

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 December 2019

Public Authority: West Oxfordshire District Council

Address: Woodgreen
Witney
Oxfordshire
OX28 1NB

Decision (including any steps ordered)

1. The complainant requested from West Oxfordshire District Council (the Council) information relating to the Council's building control performance standards and site inspections. The Council provided information within the scope of some parts of the request but withheld information within the scope of parts 2 and 3 under sections 43(2) (commercial interests), 43(1) (trade secrets) and 41 (information provided in confidence) of the FOIA.
2. The Commissioner's decision is that the Council correctly applied section 43(2) of the FOIA. Therefore, she has not gone on to also consider the application of sections 43(1) and 41 of the FOIA.
3. The Commissioner does not require the Council to take any steps as a result of this decision.

Request and response

4. On 8 November 2018 the complainant wrote to the Council and requested information in the following terms:
 - "1. A copy of Building Control Performance Standards/Guidance followed by WODC (Not required if the MHCLG's Building Control Performance Standards (and guidance) 2017 are followed)
 2. Copies of all 'Documented Information' relating to site inspections.

3. *A copy of the Building Control Quality Manual, (or equivalent document. including Scope, and Quality Policy & Objectives) including any Appendices etc., together with the Interested Parties Matrix and lists of all 'Documented Information'.*
4. *Copies of the ISO9001 Internal Audit Programme and Internal Audit Procedures, and, if available, the first ISO 9001:2015 Internal Audit Results."*
5. On 6 December 2018 the Council responded. It addressed requests 2, 3 and 4, but the Council did not provide its response to request 1. With regards to request 2, the Council said it believed that the complainant already held a copy of the information. Regarding request 3 the Council explained that this information is only available to Local Authority Building Control (LABC) members and that it can be obtained from them directly. In response to request 4, the Council disclosed some relevant information. Within its response, the Council offered the complainant the chance to arrange a meeting with the Council in order to address any specific checks and balances within the process.
6. On 15 December 2018 the complainant asked the Council for clarification of its response. He asked the Council some questions relating to its reply to parts 1 and 2 of his requests.
7. The complainant said that the Council had provided "*clarification of some issues*" on 20 December 2018.
8. On 31 December 2018 the complainant asked for an internal review with regards to parts 2, 3 and 4 of the request. He considered information had been withheld without sufficient justification by the Council.
9. On 4 February 2019 following an internal review, the Council considered that section 43(2) of the FOIA applied to request 3. With regards to the remaining parts of the request, request 1 was still not addressed, in response to request 2 the Council disclosed some information and in response to request 4, it disclosed some information, but stated that other parts of it were not disclosable.

Scope of the case

10. The complainant contacted the Commissioner on 14 February 2019 to complain about the way his request for information had been handled. Specifically, his complaint was initially that the information within the scope of requests 2, 3 and 4 was not disclosed by the Council at the internal review.

11. Following the Commissioner's request for the Council's submission on the application of section 43(2) of the FOIA to part 3 of the request, the Council revised its response and cited the exemptions provided by sections 43(1) (trade secrets), 43(2) (commercial interests) and 41(1) (information provided in confidence) to parts 2 and 3 of the request.
12. The complainant subsequently disputed the Council's reliance on the exemptions. He therefore asked the Commissioner to extend the focus of her investigation to include the Council's application of exemptions to part 2 of the request. He did not mention the Council's response to part 1, and with regards to part 4 the complainant withdrew this request.
13. The following analysis focuses on whether the exemptions at sections 43(1), 43(2) and 41(1) of the FOIA were cited correctly to the information within the scope of parts 2 and 3 of the request.

Reasons for decision

Section 43(2) – prejudice to commercial interests

14. Section 43(2) of the FOIA states that information is exempt if its disclosure 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.
15. The exemption can be engaged on the basis that disclosing the information either "would" prejudice commercial interests, or, the lower threshold, that disclosure "would be likely" to prejudice those interests. The term "likely" is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice is more probable than not. For the Commissioner to accept that prejudice *would* result, she must be satisfied that this outcome is more likely than not.
16. The withheld information, which was created by LABC, consists of copies of documented information relating to site inspections and a copy of the Building Control Quality Manual. The Commissioner considers the withheld information is commercial in nature as it relates to the Council's building works and building regulations. She recognises that

the information provides a competitive advantage to LABC¹. Also, she recognises that the Council considers that the information is unique and could not be easily recreated by competitors in the industry. Having determined that the information is commercial in nature, the Commissioner has gone on to consider the prejudice which disclosure would or would be likely to cause and the relevant party or parties that would be affected.

17. The Council stated that the information is not disclosable because it considers this to be commercially confidential both to LABC and the Council. It explained that the information is made available to members of LABC with an obligation not to supply it to third parties.
18. For Section 43(2) to be engaged three criteria must be met:
 - Firstly, the actual harm which the Council alleges would be likely to occur if the withheld information was disclosed has to relate to commercial interests;
 - Secondly, the Council must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests; 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. whether there is a real and significant risk of the prejudice occurring.
19. With regards to the first criterion, the Commissioner accepts that the prejudice envisaged would be to the commercial interests of the parties concerned. Therefore, the Commissioner is satisfied that the first criterion is met. This is not to say that she agrees it will happen; simply that the criterion is met.
20. The Council explained that disclosure would reveal sensitive information to LABC's competitors. This would inform competitors as to how LABC conducts its business and as LABC are in direct commercial competition with private sector companies, disclosure would result in loss of market share.

¹ The LABC website gives the following description: "*Local Authority Building Control (LABC) represents all local authority building control teams in England and Wales. LABC teams are independent, impartial and not for profit.*" (<https://www.labc.co.uk/about-labc>)

21. Regarding the second criterion, the Council explained that LABC informed the Council that the ISO referred to in the request has only just been introduced after two years in development at a specific cost to LABC. The Council said that if the information was used to duplicate sections of the process which LABC has developed, this may reduce its ability to compete with private suppliers.
22. The Commissioner accepts that the reasoning of the Council concerns prejudice to commercial interests, resulting from disclosure of the specific information requested.
23. Turning to the third criterion, when claiming that disclosure would prejudice the commercial interest of a third party, the Commissioner expects a public authority to obtain arguments from the third parties themselves. During this investigation, the Council was asked to clarify on what basis it believed that disclosure would prejudice the commercial interests of LABC. It was also asked to provide copies of any correspondence the Council had had with LABC in relation to this request.
24. The Council responded and confirmed that it had consulted with the LABC on a number of occasions regarding disclosure of the withheld information. LABC said that the information requested is the intellectual property of LABC and that the information is commercially confidential. It explained that its learning, qualifications, competency matrix and the Quality Management System have cost LABC thousands of pounds of members' money to develop. LABC said that the material is only accessible through the members area of its website and that this information *"should not, under any circumstances be shared."*
25. The Council argued that a disclosure of LABC's methodology would undermine its ability to compete on a level playing field with private sector providers. It would allow competitors to copy and undermine LABC's methodology in future tenders. LABC has spent significant costs developing its commercial product. Disclosing this would allow its competitors to copy the same systems to their own products without them having to spend money developing their own systems. This would undermine LABC's competitiveness in the market to a significant degree.
26. The Commissioner agrees that disclosure of the withheld information requested would undermine LABC's commercial position as it would give competitors an advantage when tendering for work. It would inform competitors as to how LABC conducts its business. The information could be copied or a similar system could be designed by LABC's competitors and the Commissioner accepts that this disclosure would threaten the sustainability of LABC.

27. Having viewed the withheld information and considered the arguments made, the Commissioner accepts that prejudice to the commercial interests of LABC would be more likely than not to result through disclosure of the information in question. She therefore finds that disclosure of the information would result in prejudice to the commercial interests of LABC and on this basis section 43(2) is engaged.

Public interest test

28. Having found that the exemption is engaged, the Commissioner has gone on to consider the public interest factors in favour of disclosing the withheld information and of maintaining the exemption.

Public interest arguments in favour of disclosing the withheld information

29. The Council considers disclosure of the withheld information would increase transparency and public confidence in the building control processes and procedures. The Council said that disclosure of the information would be likely to protect the public.
30. The complainant argued that there is currently considerable debate about the decline in the build quality of residential and other property. He said that in addition to the need for information relating to building control, he considers that there is a general expectation of transparency and openness in local authority activities.
31. The complainant also argued that information should be available to property owners or house buyers, to help them understand the approach taken by their council when inspecting properties. He added that individuals should be able to satisfy themselves that building controls risk assessment and inspection procedures follow best practice.
32. The Commissioner recognises that there is a significant public interest in disclosure of information concerning the Council's building control system. Specifically, with regards to the way the Council conducts its business and in its decision making. In this case, the Commissioner acknowledges that there is a public interest in knowing that the building regulations are being considered and applied properly, and in knowing building quality issues that are taken into consideration.

Public interest arguments in favour of maintaining the exemption

33. The Council argued that a loss of market share would lead to the loss of staff and an inability to run an effective service. It said that fewer applications would mean that the cost of processing each application would increase; some of these costs would need to be passed to the public.
34. The Council reiterated that the information (the Building Control Quality Manual) is the intellectual property of LABC. It said that the manual is available to local authorities for a fee. The terms and conditions that the Council has agreed to, do not permit it to share it outside of the LABC network. The material, the Council explained, is only accessible through the members' area of the website. Disclosing the information, it said, would be likely to result in the termination of the Council's subscription, and being suspended from the association.
35. The Council further explained that it would be unable to access the information it needs to operate its service effectively or to reap the benefits of being a member of LABC, and that this would be counter to the public interest. The Council said that the impact of this would be costly for the Council both in terms of finance and reputation and would be likely to deter other third parties from working with the Council, which would also be counter to the public interest.
36. The Council considers that there is a public interest for local authorities to be transparent in the way that they carry out their business and in their decision making and, in this particular situation, that the building regulations are being applied properly. The Council said, however, that there are appropriate processes in place for ensuring quality.
37. The Council does not consider it is in the public interest to disclose the LABC manual and associated documents as their disclosure would result in detriment to all members of LABC, and this detriment would be significant. LABC has operated in the national context for many years. It has built up a network and helped to improve standards.
38. The Council considers that disclosure of the information would have a significant impact on the sustainability of LABC; and if LABC was no longer sustainable, there would be wider implications for the local authority sector. For example, the LABC contributes to government working groups post-Grenfell which would be put at risk. The Council believed that prejudice to LABC would be counter to the public interest.

39. The Council said that it would *"lose its market share in an already fiercely competitive market, which would contribute to a less effective, more costly service. As costs increase, customers would choose alternative service suppliers, which would ultimately lead to job losses."*
40. The Commissioner recognises that there is a public interest in preventing prejudice to the commercial interests of LABC. As covered above at paragraph 16, LABC plays an important part in local authority planning controls – disruption to that role would be likely to have an impact well beyond West Oxfordshire District Council, which would be counter to the public interest.

Balance of the public interest arguments

41. The Commissioner recognises that there is a strong and legitimate public interest in the openness and transparency of public authorities with regard to their decision-making processes. In this case, the information relates to planning controls; subject matter in which there is a strong public interest.
42. However, there is a public interest in protecting the commercial interests of LABC; specifically, in protecting its ability to provide a competitive service within a competitive market.
43. Given the level of likelihood that commercial harm would occur should the information be disclosed, the Commissioner has determined that the balance of public interests favours maintaining the exemption.
44. The Commissioner's conclusion is that the public interest in disclosure of the withheld information is outweighed by the public interest in maintaining the section 43(2) exemption. Therefore, the Council was not obliged to disclose the requested information.
45. As the Commissioner has decided that the information requested at parts 2 and 3 of the complainant's request is exempt from disclosure under section 43(2) of the FOIA and that the public interest favours maintaining the exemption, it has not been necessary to go on to also consider the application of sections 43(1) and 41 of the FOIA.

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@justice.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

Ben Tomes
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF