

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 March 2013

Public Authority: Cornwall Council

Address: County Hall
Treyew Road
Truro
TR1 3AY

Decision (including any steps ordered)

1. The complainant has requested a copy of a business case relating to the future delivery of neighbourhood operational services. Cornwall Council (the "council") refused the request under the exemption for prejudice to commercial interests.
2. The Commissioner's decision is that the council has not demonstrated 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 withheld information to the complainant.
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 11 June 2012, the complainant wrote to the council and requested information in the following terms:

"Would you please send me an electronic copy (MSWord or PDF format) of the Business Case dated 21 June 2011 (version 4.5) relating to

Alternative Service Delivery: Future Delivery of Neighbourhood Operational Services as referenced in the minutes of the Cabinet on Wednesday 13 July 2011."

6. The council responded on 31 July 2012. It stated that it was refusing the request under the exemption for prejudice to commercial interests. The council also made reference to the exemption for trade secrets but did not state that it was relying on this exemption.
7. Following an internal review the council wrote to the complainant on 18 September 2012. It stated that it was upholding its original decision to refuse the request. It again made reference to the exemption for trade secrets but confirmed that it was refusing the request because it considered that disclosure would prejudice the commercial interests of a company.

Scope of the case

8. On 22 October 2012 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that his investigation would consider whether the council correctly withheld the information under the exemption for prejudice to commercial interests (section 43(2)).
10. During the course of the Commissioner's investigation the council disclosed a redacted version of the requested information to the complainant. The council confirmed that it considered that the remaining withheld information was exempt under section 43(2). The Commissioner's investigation has, therefore, considered whether the exemption has been correctly applied to the remaining information.

Reasons for decision

Section 43 – commercial interests

11. 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.

12. 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."*¹

13. The withheld information has been viewed by the Commissioner and he notes that it consists of a business case exploring how setting up a company to deliver frontline services might deliver value for money and maximise the potential dividend (surplus) returned to the council.
14. The Commissioner is satisfied that the information relates to a commercial activity, however, it will only fall within the scope of the exemption if its disclosure would, or 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

15. 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 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.
16. 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.
17. The council has confirmed that it considers that disclosure of the information *would* prejudice the commercial interests of CORMAC

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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.ashx

Solutions Ltd ("CSL"). The Commissioner notes that the information in question, the detailed business case, was used to explore the options open to Cornwall Council in setting up a company(s) to deliver frontline operational services.

18. The council explained that CSL is wholly owned and controlled by Cornwall Council. It has been set up under what is commonly known as a teckal exemption (where European case law has enabled public authorities to set up a company to deliver its services and 'pass port' services to that company). CSL has been designed to deliver operational front line services which the Council (the shareholder) requires it to do. These include highways and environmental maintenance, highway and structures design consultancy, production of stone and aggregates, property maintenance, fleet management, and soft facilities management including cleaning and security.
19. The council has stated that disclosure would be likely to weaken CSL's position in a competitive environment. This would happen by revealing market sensitive information or information of potential usefulness to competitors as the withheld information relates to the financial and business viability of the company and its disclosure would have a detrimental effect on its commercial revenue. The council argued that the company is in its first year of trading and is seeking to expand its business opportunities. Disclosure of the information, the council maintains, would be likely to give any competitors an unfair advantage.
20. 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.
21. In this instance, the Commissioner considers that the council has failed to properly explain the nature of the prejudice which disclosure of the requested information would cause and has not provided arguments which meet the evidential burden provided by the limb of the exemption it is relying upon.
22. The Commissioner considers that the arguments provided by the council do not demonstrate the causal link between the specific withheld information and the alleged effects of disclosure. He further considers that the arguments provided are either generic or simply do not cohere and that the council has failed to properly explain the nature of the prejudice which would result from disclosure of the information.
23. 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.

24. He has, therefore, concluded that the council has failed to demonstrate that the exemption is engaged. As he has decided that the exemption is not engaged he has not gone on to consider the public interest.

Right of appeal

25. 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

26. 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.
27. 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
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