

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 January 2016

Public Authority: Cheshire West and Chester Council

Address: HQ
Nicholas Street
Chester
CH1 2NP

Decision (including any steps ordered)

1. The complainant has requested information relating to a tender for a Sexual Health Contract. Cheshire West and Chester Council disclosed some information and withheld other information under the exemption for prejudice to commercial interests (section 43(2) of the FOIA).
2. The Commissioner's decision is that Cheshire West and Chester Council:
 - Failed to respond to the request within 20 working days and breached section 10(1) and Section 17(1) of the FOIA;
 - Failed to demonstrate that section 43(2) was engaged in relation to the supplier identified in the confidential annex to this decision notice;
 - Correctly applied section 43(2) to the other suppliers but that the public interest favours disclosing the information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose all the withheld information to the complainant.
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 14 February 2015, the complainant wrote to Cheshire West and Chester Council (the "council") and requested information in the following terms:

"Please provide a copy of the brief given to Liverpool John Moore's University by CWAC and a copy of their report to which you refer in your reply to the above FOI to me.

Please also supply a copy of the tender document (or at least that part of it which specifies the scoring criteria) and of the score and scoring outcome, including the report which is required to have been written covering the following requirements of the tendering process: -

"The jury shall record its ranking of projects in a report, signed by its members, made according to the merits of each project, together with its remarks and any points that may need clarification" and the " Complete minutes shall be drawn up of the dialogue between jury members and candidates". "

6. The council responded on 12 June 2015. It disclosed some information, confirmed that other information was not held and withheld other information under the exemptions for personal data (section 40) and prejudice to commercial interests (section 43(2)).
7. Following an internal review the council wrote to the complainant on 22 October 2015. It stated that it was maintaining its position.

Scope of the case

8. On 26 October 2015 the complainant contacted the Commissioner to confirm that they wished to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly applied section 43(2) to withhold some of the requested information.

Reasons for decision

Section 43(2) – Prejudice to commercial interests

10. The council has withheld The Integrated Sexual Health Service evaluation results table and tender decision letters for the successful and unsuccessful bidders.
11. Section 43(2) 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).

Does the information relate to commercial interests?

12. The Commissioner's guidance clarifies 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.
13. In this instance the withheld information relates to a tender exercise for the awarding of a contract for the delivery of an Integrated Sexual Health Service. The Commissioner is, therefore, satisfied that the information is commercial in nature and falls within the scope of the exemption.
14. However, in order for the exemption to be engaged it is necessary to demonstrate that disclosure of information would or would be likely to result in prejudice to one or more parties.

Likelihood of the prejudice occurring

15. In relation to the wording of the exemption, the ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; i.e. either prejudice 'would' occur or prejudice 'would be likely to' occur.
16. With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15).
17. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
18. In this instance the council has stated that it considers that the likelihood of prejudice occurring as a result of disclosure would be "more likely than not". The Commissioner understands that the council is,

therefore, relying upon the "would prejudice" limb of the exemption which requires it to demonstrate that there is a more than 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so.

Affected parties and nature of the prejudice

19. The council has confirmed that it considers that disclosure of the information would prejudice its own commercial interests and the interests of the parties which participated in the tender process. The Commissioner has considered the relevant arguments under the headings below.

Prejudice to the council's interests

20. In relation to the prejudice to its own interests, the council has argued that disclosure would harm its ability to carry out open tendering processes where it needs sufficient information to enable it to adequately evaluate tenders it receives. It considers that an inability to carry out a competitive tendering process will also harm the council's ability to obtain value for money services.
21. Essentially, the Commissioner understands that the council is relying upon a generic argument that the disclosure of information obtained from third parties might result in third parties being more reluctant to provide similar information in the future. In essence, disclosure would have the effect of eroding trust in an authority's ability to keep information out of the public domain.
22. However, the Commissioner considers that there are a number of reasons why this argument is not relevant in this particular scenario. Firstly, more generally, since the passing of the FOIA, authorities should make all prospective tenders aware of their responsibilities under the FOIA and the possibility that information might be the subject of a request. Secondly, the council has not provided any evidence which supports its assertion that disclosure of the information in this instance would (more likely than not) result in the prejudice it has described. Thirdly, the Commissioner considers it unlikely that parties would exclude themselves from possibly lucrative public sector contracts purely on this basis. Finally, the withheld information is focussed on evaluation scoring rather than on submissions provided by the third parties at the outset of the tendering exercise. For these reasons the Commissioner considers that the council has failed to demonstrate that disclosure of the information would result in the ascribed prejudice to its commercial interests.

Prejudice to the third party suppliers' interests

23. Where prejudice relates to the commercial interests of third parties, in line with the Information Tribunal decision in the case *Derry Council v Information Commissioner (EA/2006/0014)*, 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. Both the code of practice issued under section 45 of the FOIA¹ and the Commissioner himself recommends that authorities should consult directly with relevant third parties in such cases and seek their views.
24. In this case the council confirmed that it approached all 4 of the prospective suppliers and sought their opinions on whether the information should be disclosed. The council explained that it did not receive responses from 2 of the suppliers and, amongst the suppliers who did respond, 1 provided their consent for the information to be disclosed. Although the council has not provided the Commissioner with copies of its correspondence with these parties, he is assuming that the council has, in its submissions, reflected the views of the single supplier who objected to disclosure.
25. As noted above, where the exemption is applied in order to protect the interests of third parties, the Commissioner does not consider it appropriate for public authorities to provide speculative arguments on a party's behalf. In this instance, one of the consulted parties explicitly stated that they were content for the information to be disclosed. It follows that the party in question does not consider the information to be prejudicial to its commercial interests. The Commissioner, therefore, finds that, in relation to this specific supplier, the exemption is not engaged. The confidential annex to this notice identifies the relevant supplier and directs the council to disclose the withheld information as it relates to this party.
26. In its original response to the request the council stated that disclosure would result in damage to reputation or business confidence of the suppliers. It argued that disclosure of individual scores, which could be compared across those organisations who submitted a tender would cause harm to those third parties and loss of confidence in the provider because the scores indicate how well or how badly a provider did in

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<http://webarchive.nationalarchives.gov.uk/20150730125042/http://www.justice.gov.uk/downloads/information-access-rights/foi/code-of-practice-datasets.pdf>

relation to each part of the evaluation criteria. The council stated that the information indicates the strong and weak parts of the tenders and those areas where their service did or did not meet the requirements stated in the tender document. Disclosure would damage the provider's ability to win new business opportunities for its services and to perform them within a commercially competitive market because other contracting authorities and competitors would be aware of the strengths and weaknesses of a bidder's delivery model and methodology.

27. The council has further submitted that the suppliers will use their methodologies for other tenders in the market place, in competition with other suppliers. The council argued that it would be of use to competitors to know the strengths and weaknesses of a supplier, to the detriment of the supplier in question who would not have access to comparable information in respect of their competitors.
28. Having considered the council's arguments as applied to the remaining 3 suppliers (1 successful and 2 unsuccessful bidders), the Commissioner accepts that the disclosure of scoring information would provide competitors with an insight into their relative strengths and weaknesses and a commercial advantage, to the detriment of the suppliers. The Commissioner also accepts that, in relation to the unsuccessful bidders, disclosure would result in damage to their reputation and loss of confidence in service areas where deficiencies are identified.
29. In view of the above the Commissioner is satisfied that, in relation to 3 of the suppliers, the exemption is engaged and he has gone on to consider the public interest below. As noted above, he has concluded that information relating to the supplier identified in the confidential annex does not engage the exemption and should be disclosed.

The Public Interest Test

Public interest in disclosure

30. The council has argued that disclosure may satisfy the general principles of transparency and accountability and assist public understanding. It has also argued that it would help ensure the probity of decision making and the use of public resources.
31. The council has further argued that there is a public interest in providing reassurance that value for money has been achieved and that its commercial activities are conducted in an open and honest way.
32. The Commissioner notes the general principle that the sensitivity of commercial information is time-relative. Information disclosed during a live tendering process is generally much more likely to be damaging to a

party's commercial interests than after a tender has been awarded. Competitors would be unable to take advantage of commercial insights, at least in relation to that specific tender exercise. In this case, the council confirmed that the contract was awarded in October 2014 and the request for information was submitted in February 2015.

33. The Commissioner has also considered the specific public interest in transparency and accountability regarding the use of public funds and the awarding of public contracts in this case. He notes that the contract is valued at £2.7 million per year and is set to run over 3 years.
34. The Commissioner is also mindful, as has been acknowledged by the council, that that this contract has been subject to considerable public scrutiny and criticism.² Significant public concerns about an authority's handling of its commercial procurement activities, regardless of whether those concerns are well founded, provide a strong argument for transparency. Disclosure in this instance would assist in allaying such concerns and restore public trust in the council.
35. The Commissioner also considers that disclosure of the information would assist public understanding of the competitive tendering process and help prospective suppliers put together successful bids. This would result in stronger future bids being submitted and enhance the competitiveness of the commercial market.

Public interest in maintaining the exemption

36. The council has argued that disclosing the scoring for each bid could prejudice the commercial interests of each provider by reducing market confidence in their ability to provide services. The tender scores indicate how well or how badly a provider did in relation to each part of the evaluation criteria and identify potential weaknesses in parts of their service.
37. The council has argued that, whilst the tender process has been completed, the information could still prejudice the suppliers' abilities to win other tenders.
38. The council has stated that it received many emails and letters requiring details of the evaluation process and outcome and that delivery of the

² See, for example: <http://www.chesterchronicle.co.uk/news/health/chester-doctors-fear-patients-suffer-8221723>

service has been put under public scrutiny. The council has stated that criticism of its handling of the tender process is without foundation.

39. The council has also stated that, if disclosed, the information might be misinterpreted by unqualified readers and present a false picture of a supplier's strengths or weaknesses.

Balance of the public interest

40. In considering where the balance of the public interest lies in this case, the Commissioner has given due weight to the general public interest in averting the damage to commercial interests which the exemption is designed to protect.
41. In relation to the council's argument that the information retains its ability to cause harm despite the completion of the tender process, the Commissioner has considered whether the severity of the ascribed harm meets the relevant threshold. The council opted for the higher threshold of likeliness here, meaning that it necessary to demonstrate that disclosure would be more likely than not to result in the harm described.
42. In relation to the successful supplier's scoring, the Commissioner is not convinced that disclosure of this information would be particularly damaging to its commercial interests. By the very nature of being the successful bidder, it seems very unlikely that potential service users would lose confidence in its commercial abilities; in fact, the opposite seems the more likely outcome. As the tender process had been completed several months before the time of the request, clearly, competitors would be unable to undermine its bid in relation to this specific tender. With regard to harm to future tender submissions it may make, the Commissioner considers that the council's arguments in this regard are far too speculative and generic to demonstrate that disclosure would result in such harm being caused.
43. In relation to the unsuccessful suppliers' scoring, for the same reasons set out in 42 above, the Commissioner does not consider that its disclosure after the completion of the tender process would be of benefit to competitors in so far as this specific tender. He accepts that there is a possibility that, by revealing weakness in relation to this specific bid, a supplier's ability to participate in future tender exercises might be hindered by a perception/misperception of potential service delivery weaknesses.
44. However, the council has not provided any direct evidence that this outcome would be more likely than not to occur. Furthermore, the Commissioner notes that in a competitive marketplace, prospective tenderers will be free to submit applications and have them judged on

their own merits. If it is the case that a supplier cannot meet the standard set in a procurement exercise or is not suited to a particular role, this will, in any event, be determined during the course of a specific tender process. It seems unlikely that a supplier would be judged on the basis of a submission it has made in a completely different tender exercise.

45. Commercial success can be achieved by offering something which a competitor does not. It follows that knowledge of what this something might be would be of benefit to a competitor. Having referred to the withheld information the Commissioner also does not accept that its disclosure would provide competitors with any particular insights into unique ways of working, or knowledge which could be utilized, to the commercial detriment of the suppliers.
46. In relation to the council's submission that disclosing the information to an unqualified audience could result in the information being misinterpreted, the Commissioner does not accept the validity of this argument. In the Commissioner's view it is equally likely that the information could be correctly interpreted – in any event, this outcome is too causally remote to attach any significant weight. If the council has concerns about possible misinterpretation it is free to provide contextual narrative with any disclosure.
47. In relation to the criticism of the tender process, the Commissioner notes that the council considers this to be unfounded. It is certainly not the Commissioner's role to comment upon or determine whether the council has correctly handled this tendering exercise or awarded the contract to the most suitable supplier. From a public interest perspective, though, concerns about an authority's commercial activities, particularly where there is significant public expenditure, can be detrimental to public confidence in an authority's decision-making processes and its use of public funds. Regardless of whether such concerns are well founded or not, there is a public interest weighting in favour of transparency and facilitating scrutiny which might allay such concerns.
48. Whilst the Commissioner is mindful of commercial sensitivity of tender scoring information, for the reasons set out above, the Commissioner has concluded that the public interest in disclosing the information has a greater weighting than the public interest in maintaining the exemption in this case.

Section 10 – time for compliance

49. Section 10(1) of the FOIA requires public authorities to respond to a request for information within 20 working days of the date of receipt of a request.
50. In this case the request was submitted on 14 February 2015 and the council responded on 12 June 2015. The Commissioner, therefore, finds that the council breached section 10(1) of the FOIA.

Section 17 – refusal notice

51. Where a public authority is applying an exemption to withhold information specified in a request it must, under section 17(1) of the FOIA, issue a “refusal notice” stating this within the time for compliance set out under section 10(1) of the FOIA.
52. As the council breached section 10(1) it follows that it also failed to issue a refusal notice within the time for compliance. The Commissioner, therefore, finds that the council breached section 17(1) of the FOIA.

Right of appeal

53. 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

54. 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.
55. 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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