

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 June 2019

Public Authority: The London Borough of Enfield
Address: Civic Centre
Silver Street
Enfield
EN1 3XY

Decision (including any steps ordered)

1. The complainant submitted a request to the London Borough of Enfield (the Council) seeking a breakdown of the cost of a quote he had received for constructing two vehicle crossovers at his property. The Council provided some of the information it held but sought to withhold a breakdown of the contractor's costs on the basis of section 43(2) (commercial interests) of FOIA. The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of section 43(2) and that in all the circumstances of the case the public interest favours maintaining the exemption.

Background

2. The Council provided the complainant with a quote for constructing two vehicle crossovers at a particular property in 2014, one 4.2m wide and one 4.88m wide. In response to a request for information seeking a breakdown of this quote, the Council contacted the complainant on 19 March 2018 and explained that the cost of the 4.2m wide crossover was £1,176.14 and the 4.88m wide crossover was £1,302.00. In addition the Council quoted a figure of £226.00 to remove a bay. The Council explained that the above figures had been derived from a set rate of £155 per square metre (sqm) with the 4.2m wide bay involving 7.59 sqm of work and the 4.88m wide bay involving 8.4 sqm of work.

3. The complainant did not go ahead with the work in 2014, but in 2018 sought an updated quote for the work to construct the two crossovers. The Council provided both quotes on 28 February 2018. The cost of the 4.2m wide crossover being £2,876.08, plus an additional £284.60 for working restricted hours, and the cost of the 4.88m wide crossover being £3238.46, plus an additional £320.60 for working additional hours.

Request and response

4. The complainant contacted the Council on 25 May 2018 and asked it to:
'Supply an itemised cost for all the charges and costs the council is claiming are incurred for [constructing the two crossovers in 2018] The Council should be open and honest about the charges they make to a member of the public as they are a Public Service'.
5. The Council responded on 13 June 2018 and provided the complainant with some of the information he requested; it explained that the unit rate for a crossover was now £202 per sqm and this included the costs charged by the Council's third party Highway and Engineering work contractor and time charge costs from Council officers. The Council also provided a breakdown of the £202 figure showing the contractor's total rate per sqm, the total cost of Council officer time per crossover which is then converted in a cost per sqm, and the Streetworks Permit cost which is also converted into a cost per sqm. The breakdown showed that the officer time was charged at £66.77 per sqm, the street works permit at £6.88 per sqm and the contractor's costs at £128.91 per sqm. The breakdown included details of how the first two figures were calculated. However, the Council explained that it considered that the information it held regarding a breakdown of the contractor's costs was exempt from disclosure on the basis of section 43(2) (commercial interests) of FOIA.
6. The complainant subsequently contacted the Council on 18 July 2018 and asked it to conduct an internal review of this decision.
7. The Council informed him of the outcome of the internal review on 12 October 2018. The review upheld the application of section 43(2) of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 2 November 2018 in order to complain about the Council's refusal to provide him with a breakdown of the contractor's costs on the basis of section 43(2) of FOIA.

Reasons for decision

Section 43(2) – commercial interests

9. Section 43(2) states that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).'

10. 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 authority 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 – ie, 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.

The Council's position

11. The Council argued that disclosure of the withheld information would be likely to prejudice the commercial interests of its contractor. It explained that the withheld information formed part of the tender documentation provided by its contractor, VolkerHighways. The Council argued that disclosure of this information would result in the contractor's pricing structures becoming widely known and that this would give its competitors an advantage over it in pricing tenders for other contracts with local authorities. This would be likely to lead to VolkerHighways being unsuccessful in obtaining tenders or losing business to competitors.

The complainant's position

12. The complainant disputed the Council's position that disclosing the information would harm the contractor's interests as it would simply reveal what they are charging for their services.

The Commissioner's position

13. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the Council clearly relates to the interests which the exemption contained at section 43(2) is designed to protect. With regard to the second criterion the Commissioner is satisfied that disclosure of the withheld information has the potential to harm the contractor's commercial interests. The Commissioner has reached this conclusion given that the withheld information contains details of VolkerHighways' pricing strategy for work of this type. In the Commissioner's view it is clearly plausible to argue that disclosure of this information has the potential to harm VolkerHighways' commercial interests given the insight such information would provide to its competitors. With regard to the third criterion the Commissioner also accepts that this is also met and thus if the withheld information were to be disclosed there is clearly more than a hypothetical risk of prejudice occurring; rather there is a real and significant risk of this prejudice occurring. The Commissioner has reached this view given the level of detail contained in the withheld information about VolkerHighways pricing model and the fact such prices are likely to be used by the contractor for other similar contracts in the future.
14. Section 43(2) is therefore engaged.

Public interest test

15. Section 43 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in disclosing the withheld information

16. The complainant argued that the Council had failed to explain the significant difference in the quoted prices between the 2014 quote and the 2018 quote and it appeared that the Council were now seeking to charge an administration fee of approximately £3,500. The complainant emphasized that the Council was not allowed to make a profit when undertaking such works. He therefore needed access to the withheld information in order to fully understand how the Council had calculated the quotes provided in 2018.
17. During the course of her investigation, the Commissioner established further details regarding the basis of the quotations provided to the complainant in 2014 and 2018 in order attempt to understand the significant difference in the price of the two quotes.
18. The Council explained that the difference between the two quotes was due to two factors. One, as noted above, the price per sqm for work in completing a crossover had increased from £155 to £202 between 2014 and 2018. And two, the Council explained that whilst the width of each crossover remained the same, ie 4.2m and 4.8m respectively, the sqm quoted for had increased, thus increasing the price of the quotes.
19. The Council explained that this was because the original 2014 quote only covered the construction of a ramp area near the road. This was because the officer at the time had not allowed for strengthening under the paving slabs to the rear of the block paving (ie nearer the boundary of the complainant's property) as it was assumed that there had been previous footway works that would have provided a stronger base that might allow vehicles across this. Therefore, the price quoted in 2014 was for the construction of the ramp area only. However, the Council explained that when the site was visited in 2018 the price quoted was for the whole area (ie construction of a ramp area and also strengthening the rear block paving). As a result the Council explained that the area of the pavement which needed work to accommodate the 7.8m wide crossover was 16.032 sqm, (whereas previously it was considered to be 8.4 sqm) and when you multiply 16.032 sqm by £202 this comes out to £3238.46 plus the restricted hours charge of £320.60. The Commissioner understands that similar amendments applied to the

4.2m crossover, with the area needing work changing from 7.59 sqm to 14.24 sqm, thus giving a quote of £2876.08 (14.24 x 202).

20. The Council informed the Commissioner that it had explained to the complainant that if it was found by its contractors that the footway under the block paving has already been strengthened and no further works are required, the cost charged for that area of construction would be refunded.

21. The Commissioner communicated this explanation to the complainant. In response, the complainant noted that:

- The pavements on road in question had already been reinforced and parking lines provided so that people can park the entirety of their vehicles on the pavement to ease traffic. This can be clearly seen.
- It is not the whole width of the property, but two separate crossovers with a gap between the two, that would not form part of the crossovers and should not be taken into account.
- The complainant argued that in 2014 the Council *had* calculated the cost based on the full depth of the pavement and allowed for reinforcement of the pavement, ie the block paving area. The complainant explained that he distinctly remembered asking the officer why he was measuring up to the boundary of the complainant's property and he said in case it needed reinforcing. The complainant explained that he informed the officer that the pavements had already been reinforced, and the officer responded by saying that he had to take such measurements just in case. The complainant also referred the Commissioner to a copy of the Council's email to him of 19 March 2019 which details the costs of the 2014 quote and that this clearly states that figures quoted were based upon '*4.2 and 4.88 metres wide x the depth. The entire crossing area measures the depth from the kerb edge up to the boundary with your property.*'
- One could clearly see that all the pavements on the road in question had already been strengthened and that only the very edge of the pavement gets dropped.
- Finally, the complainant argued that there was clear public interest in understanding for what and how users of this service are charged. He emphasised that no damage would be done to the contractor as the Council decide who they give the contract to, and if this made them more competitive then it is in the public and Council's interest.

Public interest in maintaining the exemption

22. The Council identified the following factors in favour of maintaining the exemption and withholding the information:

- It is not in the public interest for the Council to disclose information that would be likely to damage the commercial interests of a company, as this could lead to financial problems for the company and or loss of jobs, which is not in the public interest.
- It is not in the public interest for commercially sensitive information about one company to be released, when the same category of information relating to other companies is not so released, thus putting one company at a commercial disadvantage.
- It is not in the public interest for information to be released, which could negatively influence ongoing and future negotiations associated with this contract, as this would be likely to have an adverse effect on value for money for the council and by extension the people of Enfield.
- The withholding of the exempt sections will not negatively affect accountability, as the council has full and proper mechanisms in place for this, and there are sufficient statutory methods for the public to be involved in ensuring accountability, for example the Overview and Scrutiny process, councillors' involvement and the Audit Commission Act process.

Balance of the public interest arguments

23. With regard to attributing weight to the public interest in disclosure, the Commissioner recognises that the complainant has concerns with the increase in the price quoted for constructing the crossovers from 2014 to 2018. However, in the Commissioner's opinion the explanation provided by the Council which is replicated above at paragraphs 18 and 19 of this notice provides a rationale and logical explanation for the increase in costs, in particular that a larger area of the footway needed alteration. The Commissioner acknowledges that the Council's email to the complainant of 19 March 2018 stated that the 2014 quote covered work from *'the kerb edge up to the boundary with your property'*. However, the Commissioner can only assume that this is perhaps misleading and that the explanation provided to her by the Council during the course of her investigation is. In any event, the Commissioner does not consider that disclosure of the withheld information would assist the complainant in understanding the differences between the 2014 and 2018 quotes. The Council has clearly explained that the cost per sqm of the work has increased from £155 to £202. Furthermore, that the figure of £202 breaks down as follows: the Council officer time was charged at £66.77 per sqm, the street works permit at £6.88 per sqm and the contractor's costs at £128.91 per sqm. The Commissioner struggles to see how disclosure of information setting out how the contractor arrived at a cost of £128.91 per sqm would assist the complainant in understanding the difference between the price of two quotes, beyond the information already released and provided by the Council.

24. Nevertheless, the Commissioner does accept that there is a more general public interest in the disclosure of information which would allow the public to understand the basis of the Council's charges for particular services. She acknowledges that disclosure of the contractor's costs would provide the public with a greater understanding of the basis of such charges beyond the information already provided.
25. However, in the Commissioner's opinion there is very strong and inherent public interest in ensuring fairness of competition and in her view it would be firmly against the public interest if a company's commercial interests are harmed simply because they have entered into a contract with a local authority. Given the weight that the Commissioner considers should be attributed to this argument, and taking into account the amount of the information the Council has already disclosed in respect of how it calculates the charges for crossovers, she has concluded that the public interest favours maintaining the exemption.

Right of appeal

26. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

27. 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.
28. 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

Jonathan Slee
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