

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 February 2018

Public Authority: East Riding of Yorkshire Council
Address: County Hall
Beverley
East Riding of Yorkshire
HU17 9BA

Decision (including any steps ordered)

1. The complainant has requested a copy of a contract between East Riding of Yorkshire Council and Arvato Government Services (ERYC) Ltd. East Riding of Yorkshire Council disclosed some information and withheld other information under the exemptions for personal data (section 40(2)) and commercial interests (section 43(2)).
2. The Commissioner's decision is that East Riding of Yorkshire Council:
 - failed to comply with the duty to confirm or deny within the statutory time limit therefore breaching section 1(1)(a) and section 10(1) and;
 - has failed to demonstrate that section 43(2) of the FOIA is engaged, thus also breaching section 1(1)(b).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose Schedule 15 of the Guarantee and Schedule 28 of the Joint Venture Agreement.
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 23 May 2017, the complainant wrote to East Riding of Yorkshire Council (the "council") and requested information in the following terms:
"A copy of any contract between the council and Arvato"
6. The council responded on 20 June 2017. It stated that it did not hold the requested information.
7. Following an internal review the council wrote to the complainant on 7 September 2017. It stated that it held a contract which took the form of a partnership agreement between the council and Arvato Government Services Ltd. It disclosed some of the contract to the complainant and withheld other information under the exemptions for personal data (section 40(2)) and commercial interests (section 43(2)).

Scope of the case

8. On 20 September 2017, following the internal review, the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The complainant confirmed that they wished the Commissioner to consider whether the council had correctly withheld the information in Schedule 15 of the Guarantee and Schedule 28 of the Joint Venture Agreement. The council confirmed that it was not relying on section 40(2) to withhold this information so the Commissioner has considered whether section 43(2) of the FOIA has been correctly applied.

Reasons for decision

Section 1 – duty to confirm or deny

10. Section 1(1) of the FOIA requires public authorities to inform requesters whether information of the description specific in a request is held and, where it is, to communicate this to a requester.
11. Section 10(1) of the FOIA requires authorities to take the steps set out under section 1(1) within 20 working days of the date of receipt of the request.

12. On 23 May 2017, the complainant wrote to the council and requested the following information:

"A copy of any contract between the council and Arvato"

13. On 20 June 2017 the council responded to the request stating:

"You have asked for a copy of any contract between the Council and Arvato. There are, you will be aware, a number of companies within the Arvato company. I have taken it that your request is for any contracts between the Council and Arvato Government Services Ltd. The partnership agreement for the provision of corporate and central services entered into in 2005 was between the Council and Aravato Government Services (ERYC) Ltd. This is a different company to Arvato Government Services Ltd. Arvato Government Services Ltd provides no services to the Council...so there is no contract for the provision of services between that company and the Council."

14. On 22 June 2017 the complainant replied to the council and confirmed that they were seeking *"....a copy of any contract between the council or anyone associated with the council and any company with any spelling of Arvato or Bertelsmann in its name or any company associated with these companies."*
15. On 7 September 2017, in its internal review response, the council confirmed that it held a copy of a contract associated with a partnership agreement between itself and Arvato Government Services (EYRC) Ltd.
16. The Commissioner considers that the council's initial response wrongly restricted the terms of the request to contracts between itself and Arvato Government Services Ltd. The Commissioner considers that it is quite clear from the wording of the request that the complainant's interests were not confined to contracts associated with Arvato Government Services Ltd. Furthermore, the Commissioner does not consider that it was reasonable for the council to assume that the complainant, or indeed any requester, would have foreknowledge of the intricacies of the Arvato family of companies.
17. Having considered the available evidence the Commissioner has concluded that the council failed to correctly confirm or deny whether information specific in the request was held until the time of the internal review. As this was some 4 months after the date of the original request she finds that the council breached section 1(1)(a) and section 10(1) of the FOIA.

Section 43(2) – Prejudice to Commercial Interests

18. The withheld information consists of two parts of a contract, namely, Schedule 15 from a Guarantee and Schedule 28 from a Joint Venture Agreement.

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.

Commercial Interests

19. "Commercial interests" in the context of this exemption encapsulates a wide variety of activities.
20. In this case the withheld information relates to a contract between the council and Arvato Government Services (ERYC) Ltd. The contract relates to the provision of corporate and support services.
21. Having considered the withheld information the Commissioner is satisfied that it relates to a commercial activity.

Likelihood of Prejudice Occurring and Affected parties

22. 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.
23. 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.
24. 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).
25. 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).

26. In this case the council has stated that disclosure of the information would be likely to prejudice the commercial interest of the following:

- Bertelsmann AG (the parent company of Bertelsmann UK Ltd);
- Bertelsmann UK Ltd (the parent company of Arvato Government Services Ltd and other companies in the Arvato group in the United Kingdom) and,
- Other companies in the Arvato group in the United Kingdom.

Consultation

27. In accordance with the recommendations of the code of practice issued under section 45 of the FOIA (the "Code"), the council confirmed that it consulted with Arvato Public Sector Services Ltd ("Arvato") and sought its views as to the disclosure of the information¹. For the purposes of brevity, the Commissioner will refer to the various manifestations of the third parties affected under the umbrella reference of "Arvato".

28. The Commissioner has had sight of the relevant correspondence and has considered Arvato's concerns alongside those provided by the council in reaching her decision.

Nature of the Prejudice

29. The Commissioner has considered the arguments provided as they relate to each element of the withheld information.

Schedule 15 of the Guarantee

30. The council has explained that this document relates to a contract between Arvato and the council for the provision of services which ended in September 2013.

31. The council has explained that, although the contract is no longer active, the withheld information details the approach Arvato takes to risk generally, specifically the level of risk it would be prepared to underwrite for this and similar commercial contracts.

¹ The Code is published online here:

<http://webarchive.nationalarchives.gov.uk/20150603210930/http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

32. The Commissioner notes that the council's argument echoes the submissions provided by Arvato and further notes Arvato's concerns that, as it still operates in the arena of public sector contracts, disclosure of the information would be potentially damaging to its current and future commercial interests.
33. What is not clear to the Commissioner is precisely how disclosure of the information, beyond revealing its approach in this specific regard, would causally result in prejudice to Arvato's commercial activities. The submissions provided do not explain how (or why) placing the information in the public domain would, for example, benefit a competitor to the detriment of Arvato.
34. The Commissioner is mindful that there can be scenarios where disclosing information about a contractor's strategy would assist a competitor in favourably modifying its approach in contract negotiations. However, it is for public authorities to explain what form the changed approach would take, how the specific information would facilitate this and how this would damage the commercial interests or otherwise undermine the strategy of the contractor.
35. The Commissioner does not consider it a sufficient argument to state that information is being withheld because it represents a party's approach to contracts. Such an argument would need to be developed to show placing knowledge of an approach would be likely to result in some identifiable form of prejudice.
36. In this case neither the council nor Arvato have explained how disclosing Schedule 15 of the Guarantee would assist a competitor or would otherwise be likely to prejudice Arvato's commercial interests.
37. In cases where an authority has failed to provide adequate arguments in support of the application of exemption the Commissioner does not consider it to be her responsibility to generate arguments on its behalf. In this case the Commissioner considers that the council has had ample opportunities to justify its position, including at the time of its initial response and at the internal review stage. She made it clear in her letter of investigation that it would have a further opportunity to argue its case in its submissions to her office. On the basis of the available evidence, the Commissioner has concluded that, in relation to Schedule 15 of the Guarantee, the council has failed to demonstrate that section 43(2) is engaged.

Schedule 28 of the Joint Venture Agreement

38. The council has explained that Joint Ventures are common commercial vehicles in public private partnerships. It has stated that the joint venture under consideration was designed to compete:

"...in the outsourcing market and there is information contained within the schedule which gives and insight into the commercial methods of Bertelsmann and the wider Arvato family which could be of advantage to a competitor..."

39. Again, as set out above in relation to Schedule 15 of the Guarantee, the Commissioner is struck by the paucity of detail in the council's submissions. Beyond stating that the information is commercial in nature and that it could be of advantage to a competitor, neither the council nor Arvato has explained how specific elements of the information would provide explicit benefits to a competitor.
40. The Commissioner is absolutely alive to the potential for a negotiating position to be undermined and the competitive marketplace to be distorted when information is disclosed without reciprocal disclosures by other parties in the market. However, it is not a given that all contractual information, if disclosed, will be likely to result in prejudice to a party's interests. In each specific instance, the Commissioner considers that it is the responsibility of an authority to identify relevant elements of withheld information and explain how disclosure would be likely to result in specific detriment to a party's interests.
41. Furthermore, the Commissioner notes that neither the council nor Arvato has explained how the document, which dates back to 2005, is still commercially relevant given the wide-ranging changes in the market which are likely to have taken place in the intervening years. Again, it is the responsibility of the council to explain how the information contained within the document maintains its commercial relevance and to set out exactly how it might be used by competitors to undermine Arvato's strategy.
42. Having considered the withheld information and the submissions provided the Commissioner is left with the impression that the council has sought to withhold the information on a general basis, without regard for the specific reasons for applying the exemption.
43. The Commissioner recognises that the council is relying on the lower threshold of likelihood in this case. That is, that disclosure would be likely to result in prejudice to Arvato's interests. However, she considers that the speculative, high level arguments provided by the council and Arvato itself do not provide the necessary detail to conclude that this limb of the exemption is engaged. The Commissioner considers

that it is not possible to conclude on the available evidence that the risk of disclosure resulting in prejudice is a real and significant.

44. As noted above, the Commissioner does not consider it to be her responsibility to generate arguments on the council's behalf and she is satisfied that the council has had sufficient opportunities to set out its final position in this matter.
45. As the Commissioner has concluded that the council has failed to demonstrate that the exemption is engaged in respect of both Schedule 15 of the Guarantee and Schedule 28 of the Joint Venture Agreement she has not gone on to consider the public interest test.

Right of appeal

46. 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

47. 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.
48. 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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