

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 October 2014

Public Authority: Kent County Council
Address: Sessions House
County Hall
Maidstone
Kent
ME14 1XQ

Decision (including any steps ordered)

1. The complainant requested information relating to the award of contract to a company to provide Kent test examination papers for schools in the county. The council provided some information but withheld other information under sections 43(2) (commercial sensitivity) and section 41 (information provided in confidence).
2. The Commissioner's decision is that the council has correctly applied section 43(2) to the information falling within parts 1 of the request, subject to the information highlighted by the council as not being sensitive being disclosed. He has decided that council was correct to apply section 43(2) to the information in part 2 of the request. During the course of the Commissioner's investigation the council reconsidered the information it held as regards parts 4 & 5 of the request and has informed the Commissioner that it is willing to disclose the information it holds to the complainant. The Commissioner has also decided that on a balance of probabilities, no further information is held falling within the scope of part 3 of the complainant's request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the information falling within the scope of part 1 of the request which the Commissioner has indicated section 43 cannot apply to as outlined in paragraph 24 of this notice.

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 13 January 2014, the complainant wrote to the council and requested information in the following terms:

"Can you provide me with copies of all:

1. *Minutes*
2. *Meeting notes*
3. *Specification documents*
4. *All Examination samples / drafts*
5. *All Test / Practise papers*

relating to the forthcoming revised Kent Test examination which is due to commence in its new revised format in Sept/Oct 2014?"

6. The council responded on 30 January 2014. It provided some information but withheld other information in respect of parts 1, 2, 4 & 5 of the request on the basis that the exemptions in section 43(2) and 41 applied.
7. Following an internal review the council wrote to the complainant on 11 March 2014. It upheld its initial decision. It also confirmed that it did not hold some information falling within the scope of parts 1, 2 & 3 of the request.

Scope of the case

8. The complainant contacted the Commissioner 12 March 2014 to complain about the way his request for information had been handled.
9. He considers that sections 41 and 43 do not apply to the information. He also considers that there must be other information held in relation to the meetings which took place between the council and the successful contractor. He also considers that he has not been provided with all of the specification documents requested at point 3 above.

10. The Commissioner considers that the complaint is therefore that the exemptions do not apply in this case and that further information is held by the council.

Reasons for decision

Part 1 & 2 – Minutes and meeting notes

11. As regards parts 1 and 2 of the request there are 4 documents which have been withheld to an extent by the council. There are 3 sets of minutes from the Kent Test Review Group (PESE), group at the council which was reviewing the way that testing was carried out. The council provided the complainant with a summary of these minutes.
12. There is also a separate set of meeting notes which were provided to the council by the successful tendering company, GL Assessments (GLA). This was withheld in its entirety under section 43 of the Act.

Minutes of PESE Review Group meetings

13. The council provided the complainant with a summary of three sets of minutes of meetings of the PESE review group. When the council wrote to the Commissioner it said that it could now provide the full minutes with a small number of redactions where it considered that the information remained sensitive. This is because it included information on the methods of a third party provider who had asked the council not to disclose that information.
14. The council provided the Commissioner with withheld information which included minutes of meetings for 3 separate dates. It highlighted the set of minutes where it considers that the information should be withheld under section 43. It said that the remaining minutes were still sensitive but far less so than they had been at the time of the request. The Commissioner must however consider the information that the time of the request was received.
15. The council said that it considered that a disclosure of this information would be detrimental to the commercial interests of the providers as it would provide details of provider's methodology.

Meetings with the successful provider

16. The council clarified that there had been only one meeting with the test providers following the award of contract. The complainant however says that there must have been more than one meeting with test providers when devising a new examination system for 11 plus

examinations. He considers that there would have been a series of meetings prior to the award of the contract and more than one subsequent to this.

17. The council however said that there was in fact only one such meeting and that no further information is held in this regard. It said that all other communications had occurred by telephone or via email. These would not fall within the scope of the complainant's request.
18. The council confirmed that the notes of the meeting with the successful provider, (part 2 of the request), were withheld on the basis that both sections 41 and 43 (2) applied.

Section 43

19. Section 43(2) was applied to the information falling within part 2 of the complainant's request. It has been applied to a small section of the PESE minutes and to the minutes provided by the successful company, GLA to the council in their entirety.

20. Section 43(2) provides that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).'

21. To engage the section 43(2) exemption it is necessary for the public authority to demonstrate that a disclosure of the information would, or would be likely to, cause some relevant prejudice. In this case the council argues that a disclosure of the information 'would be likely' to cause prejudice to the commercial interests of the companies who provided information to the council as part of the tendering exercises.
22. Where the public authority has claimed that disclosure is only likely to give rise to the relevant prejudice then, in accordance with the Tribunal's decision in the case of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*, 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk'.
23. The council argued that disclosing the information would be likely to prejudice the commercial interests of test providers by revealing their tendering methods and strategies. The Commissioner notes that as regards part 1 it had highlighted information which it considered was sensitive which it had obtained from another provider. However it had exempted all of the minutes initially and only provided a summary to the complainant in response to his request. It subsequently wrote to the

Commissioner and said that following the passage of time it considered that the information was less sensitive but that it still considered it to be potentially exempt. The Commissioner must however consider the issue at the time that the request was received by the authority.

24. Having considered the information the Commissioner is of the view that it is only information relating to details of the tests provided by the provider that is commercially sensitive in this instance. The remainder relates to discussions surrounding issues with the existing tests and how changes might be addressed. It is not information which has been provided by third party test providers or private companies. It would not cause prejudice to the commercial interest of any person as it relates to the construction of, and general issues surrounding the tests and does not relate to the commercial activities of any specific test providers. The Commissioner's decision is therefore that section 43(2) does not apply to this information. This information should therefore be disclosed.
25. The information highlighted by the council within the minutes was provided by a different provider. This does relate to commercial activities however and is therefore considered as part of the remainder of the analysis of section 43 below.
26. The council said that there had been tenders received from a number of tendering companies in response to a previous tendering exercise. This tender was eventually not taken forward by the council. As regards the final tendering exercise the council said that none of the companies are aware of identity of any of the other tendering companies other than it has subsequently been announced that the company who were successful in winning the contract was GL Assessments (GLA).
27. The council argues that Kent's 11+ assessment process involves testing approximately 12,000 children annually and the purchase of test materials is conducted after a procurement exercise because of the value of that business. Both the established supplier and other interested parties could be placed at a disadvantage in future procurement processes if information about the service and materials they offered was to be disclosed.

The likelihood of the prejudice

28. In support of its case the council provided arguments supplied by GLA for withholding the information. It said that the test papers, meeting notes and other associated materials are retained as confidential as possible to retain the integrity of the tests for the future and to keep the contents of the tests and the way it constructs them secret from its competitors. It considered that releasing these documents would prejudice its commercial interests and damage future tests. It said that it invests significantly in its examinations and that investment would be jeopardised if this information was disclosed. It also argued that releasing information on its methods would detrimentally affect its business and its ability to provide tests in the future. Its argument is that the meeting notes discuss and flesh out some of the details of the above.
29. The Commissioner recognises that the meetings will be to an extent led by the wishes of the council when seeking to deliver the tests. All tendering contractors are likely to be led by the council's intentions or aims in this regard, however the Commissioner recognises that this may, to an extent be a two way process. Examination providers will have the necessary experience and analysis to be able to make suggestions as to how best to approach the tests and will work with the council on the basic content and structure of the tests to be provided to school pupils. In this case the council clarified that it left the tendering material relatively open to tendering companies in order to see what their solutions would be. In effect therefore it argues that the specification documents to be submitted as part of the tender were led primarily by the companies themselves.
30. The prejudice is therefore likely to fall within 2 main areas - a) divulging the structure or content of tests before they are disclosed to the public, thereby weakening the commercial appeal of the products they are providing compared to their competitors, and b) disclosing the methodology and strategies used by GLA in the tendering process.
31. GLA argued that the minutes of meeting are held in confidence and are commercially sensitive due to the fact that if they were disclosed then its competitors would identify its tendering methods and strategies. It was not specific as to how this might occur however. The information is not the tenders from the companies themselves and the minutes do not go into details as to the costs to the council of agreeing any tenders to any great extent. Rather, they are discussions surrounding the potential content of the tests (at a high level), and how they might be administered.

32. The Commissioner accepts however that the meeting notes do outline details which might undermine its competitiveness if adopted by its competitors.
33. Similarly, information within the minutes in part 1 of the request does outline some details of the approach of another provider. Again however this is at a relatively high level and it would not particularly outline the specific marketing strategy (the 'selling point') of any of the parties.
34. The aim of offering the tender is the provision of the tests. This will therefore limit the differences between providers' approaches to an extent, as all tests will be similar. Details of the approach of the companies discussed within the meetings might be important in leading an authority to deciding whether a tender should be offered or not. The Commissioner therefore accepts that small differences in how the tendering company approaches the tender and in the way different options it offers may be effective in winning contracts by tendering companies. These sorts of details can be extrapolated from the withheld information to an extent.
35. The Commissioner notes that GLA provides tests to a number of different authorities, and that the contract in this case is for the provision of the tests for 2014/2015, with an additional year's extension possible. The Commissioner recognises that it is therefore likely that within a very short period of time the companies may be offered the opportunity to tender again for this contract. In any event there will inevitably be the opportunity to tender to other authorities and compete against other test providers in very similar circumstances.
36. The likelihood that prejudice would be caused to providers' processes by disclosing their strategies is therefore increased significantly due to the relatively fast turn-over of contracts of this nature and the competitive nature of the market.
37. The Commissioner therefore considers that a disclosure of this information would be likely to cause prejudice to the commercial interests of the providers' if this information was disclosed.

Conclusion

38. In conclusion the Commissioner is satisfied that section 43(2) is engaged by the information as its disclosure would prejudice the commercial interests of GLA and the other providers. The Commissioner must therefore consider whether the public interest as required by section 2 of the Act.

The public interest

39. Section 2 requires the authority to carry out a public interest test to ascertain whether the information should be disclosed in spite of the exemption being engaged. The test is whether the public interest in the exemption being maintained outweighs the public interest in the information being disclosed. If it does not then the information should be disclosed in spite of the exemption being engaged.

Public interest arguments in favour of disclosing the requested information

40. The main public interest argument for disclosing the information is to provide greater transparency over the provision of tests/examinations for the 11+ process by the council. The tests are important in deciding which children grammar and other schools should offer places to. As such, there is a public interest in ensuring that the process carried out by the council is transparent in order that parents can be assured that the process was both fair and appropriate.
41. The tests, as they stood previously, have been criticised in the past for being too open to coaching, thereby affecting their effectiveness in establishing the most appropriate children to be offered places within grammar schools. The disclosure of the minutes of the meetings would provide greater transparency on some of the issues considered and the solutions presented to this. A disclosure of the tests together with this information would therefore allow parents and other interested parties a better idea of whether the aims have been met with the introduction of the new tests once the tests have been used for the first time.

Public interest arguments in favour of maintaining the exemption

42. The main public interest in maintaining the exemption in this case revolves around retaining a competitive market in the provision of the tests.
43. It is important to note that copies of actual tests papers to be used in the future are not at issue. The complainant has accepted that these would be sensitive and so excluded them from his request.
44. The Commissioner also notes that the information does not contain details of the financial aspects of the tender.
45. The sensitivity surrounding the withheld information relates to protecting the commercial interests of GLA and other providers; in ensuring that the tests which they provide, and the strategies which the companies employ to win contracts are protected from their direct competitors.

46. If details are disclosed which provide GLA's 'selling points' then other competitors may take these points and include or better them within their own tenders in the future. This will damage GLA's commercial interests because they will be less likely to win tenders in the future using these strategies. There is a public interest in protecting GLA's strategies and methods in order to prevent its financial and commercial interests being damaged in the future. There is a similar public interest in protecting the other providers in the field for the same reasons. With the relatively short life of the contract and the number of other authorities likely to be tendering for such services there is a real potential that disclosing the commercially sensitive material of this sort will affect the level playing field compared to other providers who have not had their strategies and methodology disclosed.
47. More widely, if information on the structure of the tests is disclosed this might increase the possibility that coaching will remain effective. This will lessen the value of the tests provided by GLA and may ultimately lead to it being less successful when tendering for contracts with local authorities in the future. This latter argument does not carry much weight however as regards the minutes do not contain example questions from real tests.

Balance of the public interest arguments

48. The main interested parties would be GLA's competitors seeking information on how GLA came to win the contract, and academics and researchers wishing to establish whether the tests surmount the criticisms which have been laid against previous tests of this nature. Even this latter point is of extremely minor significance given that the only real way to establish this is to analyse the tests themselves once they have been used. The disclosure of the withheld information in this case would not provide such information to interested parties.
49. The strongest likelihood from a disclosure of this information would be damage to the commercial activities of GLA compared to their competitors or vice versa where information about their methods falls within the scope of the request. The information would not provide greater transparency on the financial decision making of the council, would not provide specific details of the intended content of the tests to any great degree and would not particularly assist parents of children in coaching them to perform better during tests.
50. It is likely that all of the tests provided by test providers will follow a similar sort of pattern between the tendering companies. Therefore when tendering for contracts the issues which will make a contractor successful will be likely to be the costs of the service to an authority, together with any additional 'selling points' or strategies which a

company might employ when tendering for the contract or when providing the tests. There is no detail of the financial aspects of the offer, and the Commissioner is not satisfied that details of the selling points of the tenders are clearly established within the withheld information. There are no specific 'pitches' from the organisation outlining why their product is any better than any of the other tendering companies. It is these additional points which are at raised through this part of the request, and it is this information which is therefore commercially sensitive.

51. Nevertheless the Commissioner is satisfied that the damage which would be likely to be caused to GL assessments or the other providers through a disclosure of this information due to the fact that its methodology would to an extent be disclosed in part. He considers that this information would be of use to competitors, and he does not consider that the public interest in this information being disclosed is very strong.
52. He therefore considers that this is sufficient that the public interest in maintaining the exemption outweighs that in the information being disclosed. The council was therefore correct to apply section 43(2).

Part 3 of the request

53. As regards point 3, as noted above the council confirmed that no notes exist about the procurement process other than that it had disclosed to the complainant. It has disclosed the information which it holds regarding this part of the request.
54. The council confirmed that it had left the tendering process for the contract fairly open on this occasion as it wished to see what could be offered by the tendering companies. This is why it does not hold the types of information which the complainant considers would normally be held in tendering situations of this sort such as requirements to be met by tendering companies.
55. There is little point in the Commissioner asking the council to carry out searches for information which the council is adamant is not held because it was not required when the tender was run. Therefore the Commissioner has not asked the council to carry out its usual searches for relevant information within its electronic and manual files.
56. The Commissioner makes a decision on whether information is held based on the normal civil standards of proof. That is to say his decision is based upon a balance of probabilities.
57. Given the council's response the Commissioner has decided that on a balance of probabilities no further information is held by the council falling within the scope of part 3 of the complainant's request.

58. The Commissioner is therefore satisfied that the council complied with the requirements of section 1 of the Act with its response to point 3 of the request.

Parts 4 & 5 of the request

59. Parts 4 and 5 of the request were for copies of "All Examination samples / drafts" and "All test / practise papers". The council confirmed that these were effectively two questions asking for the same information. The council initially stated that it was not able to provide copies of these documents as the questions were taken from a 'live bank' of questions held by GLA and could therefore be used by the council, or other councils in actual exam papers in the future.
60. The council said that it was clearly not able to provide copies of these exam papers which the council was intending to use in the forthcoming round of exams. The complainant agreed with this and said that it was clear that that was not the information he had requested. For the absence of doubt therefore, any live papers would be exempt from this request due to the complainant clarifying that this was not the information he was seeking.
61. When the council wrote to the Commissioner it said that it has subsequently become aware that the examples provided by GLA as part of its tender documents were not, as it first considered, from the secure test item bank of questions but from those available to purchase in the High Street in example papers.
62. The council confirmed that it was therefore willing to disclose this information to the complainant. The Commissioner therefore requests that the council either discloses the information or identifies to the complainant which specific information it holds in order that he may purchase a copy of the relevant paper from retail outlets.

Section 41

63. Section 41(1) provides that –

"Information is exempt information if-

it was obtained by the public authority from any other person (including another public authority), and

the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

64. The Commissioner has decided that section 43 is applicable to the information withheld from points 1 & 2 of the request.
65. As regards part 3 of the request the Commissioner has decided that on a balance of probabilities no further information is held.
66. As regards parts 4&5 of the request the council has indicated its willingness to disclose the information it holds to the complainant.
67. The Commissioner has therefore not found it necessary to consider the application of section 41 further in this instance.

Right of appeal

68. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

69. 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.

70. 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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