision of commercially sensitive information in the

future when disclosure of this particular information would, not in itself, apparently result in the disclosure of commercially sensitive information.

26. Furthermore, the Commissioner also considers that the companies will have a clear incentive to provide the Council with complete and full tenders in the future, namely the opportunity of winning valuable contracts. Moreover, if the information they provide is the subject of an FOI request then they will have the opportunity to explain why they consider such information to be commercially sensitive and thus exempt from disclosure under section 43(2). If such concerns are genuine and well evidenced then the Commissioner is unlikely to order the disclosure of such information.
27. Finally, the Commissioner notes that the Council has explained that a significant amount of the withheld information is pertinent to a further tendering exercise that was being carried out at the time of the complainant's request in March 2014 (and was awarded in July 2014). However, the Council has not provided the Commissioner with any clear explanation which sets out why disclosure of the withheld information would have actually undermined its commercial interests in relation to the more recent tendering process.
28. Taking all of the above into account the Commissioner does not accept that the Council has demonstrated that there is a real and significant likelihood of prejudice occurring to either its commercial interests or those of the third parties involved. Consequently section 43(2) is not engaged. As the exemption is not engaged the Commissioner is not required to consider the public interest test contained at section 2 of FOIA.

Right of appeal

29. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

30. 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.
31. 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

Gerrard Tracey
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