

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 November 2017

Public Authority: Essex County Council
Address: County Hall
Market Road
Chelmsford
Essex
CM1 1QH

Decision (including any steps ordered)

1. The complainant requested information relating to an estimate of the cost of particular works carried out on behalf of Essex County Council (the council) by a third party company.
2. The council has provided some information to the complainant in response. However, it has refused to disclose further information held under section 43(2) of the FOIA.
3. The Commissioner's decision that council has correctly applied section 43(2) to the information that has been withheld and the public interest in maintaining the exemption outweighs the public interest in disclosure.
4. The complainant was also concerned that there was additional information held that the council may not have considered for disclosure. The Commissioner is satisfied that, on the balance of probabilities, the council has identified all that information that was relevant to the complainant's request.
5. The Commissioner requires no steps to be taken.

Background

6. The council had awarded a contract to a third party company to carry out the 'Wood Street scheme' works.

7. The complainant was subsequently provided with a copy of an estimate submitted by the company for the cost of these works. This information was received outside the provisions of the FOIA.
8. The estimate included a breakdown of the costings for certain tasks, the combined overhead and profit amount, and the total price of the works to be carried out by the company.
9. The complainant had requested that the council provide further details about the costs set out in the estimate. When he failed to receive a satisfactory response to his enquiries, he submitted a request for the information under the FOIA.

Request and response

10. On 7 November 2016, the complainant wrote to the council and requested information in the following terms:

"1. A more detailed breakdown of the £59 000 for Civil Works showing the costs for the different items/tasks involved

2. How many hours work does the £10,000 for "Installation staff time" allow for and at what level of seniority is that task carried out.

3. What elements are included in the item "Overhead and profit"

4. How is profit defined and the amount determined in this instance."

11. The council responded on 16 December 2016.
12. With regard to item 1, the council advised that this information was exempt from disclosure under section 43 of the FOIA as its release would prejudice the company's commercial interests.
13. With regard to item 2, the council confirmed its response to be the same as that provided for item 1.
14. With regard to item 3, the council provided some generic details of corporate overheads.
15. With regard to item 4, the council advised that the overhead fee and profit percentage were competitively tendered as part of the procurement process for the contract. It went on to say that these amounts are fixed for the duration of the contract, which would be a minimum of ten years but could be extended to fifteen years.

16. The council confirmed that it had considered the public interest test and took the view that the balance lay in favour of withholding the information in this instance.
17. The complainant requested an internal review on 7 January 2017.
18. The council wrote to the complainant on 17 January 2017 to advise that it had completed its internal review. It upheld its previous decision.
19. The complainant then contacted the Commissioner raising concerns about the way his request had been handled.
20. Following receipt of the Commissioner's initial correspondence on the matter, the council reconsidered its position. On 16 June 2017 it sent a revised response to the complainant.
21. The council informed the complainant that the original estimate provided to him was based on an understanding of 'likely costs' of the works to be carried out.
22. With regard to item 1 of the request, the council provided the complainant with some additional information which included a breakdown of each of the elements of the 'Civil Works' to be carried out. However, details of the individual costing set out for each element had been redacted. The council advised the complainant that the withheld information would be considered to be commercially sensitive under section 43 of the FOIA.
23. With regard to item 2, the council now revised its response to say that it did not hold the information requested. It stated that the figure of £10,000 for staff installation time was an 'indicative figure'. It had been based on previous experience and was produced to show the likely costs involved with the supervision and project management. However, the council did now confirm to the complainant that the highest level of seniority on site was 'Senior Highway Engineer'.
24. With regard to item 3, the council advised that whilst it had previously included the overheads portion of the overheads and profit, it had not been explicit that the 'profit part was profit'.
25. With regard to item 4, the council advised the complainant that it had already given a full response to explain how profit was defined and the amount determined in this instance. It went on to say that any further figures or percentage would be considered to be commercially sensitive and could affect the ability of a third party to tender for future contracts, or extensions of existing contracts.

Scope of the case

26. The complainant originally contacted the Commissioner on 25 January 2017 to complain about the council's decision to refuse to supply information in response to his request on the basis of section 43(2) of the FOIA.
27. Following receipt of the council's revised response of 16 June 2017, the complainant contacted the Commissioner again. He stated that he remained dissatisfied with the council's handling of his request.
28. The scope of the Commissioner's investigation is to determine whether the council should disclose information that is relevant to item 1, 3 and 4 of the request which it has withheld under section 43(2) of the FOIA, and also whether any other information is held that is relevant to item 2 of the request.

Reasons for decision

Section 1—general right of access

29. Section 1(1) of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing whether the authority holds the information and, if it is held, to have the information communicated to them.
30. Where there is some dispute between the amount of information identified by a public authority and the amount of information that the complainant believes may be held, the Commissioner, following the lead of a number of First-Tier Tribunal decisions, must decide whether, on the civil standard of the balance of probabilities, the public authority holds any further information that falls within the scope of the request.
31. With regard to item 2, the complainant believes that the council must hold additional information. He states that the figure for 'installation staff time' would have been based on completed schemes where final costs have been calculated and he would like to see what hourly figures were used when reaching the total figure set out. The complainant goes on to say that as the Wood Street scheme was implemented last year, the council should, by now, have the final costs and the number of hours used for calculating this amount.
32. The complainant also states that all other labour costs have been estimated in terms of days and are included within the data that has been supplied to him. He believes that the council therefore has a clear

estimate of the time scale of the project and must know how much supervisory time is reasonably required.

33. The Commissioner has considered the arguments put forward by the complainant. However, she is of the view that there is no substantive evidence which would indicate that the council holds any additional information relevant to item 2 of the request.
34. The council has explained that the 'rounded up' figure of £10,000 figure for 'installation staff time' was an 'indicative' figure which was based on previous experience and had been produced to show the likely costs involved. In addition, the hours had not been fully costed at that point in time and the staff installation time was not accounted for separately.
35. The Commissioner has taken account of the fact that the £10,000 figure formed part of an estimate which appears to have been supplied to the council by the third party company contracted to carry out the works. She is of the view that this reduces the expectation that any additional information to that already specified by the council would be held about how this estimate was calculated.
36. Whilst the complainant points out that other labour costs are recorded this, in itself, is not a sufficient indicator that the information that has been requested is also held.
37. With regards to the complainant's belief that, as the works have now been carried out, the information requested would be held, the Commissioner feels it pertinent to point out that the council's duty under the FOIA is to consider that information held at the time that the request was received.
38. In addition, item 2 of the request was for the number of hours worked which resulted in the total figure of £10,000 set out in the estimate originally provided to the complainant. It was therefore specific to this estimate and how the particular amount of £10,000 had been derived. Any subsequent actual figures which may have existed at a later date would therefore not be deemed relevant to the request.
39. The council has confirmed that no additional information is held in relation to item 2 of the request. The Commissioner accepts that, on the balance of probabilities, it is unlikely that there is any additional information held that would be relevant to the request. Therefore, she does not require the council to take any further steps in relation to this part of the request.

Section 43(2)-commercial interests

40. Section 43(2) of the FOIA 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).
41. 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 author 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, i.e., 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.
42. 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 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 complainant's position

43. With regards to item 1, in the complainant's request for an internal review he referred to the 'Civil Works' total of £59,000 set out in the original estimate he had received (outside the FOIA access regime). He states that this did not show in a transparent manner how public money is being spent because the total covered a variety of unknown tasks. The complainant wanted a detailed breakdown of the 'Civil Works' which would include details of all of these tasks, and their individual costings.

44. The complainant also expressed his uncertainty as to whether the costings for the Wood Street scheme related to work carried out by Ringway Jacobs, or a sub-contractor and whether this had affected the council's decision to withhold certain information.
45. The complainant went on to say that if it were the case that the costings held were submitted by Ringway Jacobs, then the Wood Street scheme would be one of many that it would be responsible for as part of its contract with the council. Given that the costs involved in the breakdown for 'Civil Works' would be very small in comparison to the total value of the contract, the complainant suggested that the disclosure of the information requested would not have any significance to Ringway Jacob's decision to tender for, and participate on, future partnerships, or any future tendering of the potential renewal of the contract.
46. The complainant then went on to say that if it were the case that the works were to be carried out by a sub-contractor, then the council should have regard to its commitment to publish details of contracts it enters into from 1 January 2011, including the expenditure for the schemes and services which are involved in such contracts.
47. The complaint has advised the Commissioner that he is also not satisfied with the council's revised position as set out in its correspondence to him dated 16 June 2017. He believes that the council has taken a 'blanket' approach when redacting the cost of every element included in the breakdown of the 'Civil Works' total provided to him and that it has therefore not properly considered the information held relevant to his request.
48. With regard to item 3, the complainant had originally complained that the information provided by the council set out only those items which would be covered in overheads and did not explain what was included within the definition of profit.
49. In his most recent representations to the Commissioner, with regards to items 3 and 4, the complainant states that he was trying to establish which elements of the costs have percentage profit applied. He states he had not expected the council to disclose the percentage of profit which had been applied but does want to know how it had been determined. He goes on to say that the schedule of costs seem to show that the profit is applied to the total cost of the scheme, including the building materials and this is the same with the overheads. He has complained that the council has not explicitly confirmed that the percentage is calculated on the total costs of the scheme.

The council's position

50. The Commissioner asked the council to explain why the disclosure of the withheld information would, or would be likely to, prejudice a party's commercial interests.
51. In response, the council has maintained that the release of the associated costs would be likely to enable competitors to price future bids accordingly and price the company out of future work. It states that this would affect the company's ability to operate effectively in an open market along with being able to trade competitively and would be prejudicial to that company.
52. The council goes on to say that companies may be discouraged from participating in the scheme if they felt that it could result in the disclosure of information relating to their business.
53. The council also states that companies compete by offering something different from their rivals. That difference will often be the price at which the goods or services can be delivered, but that difference may also relate to quality or specification. Information which identifies how a company has developed that unique element is more likely to be commercially sensitive.
54. The council cited an example of where a company competes on price. It states that whilst it may be that the final price charged is readily available, information disclosing how the company is able to offer the product at that price may not be. It goes on to say that information revealing profit margins is more likely to be commercially sensitive and that this argument can extend to working practices etc. that allow a quality of service to be more effectively delivered.
55. The council also takes the view that the disclosure of the percentage profit and overhead amounts are likely to prejudice any future negotiations or tender in the future, if they become public knowledge.
56. In addition to the above, the council put forward the following points to support its view that the relevant information should not be disclosed:
 - It could encourage other suppliers to raise or lower their prices.
 - It has the potential to affect the bargaining position of the contractor and its suppliers, the price at which goods and services can be delivered and *'quality, specs and design'*.
 - The information is commercially sensitive. Where a supplier is able to compete on price, the information would reveal how they can be so competitive.

- It could reveal types of working practices that allow a quality of service to be delivered more effectively.
57. The council has provided the Commissioner with a letter from the company who submitted to the estimate for the Wood Street works. This letter is dated 15 June 2017. The council states that prior to this date, there had also been verbal consultation between the two parties about the request.
58. The company states in its correspondence of 15 June 2017 that the release of the withheld information, which it regards to be commercially sensitive, is likely to prejudice the commercial interests of its business and will affect its ability to participate competitively in the procurement process for Essex Highways, and other contracts.
59. With regard to item 4, the council has advised the Commissioner that it is not in a position to confirm how profit was calculated. It goes on to say that should any further details be supplied in response to item 3 or 4 of the request, then this could potentially allow for the profit and overhead amounts to be calculated. The council views this to be commercially sensitive information which should not be disclosed.

The Commissioner's position

60. A commercial interest relates to a person's ability to participate competitively in a commercial activity and, in most instances, will directly relate to the purchase and sale of goods. Information about the procurement of goods and services by a public authority is usually considered to be commercially sensitive.
61. In this instance the information that is in dispute is the detailed figures which formed an estimate of the cost of work to be carried out at Wood Street. This includes profit and overheads.
62. The estimate was submitted by the company who was successful in its bid for the contract to provide a service for the council. The Commissioner accepts that the detailed information which forms the estimate, including detailed costings, profit and overheads, is commercially sensitive.
63. A public authority can withhold information that has been provided to it by a third party on the basis of prejudice to the commercial interests of that party. In this instance, the arguments presented by the council suggest that the disclosure of the withheld information would primarily prejudice the interests of the relevant company, although it does make brief comment that it would also be unfair to the council itself.

64. With regard to the first criterion of the three limb test which must be met for section 43(2) to be engaged, the Commissioned is satisfied that the potential prejudice described by the council relates to the interests which this exemption is designed to protect.
65. With regard to the second criterion, the Commissioner is satisfied that the disclosure of the withheld information has the potential to harm the commercial interests of the company that submitted the estimate.
66. The Commissioner agrees with the council that disclosure of the cost for each element of the 'Civil Works', and further detail of how profit and overheads are defined, would risk undermining the commercial interests of the relevant company in respect of any future, similar tenders that it might wish to compete for.
67. This is because it would provide the company's competitors with an unfair advantage, having gained additional knowledge about the company's strategy, plans and techniques by virtue of being able to access the costings they have submitted for the works they are contracted to carry out. The Commissioner is of the view that the company would be at a disadvantage, not only in relation to possible future tenders to the council, but also its submission of tenders for other work.
68. With regard to the third criterion, the Commissioner is satisfied that there is a more than hypothetical risk of prejudice occurring to the company in question if the withheld information was disclosed. Rather, the risk of such prejudice occurring can be correctly described as one that is real and significant. Given the nature of the work, and the market to which it relates, it is likely that the same companies will compete against each other in similar competitive exercise. In the Commissioner's view, this increases the risk of prejudice occurring to the company's commercial interests, if the information was to be disclosed.
69. The Commissioner has noted the complainant's argument that the council has taken a 'blanket approach' by withholding all detailed costs contained within the 'Civil Works' part of the estimate. However, she has had some difficulty in determining how further information could be disclosed without some prejudice occurring. She therefore does not agree that the council's decision indicates that it has not given proper consideration to whether any additional information can be disclosed.
70. The complainant has also questioned how the disclosure of a number of elements involved in such a small scale project could potentially affect the award of much larger projects.

71. The Commissioner is of the view that the disclosure of further detail which reveals how the costing is derived is likely to reveal the way in which the company has arrived at the price to which it can deliver its goods or services and this has the potential to harm its commercial interests. This is regardless of whether the works in question form one single contract, or are a small part of a much larger contract.
72. The Commissioner therefore concludes that section 43(2) is engaged and has gone on to consider the public interest test.

Public interest test

73. Section 43(2) is a qualified exemption which means that even where the exemption is engaged, information can only be withheld where the public interest in maintaining that exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

74. The complainant believes that the council has not been sufficiently transparent and has failed to provide sufficient justification for withholding the relevant information. He has argued that it is in the public interest to have a greater understanding of how public money is spent.
75. The complainant also points out that the tender for the contract to carry out works for the council is not due for renewal until a time far into the future. He argues that, as a result, the disclosure of the details of works carried out in 2015, which involved such a small amount of work, would not have any bearing on this process. He indicates that the public interest in transparency outweighs any public interest there may be in withholding the information.

Public interest arguments in favour of maintaining the exemption

76. The council has acknowledged that there is a public interest in being transparent about the expenditure of public money but believes that this has been fulfilled with the information disclosed to date.
77. The council has argued that there is a public interest in ensuring that companies are able to compete fairly, in an open market along with being able to trade competitively. It goes on to say that companies may be discouraged from participating in schemes if they felt that it could result in the disclosure of information relating to their general business. In this instance, the company has expressed its concern that if the information was disclosed it would be likely to prejudice the commercial interest of its business and affect its ability to compete for other contracts.

78. The council has confirmed that it believes the public interest is in favour of upholding the exemption in this instance.

Balance of the public interest arguments

79. The Commissioner considers that there is always some public interest in the disclosure of information. This is because it promotes the aims of transparency and accountability which, in turn, promotes greater public engagement and understanding of the decisions taken by public authorities.
80. The Commissioner is sympathetic to the complainant's desire to have full access to the relevant information in order to be satisfied that the processes have been conducted fairly. She has also been mindful of the fact that further disclosure could improve the wider public's confidence of the tendering of contracts by the council.
81. However, when considering the balance of the public interest in this case, the Commissioner believes it important to note the extent of that information which has already been placed into the public domain. This includes the estimated total cost of the Wood Street works, a breakdown of the estimated costs of each of the main elements, the combined estimated total overhead and profit amounts which have been applied, and a detailed breakdown of the elements that make up the estimated total cost for the 'Civil Works' part of the estimate.
82. The Commissioner is satisfied that the council, in the interest of openness and transparency, has disclosed information where it would not result in prejudice to the commercial interests of the company.
83. With regards to the complainant's belief that the public interest arguments in support of withholding the information are weakened as a result of the longevity of the current contract, the Commissioner accepts that, in certain circumstances, relevant timescales can be an important factor to consider. However, she is mindful of the fact that, whilst the contract awarded in this instance was for a period of ten years (with potential for it to be extended to fifteen years), it is likely to be the case that the company will tender for other business during this time frame. In addition, the relevant contract is almost half way through its initial ten year term. Preparation for the submission of the tender for a further extension is likely to commence well before the contract is due to expire.
84. The Commissioner is satisfied that, despite the length of time of the current contract, there is still a realistic prospect that competitors will gain an unfair advantage, should the information that has been withheld be placed in the public domain. Not only could knowledge of the current

detailed costings, profit and overhead margins lead competitors to potentially undercut the current contractor, but it could actually lead to the opposite scenario, with them becoming aware that they can raise their prices when submitting tenders against the company.

85. Therefore, the Commissioner is not persuaded that the remaining length of time of the contract is sufficient to balance the public interest in favour of disclosure.
86. In addition, the Commissioner considers that the release of the withheld information into the public domain would undermine the company's ability to compete on a 'level playing field' with other companies when bidding for other tenders.
87. In the Commissioner's opinion, there is a very strong and inherent public interest in ensuring fairness of competition and it would be firmly against the public interest if a company's commercial interests are harmed simply because they have been awarded a public sector contract.
88. It is the Commissioner's view that, in this instance, there is a stronger public interest in protecting the commercial interests of the company and ensuring that it is able to compete fairly both in relation to future tenders with the council and other businesses.
89. Therefore, the Commissioner has decided that, in all the circumstances of the case, the public interest in maintaining the section 43(2) exemption outweighs the public interest in disclosure.

Other matters

90. The complainant, when requesting an internal review, asked the council to confirm if the £10,000 costs for 'installation task time' related to a Ringway Jacobs' employee or an officer employed by the council. The Commissioner views this to be a new request for information that would fall outside the scope of the complainant's original request.
91. Whilst the council did not originally provide a response to the complainant's question, the Commissioner understands that it has now done so, providing confirmation of the employment status of the relevant officer as requested.

Right of appeal

92. 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

93. 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.
94. 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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