

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 February 2017

Public Authority: Spelthorne Borough Council
Address: Council Offices
Knowle Green
Staines-upon-Thames
TW18 1XB

Decision (including any steps ordered)

1. The complainant has requested information from Spelthorne Borough Council about a bidding process it had undertaken
2. The Commissioner's decision is that Spelthorne Borough Council has not persuaded her that it correctly relied on FOIA to neither confirm nor deny whether it held the requested information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - It shall inform the complainant whether the requested information is held. If the information is held it should provide it to the complainant or else issue a refusal notice in accordance with section 17 of FOIA.
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 2 February 2016 , the complainant wrote to the Council and requested information in the following terms:

- Did the winning bidder reduce his bid post tender and does this revised bid now fall below that of the next highest offer"
6. On 15 March 2016, the council responded. It refused to confirm or deny that it held the requested information. It also went on to state (confusingly) that information regarding the sale of the land in question was exempt under section 43 of the Freedom of Information Act 2000.
 7. The Commissioner understands that the complainant requested an internal review but the council has not conducted the same.

Scope of the case

8. The complainant contacted the Commissioner on 16 March 2016 to complain about the way his request for information had been handled.
9. As part of her investigation the Commissioner, inter alia, wrote to the Council on 13 July 2016. She sought the Council's full and final submissions in this matter. After reminders from the Commissioner, the Council provided its purported substantive reply by way of an email dated 21 October 2016.

Reasons for decision

10. When a public authority receives a request for information it is required under section 1(1)(a) of the FOIA to confirm whether or not it holds that information. However, section 43(3) of the FOIA states that a public authority is not obliged to confirm or deny whether information is held if to do so would, or would be likely to, prejudice the commercial interests of any person.
11. The Council stated (in its aforesaid letter dated 15 March 2016) to the complainant that;
 - As the Council is still in the process of finalising the land transfer the Council are not in a position to confirm or deny it holds the requested information.
12. The Commissioner sets out, relatively fully, below the Council's further submissions in its aforesaid email to her dated 21 October 2016
13. In terms of background, this development at Bridge Street in Staines is a Conditional Sale and Development Agreement. It means that we sell the site subject to planning and other conditions and that once these conditions have been satisfied then the sale will complete. However until that happens then the sale is not guaranteed to go ahead because

each side might have a legitimate way of deciding that the deal has not worked out as agreed. So, suffice it to say these transactions are not as straightforward as a house sale where exchange and completion are straightforward concepts. They are also unlike other commercial deals we do (e.g. contracts for services) where we keep tender amounts under wraps until the Council has made a final decision, and then the transparency guidance and rules mean that essentially the deal is public knowledge and any sensitivity about price falls away. We are well used to disclosing contracts and details of deals in these circumstances.

14. The other point to note is that although the Council held a tender process (to encourage competition and get the best deal and best partner) this wasn't a transaction which was subject to the Public Contracts Regulations because it was a deal for land. That is an exception to the Public Contracts Regulations. The implication of this is that under those Regulations tenderers give a price and that is treated as the price they will deal with. Unless there are clarifications of the price, there is no negotiation, and we do not allow people to game the system by increasing their price once they suspect that they may be about to lose.
15. In a contract for the sale of land it is quite common for the parties to change prices and often this is encouraged by the vendor and its agents who want the best price. The purchasers may amend their prices according to the level of expected competition, perceived strength of bid or the constraints which become apparent as part of the negotiations. So, for example, if the Council dictates that it wants something to be delivered as part of the negotiations then the price might change accordingly. The implication of this is that changing prices is an expected part of the process but still one which attracts a great deal of commercial sensitivity and hence confidentiality.
16. Notwithstanding the Council's e-mail of 21 October 2016 it has not provided the Commissioner with the sufficient clarification she sought via her letter dated 13 July 2016. In particular it has not explained how and why confirming, whether it holds the requested information, would or would be likely to prejudice the commercial interests of any person.
17. Accordingly, the Commissioner is not persuaded that the Council has correctly relied on FOIA to neither confirm nor deny that it holds the requested information. The Commissioner therefore requires the Council to confirm whether it holds the requested information and if does provide it to the complainant or else issue a refusal notice in accordance with section 17 of FOIA.

Right of appeal

18. 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

19. 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.
20. 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
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF