

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 January 2013

Public Authority: Swindon Borough Council
Address: Civic Offices
Euclid Street
Swindon
SN1 2JH

Decision (including any steps ordered)

1. The complainant has requested information relating to the winning tender submission for a mapping and website contract relating to a Local Sustainable Transport Fund (LSTF). Swindon Borough Council (the "council") refused the request under the exemptions for personal data and prejudice to commercial interests.
2. The Commissioner's decision is that the council has correctly applied the exemption for personal data but has failed to demonstrate that the exemption for prejudice to commercial interests is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld under the exemption for prejudice to commercial interests.
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.

Background

5. The council was successful in bidding to the Department for Transport's "Local Sustainable Transport Fund" (LSTF) for £4.4million for a transport project in Swindon. The aim of the bid was to support the regeneration

of Swindon's town centre by implementing a package of measures targeted at increasing the number of employees working in the town centre, who travel to work by sustainable modes (walking, cycling, public transport, car sharing or not travelling at all, such as working from home)¹.

6. In order to deliver the project the council identified a need for mapping products and a website and invited suppliers to submit bids for a contract worth an estimated £140,000.
7. In February 2012 the contract was awarded to Steer Davies Gleave. The request for information, submitted by an unsuccessful bidder for the contract, was made subsequent to this.

Request and response

8. On 20 February 2012 the complainant wrote to the council and requested information in the following terms:

"Invitation to tender & clarification to tender documents from Steer Davies Gleave for LSTF & evaluation sheets used to score the winning tender."
9. The council responded on 20 June 2012. It stated that it was providing some of the requested information but it was withholding the remainder under the exemptions for personal data and prejudice to commercial interests.
10. Following an internal review the council wrote to the complainant on 10 August 2012. It stated that it was disclosing some additional information but withholding the remainder under the exemptions originally cited.

Scope of the case

11. On 7 September 2012 the complainant contacted the Commissioner to complain about the way their request for information had been handled.

¹ <http://www.swindon.gov.uk/ts/ts-sustainable/Pages/ts-sustainable-localsustainabletransportfund.aspx>

12. The Commissioner confirmed with the complainant that his investigation would look at whether the council had correctly applied exemptions to withhold some of the requested information.

Reasons for decision

Section 43 – commercial interests

13. Section 43(2) of the FOIA provides an exemption from disclosure of information which 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.
14. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43. This comments that:
*"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."*²
15. Having viewed the withheld information, which constitutes a tender submission for a contract to carry out work on behalf of the council, the Commissioner considers that the information relates to a commercial interest. However, it will only fall within the scope of the exemption if its disclosure would be likely to prejudice a commercial interest. The Commissioner has gone on to consider the nature of the prejudice which the council has argued that disclosure would create.

The Nature of the Prejudice

16. In investigating complaints which involve a consideration of prejudice arguments, the Commissioner considers that the relevant test is not a weak test, and a public authority must be able to point to prejudice which is "real, actual or of substance" and to show some causal link between the potential disclosure and the prejudice. As long as the

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http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

prejudice is real and not trivial, its severity is not relevant to engaging the exemption – this will be factored in at the public interest test stage.

17. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that “likely to prejudice” means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. “Would prejudice” places a much stronger evidential burden on the public authority and must be at least more probable than not.
18. The council confirmed to the Commissioner that it considered that disclosure of the withheld information *would prejudice* the commercial interests of Steer Davies Gleave (SDG).
19. Part IV of the code of practice issued under section 45 of the FOIA (the “code”) advises that, where a public authority receives a request for information which relates to the interests of parties other than the authority itself, that it would be good practice to consult with such parties prior to responding to the request³.
20. The council provided the Commissioner with evidence that it consulted with SDG when responding to the request and the Commissioner has had sight of relevant correspondence between the two parties. He is satisfied that the position presented by the council in applying the exemption, therefore, represents a reflection of the views of SDG and is not mere speculation.
21. The council has stated that it is aware of its duty to disclose information on request but it considers that it also has a duty to take into account the views of contractors where the disclosure of information might put them at a disadvantage in relation to its competitors.
22. The council has argued that the withheld information contains technical details and insights into SDG’s unique methodology in delivering projects of the type identified in the contract.
23. The council explained that, it was as a result of it not holding the relevant technical knowledge that an external contractor was sought to deliver the services identified in the tender. It confirmed that, in view of the specialised technical nature of the information, it had, therefore,

³ <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

given some weight to SDG's own expertise when, as part of the consultation process, SDG identified elements of the information which, if disclosed, would prejudice its business.

24. In this case, the council has argued that disclosure of the information would benefit SDG's competitors. However, it has not explained, with reference to the specific content of the information, the nature of the prejudice which disclosure would cause to SDG's commercial interests.
25. The Commissioner understands the general principle that, in a competitive commercial environment, information which is in the possession of one company, which gives it a commercial advantage over rivals, can, if disclosed more widely, result in the advantage being lost and there being a likelihood that prejudice will occur. However, the council has not explained the nature of the competitive environment or, with reference to the specific elements of the withheld information, how access to the information would benefit a competitor to the detriment of SDG's own commercial interests.
26. The Commissioner has also considered the timing of the request as, in a commercial environment, the timing of the disclosure will be of critical importance and the application of any exemption has to be considered in the circumstances that exist at the time the request is made.
27. It is generally accepted that information submitted during a tendering process is more likely to be commercially sensitive whilst the tendering process is ongoing compared to once the contract has been awarded. Arguments which suggest that competitors would be able to undercut a bid contained within a disclosed tender submission would only be relevant whilst a tender process is live. That is, unless an authority is able to provide arguments that a tender submission might be directly transferable to a different bid or that details of the disclosed submission and other associated information would result in other prejudice being caused to a party's commercial interests.
28. Following further prompting by the Commissioner, the council did explain that the contract allowed it to call down the other phases, (2 and 3) at a later date. So, potentially, the council could go back out to market (tender) for phases 2 and 3 or choose not to do them at all.
29. However, even accepting the possibility of a further tendering exercise, in this case the Commissioner considers that, beyond very general, generic arguments, the council has not provided sufficient detail about the nature of the prejudice to SDG's commercial interests which would result from disclosure. He also considers that the council has failed to meet the evidential burden required to demonstrate that the likelihood

of prejudice being caused by disclosure would be more likely than not to occur.

30. Whilst the Commissioner accepts that public authorities should consult with and consider the views of third parties where a request might impact upon their interests, the ultimate responsibility for decisions about disclosure or for making the case that exemptions are applicable rests with authorities. Whilst the Commissioner is not suggesting that the council has, in its handling of the request, simply deferred to the submissions made by SDG, he is concerned that it has not given sufficient attention to the level of detail required to justify a decision to withhold information.
31. The Commissioner accepts that, in conducting its own assessment of the sensitivity of the requested information and the potential for prejudice, the council might not have the technical expertise of SDG. However, the Commissioner would expect that, in order to evaluate the various tender bids submitted for the contract, the council would have some knowledge of the relevant factors. In any event, the Commissioner has set out his position that the prejudice test is not a weak test and that any ascribed prejudice must be "real, actual or of substance" and authorities must be able to show some causal link between the potential disclosure and the prejudice.
32. In cases where an authority has failed to explain the nature of an implied prejudice and failed to demonstrate the causal link between any such prejudice and the disclosure of information, the Commissioner is not obliged to generate relevant arguments on an authority's behalf.
33. In this instance, the Commissioner considers that the council has failed to properly explain the nature of the prejudice which would be likely to result from disclosure of the requested information and link this back to the exemption claimed. He has, therefore, concluded that the council has failed to demonstrate that the exemption is engaged. As he does not consider that the exemption applies, the Commissioner has not gone on to consider the public interest arguments.

Section 40 – personal information

34. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the FOIA would breach any of the data protection principles or section 10 of the Data Protection Act 1998 (DPA).
35. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as

defined by the DPA. Section 1 of the DPA defines personal data as follows:

"...data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."

36. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the data protection principles under the DPA.
37. The first consideration is whether the information is personal data. The withheld information contains the names and contact details of individuals who do not work for the council and are not employees of a public authority. The Commissioner considers that individuals' names and contact details are clearly personal data as such information relates directly to an identifiable individual.
38. Having viewed the relevant information the Commissioner is satisfied that the data subjects can be identified from this and that the information relates to their professional life. The Commissioner has concluded that the council has correctly identified the withheld information as personal data. However, before determining whether disclosure of the information would contravene any of the data protection principles he has considered whether the council has applied the exemption consistently and whether it might, as an alternative, have disclosed some of the information after first rendering it anonymous.
39. The Commissioner's guidance, which was available at the time of the request, states:

"Where a request captures personal data the first thing to do is to consider whether the personal data can be released in its entirety without breaching the data protection principles. If it can't, it is often

*necessary to anonymise the information so that some of it can be released.*⁴

40. More recently, the Commissioner has published his "Anonymisation: managing data protection risk code of practice", which sets out how anonymisation can allow public authorities to make information derived from personal data available in a form that is rich and usable, whilst protecting individual data subjects⁵.
41. Whilst this guidance was published in November 2012, after the request was made, the Commissioner considers that the general principles which it reflects should form part of all public authorities decision-making when considering whether information can be disclosed in a way which does not identify data subjects.
42. The Commissioner notes that the council's disclosures to the complainant included the names, job titles and work biographies of non-public authority data subjects. Whilst he has not reached any conclusions about whether, in disclosing this information, the council breached any data protection principles, he notes that it does appear to represent an inconsistency in the council's approach, namely, that it has disclosed the personal data of some parties but not others, despite these parties falling into the same (non-public authority employee) category.
43. The withheld information includes details of the daily remuneration rates of each of the data subjects referred to above. The Commissioner considers that these rates might have been disclosable, had it been rendered into an anonymous form by the council. However, as the council has disclosed the names and job titles to the complainant, he considers that it would be possible to link this information to a specific data subject. Whilst he considers that this information is also, therefore, the personal data of data subjects, he wishes to note his disappointment that the council failed to disclose this information in an anonymised form.

⁴ <http://www.ico.gov.uk/foikb/PolicyLines/FOIPolicyAnonymisingpostcodes.htm>

⁵

http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Data_Protection/Practical_application/anonymisation_code.ashx

Would disclosure of the information contravene any data protection principles?

44. The council has argued that disclosure of the withheld information would contravene the first and second data protection principles. The Commissioner has first considered whether disclosure would breach the first principle.

45. The first data protection principle states that:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

*(a) at least one of the conditions in Schedule 2 is met, and
(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met".*

46. In deciding whether disclosure of personal data would be unfair the Commissioner has taken into account the following factors:

- The individuals' reasonable expectations of what would happen to their personal data.
- The consequences of disclosure.
- The legitimate interests of the public.

Reasonable expectations

47. The council has explained that the personal details of SDG employees contained within the tender submission documents were provided for operational reasons only so that the council would be able to contact the individuals concerned. The council argued that the data subjects would have had a reasonable expectation that their personal data would not have been disclosed more widely, for example, in response to a request for information.

48. In view of the above, the Commissioner is satisfied that the data subjects would have a reasonable expectation that their personal data, submitted as part of the tender process, would not be disclosed.

The consequences of disclosure and nature of the information

49. On the basis of the council's submissions, the Commissioner understands that disclosure of the information would cause unwarranted interference with the data subjects' privacy rights.

50. Whilst the Commissioner has accepted that the information in question is personal data, he notes that it relates to their business rather than their personal life.
51. The Commissioner notes that the withheld information is not sensitive personal data. The information also does not relate specifically to the individuals' private lives but to a business activity which is open to scrutiny via other channels so the likelihood of disclosure causing severe damage or distress to the individuals appears low.
52. However, given the context within which the data subjects engaged with the council and the reasonable expectation of non-disclosure, the Commissioner is satisfied that disclosure would likely result in some intrusion to their privacy.

Consent

53. The council has not confirmed whether it approached the data subjects for their consent to disclose their information. It has, however, stated that it considers disclosure would breach the first data protection principle because it would be a disclosure made without consent.
54. The issue of consent is dealt with in the Commissioner's specialist guidance "Consent"⁶. The guidance states that the Commissioner will take data subjects' comments into account insofar as they represent an expression of the views of the data subject at the time of the request. The Commissioner considers that such views will help to inform the analysis of fairness because of the unique perspective of the data subject on the impact of disclosure on them.
55. The Commissioner notes that an individual's objection to the disclosure of information does not necessarily mean that it cannot be released. It is important to consider whether it is reasonable for the data subject to object to the disclosure. However, in this case, as the council has not confirmed whether consent has been sought, the Commissioner has not considered this factor further.

⁶ <http://www.ico.gov.uk/foikb/PolicyLines/FOIPolicyConsent1.htm>

Legitimate interest in disclosure

56. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to provide the information if there is an overriding public interest in doing so.
57. The Commissioner accepts that in considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for its own sake. It can also include specific factors such as, in this case, furthering the public understanding of the tender process and the factors affecting the council's decision-making and serving the interests of accountability in respect of the council's use of public money.
58. In balancing the legitimate interests in disclosure with the rights of the individual, the Commissioner considers that public authorities should not regard this as an exercise where the scales come down firmly on one side or the other. A proportionate approach should be considered, as there will be circumstances where the legitimate interest may be met by disclosure of some of the requested information.
59. The Commissioner accepts that individuals are increasingly aware of privacy rights and in some circumstances there will be high expectations of privacy. The right to privacy is also enshrined in Article 8 of the European Convention on Human Rights. However, there is also an acceptance that information rights legislation has introduced expectations of transparency and presumption in favour of disclosure of information, including personal information, by public authorities.
60. This was recognised by the Information Tribunal in the case of *The Corporate Officer of the House of Commons v Information Commissioner and Norman Baker MP* (16 January 2007; EA/2006/0015 & 0016) when it was stated in paragraph 43 that:

*"The existence of FOIA in itself modifies the expectations that individuals can reasonably maintain in relation to the disclosure of information by public authorities, especially where the information relates to the performance of public duties or the expenditure of public money. This is a factor that can properly be taken into account in assessing the fairness of disclosure."*⁷

⁷ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i83/HoC.pdf>

61. In this instance, the Commissioner acknowledges that the fact that the data subjects would have had a clear expectation that the information would not be disclosed and that transparency and accountability are served by the disclosure of, for example, the total daily rates payable to SDG employees and the total price payable for the contract, are arguments carrying some weight.
62. In relation to the majority of the information, which consists of the names and contact details of the contractor's employees, the Commissioner notes that this is fairly low-level in terms of sensitivity; however, he also acknowledges that the disclosure of this information would not significantly contribute to the public understanding of the tender process.
63. In relation to the previously referenced daily remuneration rates levied by the data subjects, the Commissioner considers that the disclosure of this information would represent a potentially more damaging or distressing intrusion into the individuals' lives. There is also potential for disclosure of this information to result in detriment to the individuals concerned.
64. The Commissioner accepts that, in this case, the legitimate public interest in disclosure does not outweigh the legitimate interests of the data subjects concerned. Whilst the public interest in knowing details of the tender process is strong, the Commissioner does not consider that disclosure of this personal data will add anything to this understanding and any benefit is outweighed by the unwarranted interference or prejudice to the rights of the individuals concerned.

Right of appeal

65. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

66. 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.
67. 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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF