

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 March 2014

Public Authority: Shropshire Council
Address: Shirehall
Abbey Foregate
SHREWSBURY
SY2 6ND

Decision (including any steps ordered)

1. The complainant has requested information relating to ip&e, a trading company wholly owned by Shropshire Council (the "council"). The council provided some of the requested information but withheld other information under the exemption for prejudice to commercial interests (section 43(2) of the FOIA).
2. The Commissioner's decision is that Shropshire Council has correctly applied section 43(2) of the FOIA to the requested information and that the public interest favours maintaining the exemption.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 1 July 2013, the complainant wrote to the council and requested the following information:
 - "1. What are the corporate objectives of I,P&E?*
 - 2. What is the structure of the Board?*
 - 3. Who are the potential target clients?*
 - 4. What services are being marketed by Shropshire Council?*
 - 5. What are the overall costs of running I,P&E?*
 - 6. What is the forecast profit/loss for the company?*
 - 7. How many people are employed by I,P&E?*
 - 8. What do the initials I,P&E stand for?*
 - 9. Do any other councils do this sort of thing?*
 - 10. Are any other council assets, apart from money being used by the company?*
 - 11. Have any services been sold so far?"*
5. The council responded on 18 July 2013. It provided some information but withheld the information identified in parts 3 and 6 of the request under the exemption for prejudice to commercial interests (section 43(2) of the FOIA).
6. Following an internal review the council wrote to the complainant on 2 October 2013. It stated that it was maintaining its original position.

Scope of the case

7. On 2 October, following the internal review, the complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly applied section 43(2) of the FOIA to withhold some of the requested information.

Reasons for decision

Section 43 – commercial interests

9. 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.
10. 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
11. The withheld information in this case consists of a list of individual organisation names which ip&e intends targeting and ip&e Limited's (the "company") forecasted profit and loss. The council has explained that the company was set up to provide public services on the council's behalf and that it would be able to trade with other organisations and generate profits.
12. The Commissioner is satisfied that the information relates to a commercial interest. 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

13. 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

1

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.

14. 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.
15. In this case the council confirmed that it was relying upon the lower threshold of prejudice, i.e., that disclosure would be likely to prejudice.
16. The Commissioner has gone on to consider whether the council has demonstrated that prejudice would be likely to occur in relation to each element of the withheld information, starting with the information specified at part 3 of the request.

“3. Who are the potential target clients?”

17. The council has confirmed that disclosure would be likely to prejudice the commercial interests of the company and the council itself.
18. In responding to this element of the request, the council provided the complainant with a broad indication of the types of markets that ip&e would be targeting but withheld details of actual organisation names.
19. The council has explained that the company is a trading company with the council as its sole shareholder. At the time of the request for information the company’s business was due to commence, with the first business unit transferred from the council to the company being public relations and marketing services (operating as “360 Communications”).
20. The council has argued that, particularly for a new venture such as the company, there are few more sensitive aspects of a commercial strategy than the list of prospective clients which it considers to be realistic and “attractive” targets for its services. The council states that it has invested time and skill in assessing the market and identifying and contacting potential clients. The council has argued that disclosure would provide access to these insights and potential advantages for free with no reciprocal access for the company to competitors’ comparable business intelligence.
21. The council considers that disclosure of the information would be likely to result in competitors “stealing a march” by targeting these named parties, undermining the council’s competitive advantage. It has argued

that a likely consequence of such targeting by private-sector rivals would be that, in at least some cases, the company would not be the successful bidder, resulting in losses for the company and ultimately for the public purse.

22. Having considered the council's arguments the Commissioner accepts that general principle that information which facilitates a business in a commercial environment may, in some situations, prove useful to a competitor operating in the same environment. The extent to which such information will be useful depends on the nature of the information and the commercial context. The Commissioner considers that it is a further step to demonstrate that access to the information by a competitor will result in detriment or prejudice to the business from which the information originates.
23. The extent to which the information has value in a commercial environment will depend upon its relative exclusivity. The Commissioner recognises that a client list will be of value to a business, as it could represent a unique compilation which would be unavailable to competitors. In its submissions, the council directed the Commissioner to a Information Tribunal decision (*Hertfordshire County Council v IC (EA/2012/0203)*) which found that the disclosure of an equivalent client list would be likely to result in prejudice to the originating company's commercial interests².
24. Having considered the council's arguments, the withheld information and the relevant Tribunal decision, the Commissioner is satisfied that disclosure of the information would be likely to result in prejudice to the council's and company's commercial interests. He has gone on to consider the relevant public interest arguments.

Public interest in disclosing the information

25. The complainant has argued that, as tax payers and, therefore, the funding source for the company, there is a public interest in information about how the money is being spent being made available for public scrutiny.

² [http://www.informationtribunal.gov.uk/DBFiles/Decision/i983/2013-03-19 Consent Order EA-2012-0203.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i983/2013-03-19%20Consent%20Order%20EA-2012-0203.pdf)

26. The complainant has also raised concerns that very little information has been made available about the company, suggesting that the principles of transparency and accountability are not being satisfied.

Public interest in maintaining the exemption

27. The Commissioner recognises that there is a general strong public interest in not inhibiting the ability of commercial bodies to fairly participate in a competitive market. He considers that this interest is heightened in cases such as this, where the company in question is publically owned and funded.
28. The council has argued that, at the time the request was made it had already publically explained that "the public sector within Shropshire and the sub-region is our initial key market"³. It has also argued that, in response to the request, it provided further details of the types of potential target clients.
29. The Commissioner notes that, at the time of the request, the company was in nascent form and, therefore, particularly vulnerable to competition from other companies already well established in the relevant market. The public interest in maintaining the exemption, is therefore, accordingly affected .

Balance of the public interest

30. In weighing the balance of the public interest the Commissioner has factored in the general public interest in transparency and accountability in the expenditure of public authorities. The Commissioner recognises that there is a balance to be struck between the disclosure of information relating to actions taken by authorities on the public's behalf and the withholding of information which would have a damaging effect on those actions.
31. In this case, the Commissioner does not see that there is a specific public interest in the list of potential clients being disclosed, certainly not an interest which in any way counterbalances the effects of disclosure

3

[http://www.shropshire.gov.uk/committee.nsf/0/245D2CE042255DCD80257B86004CCDFC/\\$file/12A%20Appendix%20A%20ipe%20Business%20Plan%20Exec%20Summary.pdf](http://www.shropshire.gov.uk/committee.nsf/0/245D2CE042255DCD80257B86004CCDFC/$file/12A%20Appendix%20A%20ipe%20Business%20Plan%20Exec%20Summary.pdf)

on the commercial interests of the council and the company. The Commissioner further considers that, in disclosing some details of the nature of the company's business and the general client bases it will target, the council has met the public interest in transparency.

32. In view of the above the Commissioner has concluded that, in relation to the information requested in part 3 of the request, the public interest favours maintaining the exemption. He has gone on to consider whether the council has correctly withheld the information identified in part 6 of the request.

"6. What is the forecast profit/loss for the company?"

33. The council has confirmed that the information in question appears in the company's final Business Plan. It has argued that, if that the company's envisaged profits were disclosed, reliable inferences about its pricing strategy could be readily drawn. The council considers that, by analysing other publically available information and piecing this together with the envisaged profit data, a competitor would be able to form a reasonably accurate picture of how the company's services would be priced.
34. The council has confirmed that a major component of the company's costs for the initial period of its operation (August 2013 onwards) was to be its human resources. It directed the Commissioner to a Cabinet meeting of 26 June 2013 which provides details of how the council's public relations and marketing staff were being TUPE transferred to the company.
35. The council has argued that this knowledge, combined with publically available information about council employee pay scales, would allow the human resources element of the company's cost base to be calculated. The council has further argued that other elements of the company's cost base, such as infrastructure and premises costs, could also be inferred from information derived from its published accounts.
36. The council has argued that the disclosure of the withheld information, when combined with other published information, could allow a competitor to understand the company's cost base for the first year of its operations. This, in itself, would be likely to compromise the fairness of the competitive environment as the company would not be able to garner equivalent insights into its competitors' cost bases.
37. The council has further argued that, aside from costs, there are further pieces of the "mosaic" which would help competitors use profit data to understand the company's pricing strategy. It considers that knowledge of the number of employees would provide a good indication of the

number of employee hours work which the company would do for clients in the first year of its operations.

38. The council has also pointed to the information it has published via its "Open Data" commitments, namely details of supplier payments over £500. As a supplier to the council, the company is listed in the published information, along with payments made to it by the council for the delivery of public relations and marketing services. By combining this information with details of the company's projected profits, the council has argued that competitors would be able to draw conclusions about the company's pricing and revenues.
39. In conclusion, the council considers that disclosure of the withheld information would, with other publically available information, provide a competitor with insights into the company's pricing strategy. Comparable insights into competitors' pricing strategies would not be available to the company and this, combined with the precarious nature of the recently established company would be likely to place it at a disadvantage. The council has also argued that disclosure would also provide potential clients with insights about potential profit margins, inhibiting the company's ability to maximise its commercial potential.
40. Having considered the withheld information the Commissioner is satisfied that the disclosure of the requested information would be likely to be prejudicial to the commercial interests of the company and, by extension, the council itself. He considers that projected profit and loss constitutes core financial information which would provide both competitors and potential clients with insights into the company's pricing strategy. These insights would be likely to enable parties to undercut the company's strategy, thus prejudicing its ability to compete in a commercial arena.
41. As he has concluded that the exemption is engaged, the Commissioner has gone on to consider the associated public interest arguments.

Public interest in disclosure

42. The complainant has argued that, as tax payers and, therefore, the funding source for the company, there is a public interest in information about how the money is being spent being made available for public scrutiny.
43. The council has acknowledged the general public interest in transparency around its commercial activities. The Commissioner notes that the company will be carrying out a range of public functions on behalf of the council, so there is a dual public interest in knowing that the company's delivery of these functions is being correctly overseen by

the council and that the allocation of public money to the company is accountable and transparent.

Public interest in maintaining the exemption

44. The council has highlighted that the public interest in disclosing profit forecast data is extremely limited and that it would not contribute much to transparency. The council has argued that the company's actual profit data which would be made available through the company's and council's published accounts, would be of far greater public value. These latter disclosures would allow the public to hold the company and council to account for the company's commercial performance.
45. The council has highlighted the particular sensitivity of the information at the time of the request, when the company was just beginning its commercial activities. Disclosure of the information at this stage of the company's development would reveal its pricing strategy to competitors and undermine its ability to negotiate in a way which would maximise its commercial potential. That the company is publicly owned and any losses would be directly attributable to the council and the public purse provides a further reason for maintaining the exemption in this case.

Balance of the public interest

46. The Commissioner considers that, as a publicly owned business delivering public services there should be an expectation that the company will attract a degree of scrutiny. However, the Commissioner recognises that this must be set against the public interest in allowing the company to participate effectively in a commercial environment.
47. The Commissioner recognises that ordering the disclosure of the information in this case would be likely to interfere with the current 'level playing field' in which the company operates when competing with the private sector for public authority business. A disclosure of the information would allow private businesses to consider the company's profits and, together with the other publically available information (identified above,) take advantage of that information. It is unlikely that the company would be able to enjoy similar insights from private suppliers.
48. In this case the Commissioner notes that information about the role of the company and about its expenditure and income (and actual profits and losses) has been or will be made available. These disclosure allow the public to scrutinize the commercial success or otherwise of the company and hold the company and the council to account. The Commissioner does not see that the disclosure of the withheld information will meet these goals, rather that it would be likely to

restrict or damage the company's ability to realise its commercial potential. The resulting impact on the public purse cannot be a valid public interest goal.

49. Having considered the relevant public interest arguments the Commissioner has concluded that, in this case, the public interest in maintaining the exemption clearly outweighs the public interest in disclosure. He, therefore, finds that the council has correctly withheld the requested information.

Right of appeal

50. 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: GRC@hmcts.gsi.gov.uk

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

51. 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.
52. 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
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