

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 November 2021

Public Authority: Cambridgeshire County Council
Address: Scott House
5 George Street
Huntingdon
PE29 3AD

Decision (including any steps ordered)

1. The complainant has requested information from Cambridgeshire County Council ("the Council") in relation to various sets of information, including accounts, invoices, missing work orders, and reports.
2. The Commissioner's decision is that the Council has appropriately applied the exemption at section 40(2) of the FOIA to withhold the requested information. She also finds that the Council has correctly applied section 43(2) of the FOIA to part of the remaining withheld information, excluding the information detailed below.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the contractors' day rates
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 2 August 2020, the complainant wrote to the Council and requested information in the following terms:

"Could you please provide me with the following pieces of missing documentation:

- *The cost centre look up list giving descriptions for the cost centre codes appearing in the Skanska payment runs*
- *The missing GRI invoices supporting the £1.39 million paid in 2019/20 that were not provided in the inspection*
- *Signed and dated contracts supporting the payments to GRI and V4/Bloom during the year*
- *Documentary evidence showing that all the GRI work orders and payments and the V4/Bloom payments made in 2019/20 were properly procured in line with the procurement rules. As I pointed out in my last letter, the printout of the £1m 4 year framework contract with De Poel/GRI is not relevant given that the £1 million limit of that agreement (for which there is no available contract anyway) was reached several years ago.*

The other outstanding matter is the "Migration only" payment details I sent you. I would be grateful if you could respond explaining what these are and what financial exposure CCC is under in terms of unauthorised or duplicate payments to suppliers – possibly reaching £4 million."

6. The complainant contacted the Council again on 8 October 2020, as they had not received a response to their request for information.
7. The Council responded on 1 December 2020 and explained that the request was originally handled under Section 26 of the Local Audit and Accountability Act 2014. However, as the request for a review on 8 October 2020 referred to the FOIA, it would now review the request under this legislation.
8. On 22 February 2021, the Council provided a further update. It provided some information but withheld some, citing sections 40(2) of the FOIA – personal information, and section 43(2) – commercial interests.
9. Following communication with the Commissioner, on 14 June 2021, the Council provided the complainant with a further review of the request.

It provided further information but advised again that the remainder was withheld under sections 40(2) and 43(2).

Scope of the case

10. The complainant contacted the Commissioner on 23 November 2020, to complain about the way their request for information had been handled.
11. The Commissioner considers the scope of her investigation is to establish whether the public authority was correct to withhold the requested information under section 40(2) and section 43(2) of the FOIA.

Background

12. The complainant explained that in November 2018, the Council's Audit and Accounts Committee issued an apology for the procurement failings and assured that there was now a "robust procurement framework" in place, which would ensure that similar failings would not be repeated.
13. The complainant referred to the failings as "*a complete absence of effective controls in relation to the use of consultants, and procurement procedures were not being followed*".
14. The complainant made a request to view all the invoices in relation to the Council's expenses. The Council explained that the complainant requested and received copies of the invoices under the right to public inspection of documents, as set out in Section 26 of the Local Audit and Accountability Act 2014 (LAAA 2014). The Council provided the complainant with 48 invoices and work orders, but explained that the remaining 68 invoices and work orders had been misplaced.
15. The complainant stated that seven months after receiving the first 48 invoices, the Council stated in a public meeting that it had lost 68 invoices and the accompanying work orders. Six days after the meeting, the Council found the missing invoices and work orders, and provided them to the complainant, after redacting some information.
16. The complainant explained that the original 48 invoices that were provided did not show any mark-up percentages for both the main contracting group, or its sub-contractors. However, the work orders received at a later date, did have redacted percentage mark-ups.
17. Further to the above, the complainant advised the Commissioner that there was only one bidder for the contract in question and for it to be a

competitive procurement exercise, there should have been at least three bids for such a high value contract.

18. The complainant considered the absence of competition in the procurement process for the framework agreement meant that the mark-up percentages in work orders and framework contracts, along with the daily rates, do not satisfy the criteria set out by the ICO's section 43 guidance for genuinely prejudicing the relevant "*legal persons' ability to participate competitively in a commercial activity*"¹, especially over a year after the four year contract came to an end.

Reasons for decision

Section 43(2) – prejudice to commercial interests

19. 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.
20. 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.
21. For the Commissioner to accept that prejudice would result, she must be satisfied that this outcome would be more likely than not. The Council considered that disclosure of the requested information "would be likely" to prejudice the commercial interests of third parties.
22. The withheld information consists of the names of external contractors, along with IT specialists and contains their individual day rates. The Council considers that disclosure of the requested information "would be likely" to prejudice the commercial interests of the individuals/third parties.
23. The Council provided the Commissioner with the withheld information, which it considered commercially sensitive. It explained that the three

¹ <https://ico.org.uk/for-organisations/foi-guidance/section-43-commercial-interests/#prejudicetest>

areas which would be impacted by the disclosure of the information is as follows:

- External contractors and IT specialists individual day rates – these are broken down in to detail and it would reveal individuals' pricing structures.
 - Overhead percentages of external providers – the company would not expect its charge rate, a key commercial differentiator with competitors, to be disclosed. Disclosure of this information would enable competitors to adjust their prices accordingly and place the provider at a disadvantage when negotiating future work.
 - Method statements of the external provider – disclosure of this information would be likely to prejudice the commercial interests of the provider in question but disclosing work practice and strategies, which could be emulated by a third party and causing a disadvantage to the provider.
24. The Council explained to the Commissioner that if the information were to be released, it would enable competitors of the third parties, to adjust their prices accordingly and place them at a commercial advantage when negotiating future work.
25. It went on to explain that should the overhead percentages of external providers be released, it would be likely to prejudice the commercial interests of the provider, which in turn could then prejudice rates offered on similar contracts in the future if suppliers have an expectation that their commercial terms will be published.
26. The Commissioner is satisfied that the harm alleged by the Council relates to the commercial interests of the third parties. She therefore accepts that the alleged prejudice is relevant to the section 43 exemption. She considers that the second criterion in paragraph 12 is met.
27. Having reviewed the withheld documents the Commissioner accepts that the information is commercially sensitive, as the documents cover different aspects of each of the third parties/companies. She accepts the causal relationship between releasing this information and prejudice to the commercial interests of the third parties above.
28. The Commissioner also acknowledges the potential prejudice to the Council and current or potential future commercial partners. The disclosure of information such as this would be likely to undermine trust in the Council and its partners with the effect of reducing the open and frank sharing of information between them.

29. The Commissioner accepts that the Council has demonstrated the application of the lower threshold of *would be likely* to prejudice the commercial interests of the third parties. She agrees that competitors could benefit from the information, which in turn would result in prejudice of the third parties commercial interests.
30. The Commissioner therefore finds that disclosure of the information would be likely to result in prejudice to the commercial interests of all of the third parties and, on this basis, section 43(2) of the FOIA is engaged.
31. However, with regard to the individual day rates of contractors, she does not consider that section 43 applies. This information is several years old and day rates will most likely have changed (either up or down) and any prejudice to those contractors will be negligible. Whilst it is acknowledged that disclosing the day rates paid to the contractors by the Council would provide insight into the spending under the contract it would be information which shows a snapshot of the situation at a moment in time. The Commissioner is also mindful that the contractors' day rates may vary from one contract to another and may relate to the role that is expected from the individual. Additionally, she considers it not unreasonable that GRI may have varied its rates since the contract commenced.
32. The Commissioner asked the Council if it had access to the contractors' day rates at present. It advised that it no longer had professional engagement with the third party and, as such, they did not have access to the contractors' current day rates.

Public interest test

33. 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. Although the Commissioner has found the section 43(2) exemption is engaged, the information must still be released if the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

Public interest arguments in favour of releasing the information

34. The complainant has put forward several arguments to support their reasoning why the information should be released.
35. They have advised that they do not see how withholding rates of a historical, improperly procured £1 million framework agreement, in which there was only one bidder, and which resulted in over £5 million plus VAT worth of payments to the main contract holder and a further £1 million paid to the delivery partner, without any documentary

evidence of a separate contract, could serve towards ensuring that the Council secures competitive rates from the same company in future procurement exercises.

36. The complainant has explained that it is reasonable to assume that the procurement exercise was designed not to have more than one bidder, which means that the third party could put in any amount for the mark-up percentage and it would still be the lowest percentage. They add that it is in the public interest to know what the percentage was.
37. The complainant has also advised that the contractor was brought to the Council by the Chief Executive, from their previous role at another Council, which they say bypassed any competitive procurement process. They believe that these details add to the public interest argument for releasing the unredacted mark-up percentage figures in the work orders and framework contract.
38. The complainant explained that given the existing commercial relationships between the Council and the contractors/subcontractors, the question mark over the redacted mark-up percentages strengthens the public interest argument for removing the redactions. They went on to explain that there is a risk that the percentages could be excessive and if the redactions are not removed, it is hard to see how the public can exercise its statutory right to scrutinise the Council's accounts and supporting documents.
39. The Council said that there is public interest in ensuring the local authority procures effectively and in knowing how public funds are spent to further public debate and to assure the public that value for money is being achieved.
40. It also explained that there is a public interest in gaining access to contractual information, which enables the public to understand more clearly why a particular supplier was selected and what the requirements of the contract were.
41. The Council stated that in this particular procurement, there is public interest due to the cost, which is a substantial amount of public money.

Public interest arguments in favour of maintaining the exemption

42. The Council explained that it considers the public interest has already been met by the information which has already been released, such as contracts, invoices and work orders, with the exception of the limited redactions. It considers that the level of information already in the public domain is sufficient to enable the public to understand the arrangements in place and to scrutinise its spending of public funds.

43. The Council explained that revealing contractual day rates and overhead rates would be likely to discourage contractors and providers from co-operating with the local authority in the future if they feel that their pricing information will be published in the public domain. This could hamper the Council's ability to procure services in the future.
44. The Council also explained that disclosure of the information may prejudice rates offered on similar contracts in the future if suppliers have an expectation that their commercial terms will be published.
45. The Council stated that disclosure of the information would be likely to place the contractors and providers in question, at a commercial disadvantage when negotiating with other authorities, who are aware of the rates received by the local authority.

Balance of the public interest

46. In its submission to the Commissioner, the Council explained it provides information about its procurement processes here:

"Providing goods and services to the council - Cambridgeshire County Council. The Council's contract procedure rules are available via this link <http://tiny.cc/ia4luz>"

47. The Council explained to the Commissioner that the GRI procurement, which the complainant is referring to, was a mini competition using the YPO Framework Fw 569 Lot 5, which De Poel won. However, De Poel were subsequently taken over by Geometric Results Incorporated (GRI) and the contract was novated.
48. During her investigation the Commissioner asked the Council to explain its relationship and history with the contractors in question. The Council explained that, *"V4 were initially procured in late December 2015 to advise on the Council's transformation agenda. Work was subsequently commissioned from V4 via a YPO framework until 2017. Subsequently GRI was procured via Mini Competition from YPO Framework Fw 569 Lot 5 which De Poel won. As we noted De Poel were subsequently taken over by Geometric Results Incorporated (GRI) and the contract was novated"*.
49. The Council explained to the Commissioner that De Poel were the only bidder in the mini competition referred to above. Another supplier actively declined to tender and two others did not respond to the request to participate.
50. The Commissioner accepts that there is a strong and legitimate public interest in the openness and transparency of public authorities with regard to their decision-making processes. This is because it promotes

the aims of transparency and accountability, which in turn promotes greater public engagement and understanding of the decision taken by public authorities.

51. The Commissioner considers that issues relating to the spending of public funds, especially when it is a large amount, attracts a high level of public interest.
52. The Commissioner also recognises that there is a public interest in preventing prejudice to the commercial interests of the contractors.
53. The Commissioner does not accept that disclosing the information could undermine the contractors' future negotiating position with other businesses as this information is likely to have changed in recent times either by an increase or decrease in an individual's day rates, if they are still in the same job role. Any future negotiations are unlikely to be impacted as day rates are considered within the financial climate at the time.
54. The Commissioner has considered the withheld information and the arguments for openness and transparency to enable further scrutiny of the services provided. She is not persuaded that revealing the day rates of the contractors would erode their competitive position.
55. The Commissioner is, however, persuaded that the Council may incur some reputational damage in regard to third parties working with them, if they consider it is likely that their commercial terms and costs would be disclosed.
56. Having considered all the arguments provided by both parties in this case, the Commissioner is satisfied that there is no evidence of wrongdoing by the Council. This in turn lends weight to the argument that supports maintaining the exemption.
57. The Commissioner has decided that the Council is entitled to rely upon the provisions of section 43(2) of the FOIA to withhold the requested information, aside from the day rates, and that the balance of the public interest favours maintaining the exemption.

Section 40(2) – Personal information

58. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
59. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the

public would contravene any of the principles relating to the processing of personal data ("the DP principles"), as set out in Article 5 of the General Data Protection Regulation ("GDPR").

60. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ("DPA"). If it is not personal data then section 40 of the FOIA cannot apply.
61. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

62. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual"

63. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
64. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
65. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
66. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information both relates to and identifies the individuals concerned, that is the names of the individual contractors. The information therefore falls within the definition of "personal data" in section 3(2) of the DPA.
67. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
68. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

69. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

70. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
71. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

72. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.
73. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"²

74. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
 - i. Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;
 - ii. Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;

² Article 6(1) goes on to state that:- "Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

- iii. Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

75. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

76. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.

77. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

78. The Commissioner accepts that there is a legitimate interest in the accountability of public authorities as a general principle. There is also the legitimate interest of the requester, the complainant.

79. In this case, it is clear that the complainant is seeking access to the withheld information for a specific reason: to determine how the Council spent the amount of money it did.

80. The Commissioner accepts that there is a legitimate interest in disclosure of this information.

Is disclosure necessary?

81. "Necessary" means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

82. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

83. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
84. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual
85. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information would be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as a private individual, and the purpose for which they provided their personal data.
86. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to the individuals.
87. The Commissioner is mindful that disclosure under the FOIA is disclosure to the world at large and not just to the requester. It is the equivalent of the Council publishing the information on its website.
88. During the Commissioner's investigation, the complainant provided copies of invoices/workorders that they had received from the Council in July 2020 when they were inspecting the Council's documents.
89. The Commissioner asked the Council to explain why these unredacted documents were provided to the complainant and if it had been provided in error. The Council explained that the complainant had requested to view the documents during the "Inspection Period", which is a 30 working-day period that is set by the authority whereby an interested person may inspect an authority's accounts and related documents.
90. The Council advised the Commissioner that the LAAA 2014 does appear to provide exemptions for both personal information and commercially

confidential information, which would appear to be the equivalent to the exemptions applied under the FOIA. However, the LAAA 2014 does not specify a test for weighing up prejudice to commercial confidentiality, the public interest or conditions surrounding the disclosure of personal information in the same way that the FOIA does.

91. The Council explained further that at the time of the complainant's request to view the documents, a decision was made to disclose the specific invoices, unredacted, to the complainant. It also advised that these documents were not requested under the FOIA.
92. The Commissioner notes that this information was provided outside the FOIA, and consequently not to "the world at large". When considering disclosure under the FOIA the Council must take account of the requirements of that legislation and proceed accordingly. She is therefore satisfied that it is appropriate for the Council to consider redactions under the exemptions provided in the FOIA. The purpose of this decision notice is to determine if those exemptions have been applied correctly.
93. The Commissioner notes that the complainant considers that the withheld information is crucial as they believe it would assist in identifying underlying issues within the Council.
94. The Commissioner understands the complainant's concerns, however, she is only able to consider the information under the FOIA and if the public authority has cited the exemptions correctly. In the circumstances of this case, although the complainant has been provided with some of the information, to release the remaining documents would be in breach of the FOIA and DPA.
95. From the information that has been provided, the Commissioner is satisfied that the withheld information contains the names and job roles of individual contractors.
96. The complainant contends that:

"...the data subjects here are commercial operators, and as such could reasonably expect their identities and contractual rates to be published to interested persons under S26 of LAAA under the public's statutory right to inspect documents etc. In agreeing to work for a subcontractor on a local authority contract, I would argue that these data subjects have already given their tacit consent to this information being revealed to interested persons under S26. These data subjects are quite different in this context to say private individuals in receipt of grants and other council payments whose names and other personal information are properly redacted in councils' Transparency Code spend data".

97. Regardless of the complainant's assertions above, individual contractors are entitled to the same protections as private citizens when considering disclosure of their personal data. It is not sufficient to assume 'tacit' consent has been given.
98. The company itself provides outsourcing solutions, and staff on an employed basis, rather than outsource contractors, would have no expectation that their personal data would be disclosed. Whilst the Commissioner understands the complainant's reasoning for wanting to receive this information, she must consider the impact of disclosure to the world at large, rather than to an interested party (which is how the rest of the information was provided). She therefore finds that disclosure could cause unwarranted damage or distress to the named individuals, as their personal information would be disclosed.
99. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
100. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
101. The Commissioner has therefore decided that the Council was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Other matters

102. The Commissioner reminds the Council of its responsibility to protect the personal data of all individuals, along with ensuring commercial interests are not prejudiced. By providing the original information to the complainant under the LAAA 2014, it has potentially released personal data, alongside commercial information, which could prejudice the Council or third parties, should the complainant make the information available publicly.

103. Although the Commissioner does not regulate the LAAA 2014, she reminds the Council that it should consider any provisions available whereby personal data can be redacted³.

³ <https://www.legislation.gov.uk/ukpga/2014/2/section/26>

Right of appeal

104. 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

105. 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.

106. 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

Michael Lea
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