

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 February 2018

Public Authority: Sheffield City Council
Address: Town Hall
Pinstone Street
Sheffield S1 2HH

Decision (including any steps ordered)

1. The complainant has requested information from Sheffield City Council ('the Council') on particular performance measures. The Council says that the information the complainant has requested is exempt from release under section 22(1) (information intended for future publication).
2. The Commissioner's decision is as follows:
 - The Council breached section 1(1)(a) of the FOIA with regards to the second part of the complainant's request as it did not confirm that it does not hold this information.
 - The Council breached section 10(1) as it did not comply with section 1(1) within 20 working days.
 - Section 22(1) is not engaged with respect to the information that has been withheld under this exemption.
3. The Commissioner requires the Council to take the following step:
 - Release to the complainant the information it has withheld under section 22(1).
4. The Council must take this step 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. Following on from a previous request for information, on 4 February 2017 the complainant wrote to the Council and requested information in the following terms:

"However I would like to request a review of FOI 3202, specifically questions 1 and 2 within this. Whilst the information provided does give a high level insight into the roughly what the measures cover, as the reply says, this is the publically available information I was already aware of. What I'm really looking for are the specific details of the measures.

I'll give an example. On page 10 of the December 2016 Streets Ahead Contract Data Sheet (which is accessed through the link you sent me), there is a table which lists the "Service Immediate Response" targets. For highways, the table suggests that 99.69% of the 657 requests were met within the contractual timescales.

This is too high level. I would imagine that there would be sub-categories in the highways measure (eg trees, potholes, pavements), but these aren't shown. Similarly, all it says is "contractual timescales", without saying how long the timescale is? Is it five days, or ten days, or 100 days? There is no indication.

So in terms of the review, I would like [1] all the measures contained in the tables on page 10 of the document to be broken down to the lowest possible level, with [2] as much detailed description as possible explaining how these measures are specifically calculated."

6. Following the Commissioner's intervention, the Council responded on 8 September 2017. It refused to disclose the requested information, citing the FOIA exemptions under section 41(1) (information provided in confidence) and 43(2) (commercial interests) as its basis for doing so.
7. Given the delay in providing the response, the Council waived the internal review on this occasion. However, in the course of the Commissioner's investigation the Council advised her that, on reconsideration, it considered that the majority of the requested information is exempt from release under section 22 of the FOIA as it is intended for future publication. It considered a small amount is exempt from release under section 43(2).

Scope of the case

8. The complainant initially contacted the Commissioner on 3 July 2017 as he had not received a response to his request. On receipt of the response, the complainant remained dissatisfied.
9. The Council initially provided a submission to the Commissioner on 17 October 2017. In the submission the Council indicated that it considered the requested information was exempt under section 22 and section 43; however aspects of the submission were not clear and the Council said that it would need to consider some aspects of the matter further. The Council subsequently provided the complainant with a fresh response on 20 November 2017 in which it appeared to rely solely on section 22.
10. The Council then confirmed to the Commissioner and to the complainant that it considers a small amount of the information – the negotiated penalty adjustments – engages section 43(2).
11. Following contact with him, the complainant confirmed to the Commissioner on 20 January 2018 that his request is not for any commercial or financial information contained in the Streets Ahead contract, such as might attract the section 43(2) exemption. He confirmed that (the first part of) his request is for a breakdown of the performance measures within the contract. Since the complainant has not requested financial information, the Commissioner has not included the matter of section 43(2) in her investigation of the Council's response to the first part of the request. The second part of the request is for a detailed description of how the performance measures are calculated.
12. The Commissioner's investigation has therefore focussed on the Council's application of section 22(1) to the information that it holds that falls within the scope of the first part of the complainant's request and, if necessary, the balance of the public interest. The Commissioner has also considered whether the Council has complied with section 1(1) with regards to part [2] of the request. Finally the Commissioner has considered whether the Council complied with section 10(1) of the FOIA.

Reasons for decision

13. The subject of the request concerns performance measures within the 'Streets Ahead' contract that the Council has with Amey and which has run since 31 July 2012. The Streets Ahead contract is a large, city-wide highways maintenance contract. In its submission to the Commissioner, the Council has indicated that it is carrying out a full review of this

contract with a view to disclosing as much related information as possible. It says it is undertaking this review because of the level of public scrutiny associated with how the Council is managing its street trees.

Section 1 – general right of access to recorded information

14. Section 1(1) of the FOIA says that anyone who requests information from a public authority is entitled (a) to be told if the authority holds the information and (b) to have the information communicated to him or if it is held.
15. The second part of the complainant's request is for:

"...as much detailed description as possible explaining how these measures are specifically calculated."
16. The FOIA does not oblige a public authority to create new information in order to respond to a request. Nor does the Act oblige an authority to provide explanation, comment or opinion; that is a general customer service matter.
17. The Council has confirmed that, at the time of the request and presently, it does not hold recorded information falling within the scope of this part of the complainant's request.
18. The Council says that it has spoken to the contract manager who confirmed that it does not hold recorded information on the calculations that Amey made or used in order to provide data to support the Council's key performance indicator reports. Nor does it hold a copy of an explanation such as the complainant has requested.
19. The Commissioner has reviewed this part of the request and considered the step the Council has taken to ascertain whether it holds relevant information; namely to ask the contract manager. She considers that the contract manager would have a good knowledge of what information is held and is prepared to accept, on the balance of probabilities, that the Council does not hold information falling within the scope of this part of the request.
20. However, having also reviewed the Council's correspondence with the complainant of 8 September 2017 and 20 November 2017, it appears to her that the Council did not advise the complainant that no such information was held. The 20 November 2017 correspondence *does* refer to the second part of the request but the Council goes on to discuss information that, it appears to the Commissioner, falls more within the scope of part 1. She therefore finds that the Council breached section 1(1)(a) with regard to part 2 of the request.

Section 22 – information intended for future publication

21. The Council has confirmed to the Commissioner that it understands that the detail of the performance measures the complainant is interested in are held in Schedule 2 of the Streets Ahead contract. The measures are titled 'Service Standards' and are broken down into 10 separate parts, relating to the major elements of the contract. They comprise the performance standards/specifications and the timescales that the contract requires works to be completed by. These are the performance measures on which Amey will report.
22. Section 22(1) of the FOIA says that information is exempt information if it is held by a public authority with a view to its publication at some future date (whether determined or not).
23. Section 22(1) can only be engaged if the information was already held with a view to such publication at the time when the request for information was made, and if it is reasonable in all the circumstances that the information should be withheld from disclosure until the date of its publication.
24. Section 22(1) is subject to the public interest test; that is if the Commissioner finds that the exemption is engaged, she must consider whether, despite finding it exempt information under section 22(1), there is a greater public interest in disclosing the information or whether the public interest favours maintaining the exemption.
25. In order to determine whether section 22(1) is engaged the Commissioner considers the following conditions, all three of which must be satisfied for the exemption to be engaged:
 - When the complainant submitted the request, did the authority intend to publish the information at some date in the future?
 - If so, had the authority determined this date when the request was submitted?
 - In all the circumstances of the case, was it 'reasonable' for the authority to withhold the information until some future date (whether determined or not)?

When the complainant submitted the request, did the Council intend to publish the information at some date in the future?

26. The Commissioner's guidance on section 22 explains that a general intention to publish some information is not sufficient to engage the exemption. It is not enough for the public authority to note that it will identify some, but not all, of the information within the scope of the

request for future publication. For section 22(1) to apply, the public authority must have the settled intention to publish the specific information that has been requested, at some point in the future.

27. The Council says that as part of the current contract review the performance measures within the above service standards will be published apart from, it says, the commercially sensitive penalty adjustments individually negotiated with Amey.
28. Since the start of the Streets Ahead contract, the Council says it has been working through the contract with a view to disclosing as much as possible, as indicated on its website¹.
29. In its submission to her, the Council has told the Commissioner that the Schedule 2 documents are with Amey for their final review and representations prior to publication and that it is expecting to publish the non-exempt information in the near future.
30. The Commissioner has reviewed the contract and schedule information already published on the Council's website. She notes that a number of contract schedules have been published (some with information redacted), but not Schedule 2.
31. The Commissioner has also noted the following, which is published on the website:

"We're publishing the Streets Ahead contract as part of our on-going commitment to transparency. Please note that information has been redacted where it is considered commercially confidential or includes personal data.

We're currently in the process of reviewing and redacting the remaining schedules and annexes to the contract and hope to be in a position in the next few months to have completed this exercise and publish these documents on the website.

Some of the Schedules are too large to be published online but these Schedules can be viewed by appointment following the publication of the remaining Schedules and Annexures.

¹ <https://www.sheffield.gov.uk/home/roads-pavements/streets-ahead/streets-ahead-documents>

These Schedules are

Schedule 16 – Agreed Non-Compliant Project Network Parts

Schedule 20 – Project Network Information

Please contact us to make an appointment to view these Schedules.”

32. While it is clear that the Council is publishing information associated with its Streets Ahead contract with Amey and is intending, as part of this, to publish Schedule 2, the Commissioner needs to be satisfied that the Council had intended to publish the specific information requested at the point that it received the complainant's request for the information on 4 February 2017.
33. The Commissioner therefore put further questions to the Council. The Council confirmed that the review of the Streets Ahead contract began when the contract was instigated in August 2012. It says it has always held a commitment to review and publish the contract since that time and noted the published commitment on its website.
34. The Council has explained that the staff initially tasked with the contract review were the contract management team and legal officer involved in the drafting of the contract, who were themselves in part involved in implementing, monitoring and the overall control of the contract and associated works. It says that disclosure of redacted information on the site (and its predecessor on the Council's previous version of the website: <http://www.sheffield.gov.uk/content/sheffield/home/roads-pavements/streets-ahead/streets-ahead-documents.html>) has therefore previously been staggered as each review with Amey has been completed. As a result the Council's view is that the commitment to review and publish the [entire] contract has been in place since contract instigation in 2012 and contract elements have been available in redacted form from at least 2014.
35. The Council went on to explain that further to this process, and as a result of the efforts of pressure groups related to the protests about the Council's management of trees, the Council made a commitment in April 2017 to complete a full and refreshed review of the contract. This would review all elements of the contract, including previously published versions, to make sure that only currently commercially sensitive information is withheld. The Council says through its latest review it is looking to disclose the majority of information within Schedule 2 with very minimal redaction. The Council says this is part of its commitment to be transparent and that it appreciates that commercial sensitivity issues do change over time and this will allow for a wider disclosure of information.

36. In its submission to the Commissioner the Council has argued that due to the sensitive nature of the Streets Ahead contract, it considers it appropriate to make sure that the appropriate 'checks and balances' are completed before the requested information is made public. The Council says it has presented the information to Amey together with a range of wider contract documentation so that Amey can consider whether it has any specific concerns about this information being disclosed. The Council considers this is a proportionate process in this specific case.
37. During the Commissioner's investigation, the Council also provided her with material that it considers is evidence of a commitment to publish the contract, including Schedule 2. This is email correspondence from April 2017 (ie after the date of the complainant's request) and a log that itemises: each schedule; whether each schedule contains redactions, whether each schedule has had particular approval and whether it is 'On website'. It is not clear whether this last element means that a particular schedule is currently on the website, or is destined to be published on the website. The Commissioner assumes it means the latter as Schedule 2 has been marked 'Yes'.
38. The Council may have made a further commitment in April 2017 to review [and publish] the entire Amey contract including Schedule 2. However, the Commissioner can only consider the situation at the time of the request, in February 2017.
39. It is not clear from the Council's website that the commitment to publish the contract which is published on the website pre-dates the complainant's request. And the Council has not provided recorded evidence to support its position that, in February 2017 specifically, it had the settled intention to publish Schedule 2.
40. Despite this, the Commissioner is prepared to accept that elements of the contract were being published from at least 2014 and there is no evidence to suggest that all or parts of Schedule 2 of the contract would not also have been published in time.
41. It follows that the Commissioner is prepared to accept that, at the time of the request, the Council had the settled intention to publish information related to the complainant's request at some point in the future. However, for the section 22(1) exemption to apply, there must be the settled intention to publish, in the future, *the specific information that has been requested*.
42. When it received the request in February 2017 it appears that the Council was engaged in an ongoing review of the contract with Amey; considering what would be published and what would not. The website declaration referred to above supports this; it says "*We're currently in*

the process of reviewing and redacting..." The Council would therefore not, it seems to the Commissioner, have been able to confirm exactly what elements of the contract would be published in the future and what elements would not. It follows that it cannot be said that the Council had a settled intention to publish the specific information that has been requested at the time of the request. The Council had not decided whether the requested information was to be published or not. This is further supported by the fact that a further, more in depth, review was instigated after the request was made, in April 2017. If the Council had known exactly what was to be published at the time of the request there would have been no need for any further review (a review that included Schedule 2) in April.

43. In addition, all the requested information must be published at some time in the future for section 22 to apply. The Commissioner has noted the Council intends to redact at least one element of the requested information. At the time of the request, it could not therefore have been certain what information would be published; because the redactions had not been finalised at the time of the request there is a real danger that some of the requested information that it has said would be published in the future could be still be redacted ie not published.
44. In view of the above, the Commissioner has decided that the first of the criteria at paragraph 25 has not been met. This is because she has found that, at the time of the request, the Council did not have the settled intention to publish the specific information the complainant has requested, at some point in the future. Because not all three of these criteria will therefore be met it follows that the Commissioner must conclude that the Council was not entitled to rely on section 22(1) with regard to the information it has withheld under this exemption. Because she has found that section 22(1) is not engaged it has not been necessary for the Commissioner to consider any public interest arguments associated with this exemption.

Section 10 – time for compliance

45. Section 10(1) says that a public authority must comply with section 1(1) as soon as possible and within 20 working days following the date of receipt of the request.
46. In this case, the request was submitted on 4 February 2017. The Council did not provide a response until 8 September 2017; far in excess of the 20 working days. At this point the Council complied with section 1(1)(a) with regards to part 1 of the request but did not comply with section 1(1)(a) with regards to part 2, as has been discussed above.

Right of appeal

47. 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

48. 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.
49. 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

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