

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 February 2022

Public Authority: Tunbridge Wells Borough Council

Address: Town Hall
Royal Tunbridge Wells
Kent
TN1 1RS

Decision (including any steps ordered)

1. The complainant asked to know the name of a consultant who had been paid to do work for Tunbridge Wells Borough Council ('the Council') and what he was paid for. The Council refused the request, citing the exemption at section 43 (Commercial interests) of FOIA.
2. The Commissioner's decision is that the Council was not entitled to rely on section 43 to withhold the requested information. He also finds that it breached sections 1 and 10 of FOIA, by failing to respond to the request within the statutory time for compliance.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the name of the consultant and what the payments made by the Council were for.
4. 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

5. On 27 February 2021, the complainant wrote to the Council and requested information in the following terms:

“The Council made payments of £2080 in September, £2340 in October and £1690 in November to a "consultant" for the Assembly Hall, but the name of the consultant has been redacted. Please could you tell me who this mysterious consultant is and what the payments were for?”
6. The Council responded on 30 March 2021. It refused to disclose the requested information, citing the exemptions at sections 40(2) (Personal information) and 43 (Commercial interests) of FOIA.
7. On 30 March 2021 the complainant expressed dissatisfaction with the response. He referred the Council to the Commissioner’s decision in what he considered to be a similar case¹, where section 40(2) was not engaged. On 4 April 2021, the complainant formally requested an internal review of the response.
8. The Council provided the outcome of the internal review on 23 April 2021, which was conducted by a senior lawyer. Referring to the aforementioned decision notice, it withdrew its reliance on section 40(2) of FOIA, saying:

“When considering the section 40(2) exemption in isolation, I consider that a sole trader who is conducting business with a public authority should reasonably expect their personal data to be made available to the public (having considered the consequences of disclosure) due to the legitimate interest in the spending of public money. It is for the reasons set out by the Commissioner that I conclude (contrary to the Council’s initial response), that the section 40(2) exemption does not apply to this particular request.”
9. However, the Council confirmed that section 43 of FOIA remained engaged and that the public interest favoured maintaining the exemption.

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2013/802230/fs_50450700.pdf

Scope of the case

10. The complainant contacted the Commissioner on 2 May 2021 to complain about the way his request for information had been handled. He disagreed with the Council's decision to refuse the request. He argued that it was in the public interest that the Council disclose the information. He also noted that the Council had failed to respond to the request within the statutory time for compliance.
11. The analysis below considers whether the Council was entitled to rely on section 43 of FOIA to withhold the requested information. The Commissioner has also considered the Council's delayed response under sections 1 and 10 of FOIA. The Council withdrew section 40(2) of FOIA at the internal review and it did not seek to re-introduce it during the Commissioner's investigation. The Commissioner considers it unlikely that section 40(2) would be engaged in this case. He has therefore not considered its application in this decision notice.

Reasons for decision

Section 43 – Commercial interests

12. Section 43(2) of 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.
13. Information may be commercially sensitive, but it does not necessarily follow that it is exempt from disclosure under section 43(2). A public authority must be able to show how and why its disclosure has the potential to prejudice someone's commercial interests. The prejudice can be to the commercial interests of any person (an individual, a company, the public authority itself or any other legal entity).
14. For the exemption to be engaged the Commissioner considers that each of the following three criteria must be met:
 - The actual harm that the public authority alleges would, or would be likely to, occur if the withheld information was disclosed must relate to commercial interests.
 - 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. Any prejudice that results must also be real, actual or of substance.

- The level of likelihood of prejudice being relied upon by the public authority must be met (ie it must be shown that disclosure would, or would be likely to, result in prejudice occurring).
15. The Commissioner's guidance on section 43² states that a commercial interest relates to a person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent.
 16. The Commissioner asked the Council to provide full arguments setting out why it considered that the exemption was engaged. He explained that its submissions should identify whose commercial interests it believed would, or would be likely to, be prejudiced in the event of disclosure, and details of the nature of the prejudice itself. He also asked it to provide evidence that any arguments relating to a third party's interests were a genuine reflection of concerns known to be held by that third party. Finally, the Commissioner noted that the Local Government Transparency Code³ requires that local authorities must publish details of each item of expenditure that exceeds £500, including the identity of the beneficiary and a summary of the purpose of the expenditure. He asked the Council to explain how its refusal of the request intersected with that requirement.
 17. The Council provided the Commissioner with the name of the consultant, and the services it had paid for, as shown on the invoices the consultant submitted. It said that section 43 was engaged on the basis that disclosure of this information would be likely to prejudice the consultant's commercial interests.
 18. The Council said that the consultant undertakes highly specialist work. It believed the consultant operates in a market with few competitors.
 19. The Council said that the consultant operates under their own name and does not have a significant online presence.
 20. The Council argued that if a combination of the name of the consultant along with the monthly payment amounts made by the Council was released into the public domain, it would be likely to give an unfair

² <https://ico.org.uk/for-organisations/section-43-commercial-interests/>

³https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/408386/150227_PUBLICATION_Final_LGTC_2015.pdf

advantage to the consultant's competitors. It believed that this risk was enhanced because the payment information currently in the public domain relates to monthly payments, as opposed to being a combined figure. It said that revealing the consultant's details would be likely to enable competitors to gain an unfair advantage in competing for future tendering opportunities, both at the Council and elsewhere.

21. As to whether it had approached the consultant to ascertain their views on responding to the request, the Council acknowledged that it had not. It explained that it was relying instead on views expressed during a 'discussion' it understood had taken place between the consultant and a member of staff, at the time the consultant was carrying out the work (ie around autumn 2020, several months prior to the request being submitted). It said that it held no recorded information which related to this discussion and that it was not possible to corroborate it with either party.
22. On the question of transparency with regard to the payments, the Council said that the Chairman and a member of its Overview and Scrutiny Committee had been offered the opportunity to view the un-redacted information through the Access to Information Regulations.
23. The Council did not offer any comment on the requirements of the Local Government Transparency Code to publish information of the type described in the request.

The Commissioner's conclusion

24. The Commissioner's guidance on section 43 says the following about applying section 43(2) with regard to third parties:

"...if you propose to withhold information because the disclosure would, or would be likely to, prejudice a third party's commercial interests, you must have evidence that this accurately reflects the third party's concerns. It is not sufficient for you to simply speculate about the prejudice which might be caused to the third party's commercial interests. You need to consult them for their exact views in all but the most exceptional circumstances."
25. The Council's attention was specifically drawn to this requirement by the Commissioner, during his investigation. However, the Commissioner does not consider that the Council has provided credible evidence that its arguments in support of the application of section 43 are a genuine reflection of the concerns of the consultant. Rather, it appears to have relied on hearsay from some 18 months ago, which it has been unable to substantiate with any recorded information as to the consultant's views.

26. The Commissioner would expect the Council to have obtained the view of the consultant in response to this particular request, in order for its arguments in that regard to carry any significant weight.

27. Turning to the arguments themselves as to why the disclosure of the withheld information would be likely to harm the consultant's commercial interests, the Commissioner's guidance says:

"It is not sufficient for you to simply argue that because information is commercially sensitive, its disclosure would, or would be likely to, prejudice commercial interests. You must be able to demonstrate a causal relationship between the disclosure of the information in question and the prejudice you envisage."

28. Arguments regarding the harm that may be caused by disclosing commercially sensitive material will be relevant where the information in question might enable a competitor to replicate the consultant's work. However, the information in this case is simply the consultant's name and the information on the invoice regarding what they were contracted for. If disclosed, it will be known that they were paid a certain amount across three months for certain services. The Council has not offered any analysis as to why this information would be likely to be harmful to the consultant's commercial interests, and the precise detail of the work conducted is not revealed by providing the requested information (ie it would not indicate the amount of work actually undertaken or an hourly amount charged). Despite being asked to by the Commissioner, the Council has not explained the causal relationship between disclosure and prejudice. It simply seems to be saying that the fact that a particular consultant carried out certain work for it would put the consultant at a competitive disadvantage, if this became widely known. It is not clear from the Council's explanation why this is information which would be likely to harm someone's commercial interests, particularly in a field which, in the Council's assessment, the consultant faces little meaningful competition.

29. Mindful that the Council had informed the Commissioner that the consultant would be difficult to locate online, the Commissioner conducted a cursory internet search and was able to find information apparently placed online by the consultant. The information makes reference to the consultant having provided services to the Council, although it does not go into any detail on that point.

30. Finally, the Commissioner has had regard to what his guidance on section 43 says about the Local Government Transparency Code 2015:

"...the Local Government Transparency Code 2015 requires local authorities in England to publish the details of any item of expenditure

that exceeds £500. The Commissioner reflects this in their Definition document for principal local authorities⁴ which provides guidance about publication schemes to local authorities. It recommends that a principal local authority should make financial information about projected and actual income and expenditure, procurement, contracts and financial audit available for at least the current and previous two financial years. This should include details of expenditure over £500, including costs, supplier and monthly transaction information.

Such information is unlikely to be prejudicial to the local authority's commercial interests and is therefore unlikely to be exempt under section 43".

31. As stated above, despite being asked to, the Council did not comment on the apparent conflict between its response and the proactive publication requirements of the Code.
32. Having considered all the above, the Commissioner has concluded that, in this case, the Council has not demonstrated that section 43 is engaged. This is because it has not convincingly shown how the disclosure of the withheld information would be likely to prejudice the consultant's commercial interests and it has also not shown that its views genuinely reflect those of the consultant. Either one of these is sufficient to mean that section 43 is not engaged.
33. It follows that the Council was not entitled to rely on section 43 of FOIA to withhold the name of the consultant or the work they were paid for. The Council must therefore take the steps set out in paragraph 3.

⁴ https://ico.org.uk/media/1262/definition_document_local_authorities.pdf

Section 1 – general right of access
Section 10 - time for compliance

34. Section 1(1) of FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.
35. Section 10(1) of FOIA provides that a public authority should comply with section 1(1) within 20 working days. Section 1(1)(a) initially requires a public authority in receipt of a request to confirm whether it holds the requested information.
36. The request was submitted on 27 February 2021 and the Council responded on 30 March 2021, 21 working days later. The Commissioner therefore finds that the Council has breached section 10(1) by failing to comply with section 1(1)(a) within the statutory time period.
37. The Council explained that the slight delay in its response was due to the request being received against a background of staff shortages and re-deployment, caused by its response to the coronavirus pandemic.
38. The Commissioner wishes to place on record his understanding of the immense pressures placed on public authorities during the pandemic. He is sympathetic to the difficult decisions such authorities must make, between prioritising front-line services and continuing to meet their obligations under FOIA.
39. The Commissioner uses intelligence gathered from individual cases to inform his insight and compliance function. This aligns with the goal in his draft "Openness by design"⁵ strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting systemic non-compliance, consistent with the approaches set out in his "Regulatory Action Policy"⁶.

⁵ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁶ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

40. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

41. 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.
42. 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

Samantha Bracegirdle
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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Wilmslow
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SK9 5AF