

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 September 2020

Public Authority: Harlow Council
Address: Civic Centre
The Water Gardens
College Square
Harlow
CM20 1WG

Decision (including any steps ordered)

1. The complainant requested information about a tendering process from Harlow Council ("the Council"). The Council provided some information outside the FOIA, which has not been considered in this notice. It provided other information under the FOIA, but made redactions under section 40(2) of the FOIA – third party personal data, section 41(1) of the FOIA – information provided in confidence – and/or section 43(2) of the FOIA – commercial interests. It also withheld some information in its entirety, under the latter two exemptions.
2. The complainant wished the Commissioner to consider the information withheld under sections 41(1) and/or section 43(2). The Commissioner was also asked to consider whether certain correspondence, considered by the Council to fall outside the scope of the request, should have been considered for disclosure in response to the request.
3. The Commissioner's decision is that the Council correctly withheld the information identified at paragraph 18 of this notice, under section 41(1) of the FOIA, and she does not require any steps to be taken in respect of this information. She has also determined that the correspondence identified at paragraph 54 of this notice fell within the scope of the request, and should therefore have been considered for disclosure.

4. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Consider the information identified in paragraph 54 of this notice, and issue a fresh response to the complainant in respect of this information.
5. The Council 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

6. On 6 September 2018, the complainant wrote to the Council to request information of the following description:

“copies of all the documents and information considered during the tender process, including those relating to Harlow Advice Centre, Harlow Citizens Advice Bureau and any other tenderers. Please include the names, qualifications and relevant experiences of all those who took part in the assessment process”.
7. On 25 September 2018, the Council responded and stated that it required more time to consider the public interest test. On 1 November 2018, it issued its full response and provided some information.
8. Specifically, the Council provided two bundles of redacted information under the FOIA. Some personal data (names and contact details) had been redacted. Other redactions were made under the exemptions at section 41(1) of the FOIA – information provided in confidence, and/or section 43(2) of the FOIA – prejudicial to commercial interests.
9. The Council also withheld bank statements, financial statements and accounts, a creditor information sheet, and a business continuity document.
10. The withheld information all related to Harlow Citizens Advice Bureau (“the CAB”), also known as Citizens Advice Harlow.
11. The Commissioner is also aware that the Council also provided the complainant with a bundle of information which related to her own organisation, outside of the FOIA.
12. The complainant requested an internal review on 21 December 2018. The Council sent its internal review response on 24 January 2019 and

subsequently re-sent it on 4 April 2019, owing to its not having been received by the complainant. The Council upheld its position regarding the exemptions that had been applied.

Scope of the case

13. The complainant contacted the Commissioner on 2 July 2019 to complain about the way her request for information had been handled.
14. During the course of the investigation, the complainant confirmed to the Commissioner that she had not expected to receive copies of the CAB's bank statements and was happy for these not to be included in the scope of the investigation. It was also confirmed that the CAB's annual financial statements were already publicly accessible, since they were published on the Charity Commission's website.
15. The complainant accepted that some personal data had been redacted from the CAB bundle. It was agreed that the Commissioner's investigation would focus on the withheld business continuity document, the creditor information sheet, and the redactions that had been made to the CAB bundle. All of this had been withheld under section 41(1) and/or section 43(2).
16. The complainant also questioned whether the Council held any further information relevant to her request. Specifically, she considered that the Council may hold correspondence with an external advisor. She commented: *"The advisor must have been given a brief... there would almost certainly have been telephone calls, emails, hand written notes and texts about the precise framework within which the external advisor would operate, the history of the tender process prior to their appointment, the assessment itself and so on."*
17. During the course of the investigation, the Council identified some further correspondence and provided it to the Commissioner. Its position, however, was that it fell outside the scope of the request. The complainant has confirmed that she wishes the Commissioner to consider whether it falls within the scope of her request.
18. This decision notice covers whether the following information was correctly withheld by the Council under section 41(1) and/or section 43(2) of the FOIA:
 - Information redacted from pages 131-134 of a bundle relating to the CAB; and

- A CAB business continuity document and creditor information sheet.
19. It also covers whether the further correspondence identified by the Council but not yet considered for disclosure, may fall within the scope of the request.

Reasons for decision

Section 41(1) – information provided in confidence

20. Section 41(1) of the FOIA states that information is exempt from disclosure under the FOIA if–
- a) it was obtained by the public authority from any other person (including another public authority), and
 - b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

Was the information obtained from another person?

21. In this case, the information withheld under this exemption comprises information provided to the Council by the CAB, for consideration as part of the tender process. This includes the information from pages 131-134 of the CAB bundle, as well as the creditor information sheet and the business continuity document.
22. The Commissioner is satisfied that the Council obtained all of this information from another person.

Would disclosure constitute an actionable breach of confidence?

23. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following three matters:
- Whether the information has the necessary quality of confidence;
 - Whether the information was imparted in circumstances importing an obligation of confidence; and
 - Whether disclosure would be an unauthorised use of the information to the detriment of the confider.

Does the information have the necessary quality of confidence?

24. Information will have the necessary quality of confidence if it is more than trivial, and is not otherwise accessible.
25. In this case, the Commissioner has reviewed the withheld information. She notes that the information relates to services provided by the CAB. It also concerns the financial position of the CAB, and its potential future operations, as at the date of the tendering process.
26. Regarding its accessibility, the Council has explained that it has been advised by the CAB that the information was not otherwise in the public domain at the date of the request.
27. The Commissioner is satisfied that the withheld information is not trivial and was not, to her knowledge, accessible elsewhere. It therefore has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

28. The Council has explained the expectations of the organisations which were tendering to provide the relevant services. It has explained that, whilst the Invitation to Tender did not state explicitly that information from bidders would be held in confidence, *"it is a cornerstone principle of public procurement that bidders are treated equally and that information about their specific service provision is not shared with other bidders as that would compromise the competitive nature of the process. The Council takes this duty very seriously."*
29. The Commissioner notes that the withheld information was prepared and/or provided by the CAB for the purposes of the tender which, the Council states, is *"an inherently confidential process"*.
30. The Commissioner agrees that the relationship between the Council and businesses providing financial and operational information about themselves in a tendering process, such as in this case, is such that the circumstances create an obligation of confidence.

Would disclosure be an unauthorised use of the information to the detriment of the confider?

31. In this case, the Council has argued that disclosure of the information would be unauthorised, for the reasons explained above relating to expectations of confidence. It further considers that a risk of detriment to the CAB would arise from disclosure, because the tendering process related to the grant of a contract for three years. The Council states that: *"it is very likely that the Council will retender for the same services"*

again and that the service provision will be a similar nature to the current contract. Therefore, providing the complainant with the withheld information... at the time of the FOI Request, would have given the complainant (and other third parties if the information was subsequently made public) a lengthy period of time to plan for, or put in place, different arrangements that would ensure equality with the CAB next time around. This would put the CAB at a material disadvantage under a new tender opportunity".

32. The Commissioner is satisfied that, at the date when the request was being considered for response, there was a risk of detriment to the CAB from the disclosure of the information.
33. The Commissioner has therefore determined that the criteria at section 41(1) of the FOIA are met in this case, and the withheld information was provided in confidence.

The common law duty of confidence and the public interest

34. While section 41(1) of the FOIA is an absolute exemption, and therefore not subject to the public interest test at section 2 of the FOIA, the common law duty of confidence contains an inherent public interest test.
35. The test assumes that the information should be withheld, unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence.
36. The Commissioner considers that there is always some public interest in a public authority (the Council) conducting its business in a transparent manner.
37. Additionally in this case, the Commissioner understands that the complainant considers that there is a public interest in being able to scrutinise, fully, the information provided to the Council for consideration, prior to its decision to award the relevant contract.
38. Whether any public interest is sufficient to outweigh the duty of confidence, will depend on the circumstances of the case. For example, there would be greater public interest in disclosure in a case where there is evidence of any wrongdoing, or efforts to cover up the reason for a course of action.
39. The Council has argued that the balance of the public interest lies in its being able to *"ensure that its suppliers maintain confidence in the Council's ability to protect confidential information provided as part of the tender process"*.

40. The Council also stated: *"the CAB is a charity, meaning that its finances and activities are already scrutinised, and any further information disclosed would neither enhance the Council's accountability or transparency, nor allow additional scrutiny of the CAB."*
41. Regarding any wrongdoing, the Council explained by way of background that the complainant, in parallel to her FOI request, pursued a complaint against it through the Local Government Ombudsman¹, in relation to the tender process and the awarding of the contract. The Commissioner notes that the Ombudsman's decision found no fault with the Council's processes in these matters.

The Commissioner's decision

42. The Commissioner has weighed up the public interest in the disclosure of the information, against the public interest in maintaining the inherent duty of confidentiality which exists when information has been provided in confidence.
43. Having considered the withheld information in this case, she is not persuaded that there exists sufficient public interest in its disclosure as to outweigh the duty of confidence.
44. The Commissioner is satisfied that the information described in paragraph 18 of this notice was correctly withheld under section 41(1) of the FOIA.
45. It has, therefore, not been necessary for her to consider whether that information is also exempt under section 43(2) of the FOIA.

Section 1(1) – information falling within the scope of the request

46. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to them.

¹ <https://www.lgo.org.uk/decisions/other-categories/leisure-and-culture/19-001-049>

47. In this case, the complainant expected correspondence with an external adviser to be held and, if so, for it to fall within the scope of her request. The Council identified some information, which it provided to the Commissioner for her consideration; however, its position was that it did not fall within the scope of the request.
48. The Commissioner notes that the relevant information is correspondence between the Council and an external adviser, and that it does concern the two tendering organisations. It also dates from the time that the tendering process was ongoing. She has therefore considered the wording of the request.
49. In this case, the request for information, as set out previously, was for:
"copies of all the documents and information considered during the tender process, including those relating to Harlow Advice Centre, Harlow Citizens Advice Bureau and any other tenderers. Please include the names, qualifications and relevant experiences of all those who took part in the assessment process."
50. The Commissioner notes that the request is effectively in two parts: firstly, *"all the documents and information considered during the tender process"* and secondly, *"the names, qualifications and relevant experiences of... those who took part in the assessment process"*.
51. She has focused her considerations on whether the correspondence falls within the information described as *"documents and information considered during the tender process"*.
52. The Commissioner notes that some of the emails provided to her are of a routine nature, arranging times for telephone calls and similar. These cannot be said to be matters for consideration relating to the awarding of the relevant contract. However, some emails contain more substantive information relating to the tendering process and the operation of the two organisations.
53. The Commissioner considers that these emails are *"information of the description specified in the request"*, as defined by section 1(1)(a). She is satisfied that they fall within an objective reading of the request for *"information considered during the tender process"*. Information of this type is not, in her view, limited to information provided by the tendering organisations themselves, as the Council may have assumed.

The Commissioner's decision

54. The Commissioner therefore orders the Council to consider the following information for disclosure, and to issue a response to the complainant regarding whether it can be disclosed under the FOIA:

- email from external adviser to Council, dated 26 March 2018, timed at 09:16 (and its attachments);
 - email from Council to external adviser, dated 4 April 2018, timed at 09:45; and
 - email from external adviser to Council, dated 8 April 2018, timed at 20:58.
55. This step should be taken in accordance with the time-frame set out at the beginning of this notice.

Right of appeal

56. 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

57. 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.
58. 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

Phillip Angell
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