

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 November 2016

Public Authority: Nottinghamshire County Council

Address: County Hall West
Bridgford
Nottingham
NG2 7QP

Decision (including any steps ordered)

1. The complainant has requested a copy of a winning tender application. Nottinghamshire County Council disclosed some of the 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 Nottinghamshire County Council has breached section 10(1) and failed to demonstrate that section 43(2) is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the 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 16 February 2016 the complainant wrote to Nottinghamshire County Council (the "council") and requested information in the following terms:
"...under the Freedom of Information Act we request a copy of the winning tender application from Rock Kitchen Harris Ltd."
6. The council responded on 19 May 2016. It stated that it was withholding the information under the exemption for prejudice to commercial interests – section 43(2) of the FOIA.
7. Following an internal review the council wrote to the complainant on 7 July 2016. It stated that it was partially revising its position and disclosed some of the requested information. The remaining information was withheld under section 43(2).

Scope of the case

8. On 6 July 2016 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that her investigation would consider the timeliness of the council's response and its application of section 43(2).

Reasons for decision

Section 10 – time for compliance

10. Section 10(1) of the FOIA requires that public authorities receiving a request for information *"...must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."*
11. In this case the request was submitted on 16 February 2016 and the council's response was issued on 19 May 2016.
12. The Commissioner has concluded that, in failing to respond within 20 working days the council breached section 10(1) of the FOIA.

Section 43(2) – commercial interests

13. The council has withheld elements of the tender submissions made by the winning bidder for an IT contract, Rock Kitchen Harris Ltd.
14. Section 43(2) provides an exemption from disclosure for 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.
15. “Commercial interests” in the context of this exemption encapsulates a wide variety of activities. In this case, the withheld information relates to a tender exercise to deliver an IT contract. The Commissioner is satisfied that the withheld information relates to a commercial activity and falls within the scope of the exemption.
16. In order for the exemption to be engaged it is necessary for it to be demonstrated that disclosure of information would result in some identifiable commercial prejudice which would or would be likely to be affect one or more parties.
17. 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.
18. 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).
19. 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).
20. The council has argued that disclosure *would* prejudice the commercial interests of Rock Kitchen Harris Ltd. The Commissioner has gone on to consider the nature of the prejudice in this case.

The nature of the prejudice

21. In its submissions to the Commissioner the council has stated that disclosure of the information:

"...would give a competitor information not in the public domain and may result in anti-competitive behaviour,

22. In reaching a determination in this case the Commissioner has also referred to the council's initial response to the request and its internal review response. The Commissioner notes that these responses do not provide any further details about the nature of the prejudice. The Commissioner further notes that, in accordance with the code of practice issued under section 45 of the FOIA, the council did consult with Rock Kitchen Harris Ltd and sought its views as to whether the information might be disclosed. Having viewed the submissions provided by the third party the Commissioner observes that these add nothing beyond stating that the information "feels commercially sensitive."
23. Where an authority has failed to provide adequate arguments in support of the application of an exemption, the Commissioner does not consider it to be her role to generate arguments on its behalf. In this instance the Commissioner considers that the council has failed to even approach a proper definition of the nature of the prejudice, let alone linked any prejudice to specific elements of the withheld information.
24. Having considered the council's submissions, the Commissioner has concerns that it might have applied the exemption in a blanket manner without regard for the content of the information or the threshold which must be met to engage the exemption and withhold the information.
25. In any event, the Commissioner has concluded that the council has failed to define the prejudicial effects it considers that disclosure would cause to Rock Kitchen Harris Ltd's commercial interests and failed to demonstrate that it would be more likely than not that such effects would occur. As the Commissioner has determined that the exemption is not engaged she has not gone on to consider the public interest.

Other matters

26. Although they do not form part of this decision notice the Commissioner wishes to note the following matters of concern.

Section 45 code of practice

27. The code of practice issued under section 45 of the FOIA (the "code") contains recommendations as to the good practice which public authorities should observe when dealing with requests for information.

28. The introduction to the code states:

*"All communications in writing to a public authority, including those transmitted by electronic means, may contain or amount to requests for information within the meaning of the Act, and so must be dealt with in accordance with the provisions of the Act. While in many cases such requests will be dealt with in the course of normal business, it is essential that public authorities dealing with correspondence, or which otherwise may be required to provide information, have in place procedures for taking decisions at appropriate levels, and ensure that sufficient staff are familiar with the requirements of the Act and the Codes of Practice issued under its provisions. Staff dealing with correspondence should also take account of any relevant guidance on good practice issued by the Commissioner. Authorities should ensure that proper training is provided in this regard. Larger authorities should ensure that they have a central core of staff with particular expertise in Freedom of Information who can provide expert advice to other members of staff as needed."*¹

29. Although the introduction does not form part of the code itself the Commissioner endorses and echoes its recommendations. Having considered the council's failure in this case to deal with the request promptly or to provide adequate arguments in support of the application of an exemption the Commissioner has concerns that it might not take its responsibilities seriously or that it has not provided staff with sufficient training.

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<http://webarchive.nationalarchives.gov.uk/20150730125042/http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

30. The Commissioner expects that the council's future handling of requests will conform to the recommendations of the code and to the recommendations provided in her own published guidance.

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: 0870 739 5836

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

Andrew White
Group Manager
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