

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 April 2015

Public Authority: Staffordshire County Council
Address: Number 1 Staffordshire Place
Stafford
ST16 2LP

Decision (including any steps ordered)

1. The complainant submitted a request to Staffordshire County Council (the Council) for the copies of the three highest scoring tenders received by the Council regarding a particular contract. The Council refused to disclose the tenders relying on section 43(2) (commercial interests) of FOIA.
2. The Commissioner has concluded that whilst section 43(2) of FOIA applies to the entirety of one of the tenders in question, it can only be used to withhold parts of the other two tenders. The Commissioner has also concluded that the Council has breached sections 17(1) and 17(3) because of its delays in issuing a refusal notice and completing its public interest deliberations.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with the parts of Affinity Trust's tender which that organisation accepted were not commercially sensitive. Such information is identified in the letter sent by Affinity Trust to the Council dated 17 April 2014.
 - Provide the complainant with the redacted version of company B's¹ 'T52 Supporting Business Plan' as it was provided to the Council on 22 April 2014.²

¹ The Commissioner has provided the Council with a confidential annex in which he clarifies which company this is.

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. The complainant submitted the following request to the Council on 13 February 2014:

'REF: Framework for the Provision of care and support in a community living setting for clients of the directorate for people (adult social care service area) with learning disabilities. 2013 to 2014 (with an option to extend for a further year) Reference: SCHLD00102. Under the Freedom of Information Act we would like to see the 3 highest scoring tenders submitted against SCHLD00102.'

6. The Council acknowledged receipt of this request on 17 February 2014.
7. The complainant contacted the Council on 11 April 2014 in order to chase up a response to his request.
8. The Council responded on the same day and explained that the requested information was likely to be exempt from disclosure on the basis of section 43(2) of the FOIA but it needed additional time to consider the balance of the public interest.
9. The complainant contacted the Council on 9 June and 18 September 2014 in order to chase a response to the request again.
10. The Council responded on 18 September 2014 and confirmed that it had concluded that the public interest favoured withholding all of the requested information under section 43(2) of FOIA.
11. The complainant contacted the Council on the same day and asked for an internal review to be completed.

² In providing this document the Council should ensure that the content of the redacted material cannot be seen, as is the case on the version of the document provided to the Commissioner.

12. The Council informed him of the outcome of the review on 18 November 2014. The review upheld the application of section 43(2).

Scope of the case

13. The complainant initially contacted the Commissioner on 30 September 2014 in order to complain about the Council's handling of his request. In particular, he asked the Commissioner to consider:

- The Council's delay in responding to his request;
- The Council's failure to even acknowledge his request for an internal review; and
- The Council's decision to withhold the requested information on the basis of section 43(2) of FOIA.

14. Following the completion of the internal review the complainant confirmed that he wished to continue with his complaint.

Reasons for decision

Section 43 – commercial interests

15. The Council sought to withhold the requested information, the three highest scoring tenders, on the basis of the exemption provided by section 43(2) of FOIA.

16. Section 43(2) states 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).'

17. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the

exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.
18. In relation to the commercial interests of third parties, the Commissioner does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, the Commissioner expects that arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns.

The Council's position

19. The Council argued that disclosure of the three bids (submitted by Affinity Trust – who won the tender, and two other companies, referred to here as companies B and C) would be likely to harm the commercial interests of each of the companies who submitted the bids. This is because the tender submissions are unique to each company and the content of their submission can be the difference between winning the contract and being unsuccessful. The Council argued that using the tenders, competitors could see how staff are trained, what unique products and services the tenderers offered, or understand the financial breakdown of their bid. The Council argued that access to such information would result in winning bids being scrutinised by competitor companies and successful aspects of them copied. The Council argued that even issuing a redacted version of the tenders would still show the different types of information included by a company in their submission. It emphasised that the different styles of submission and the level of detail of the submission would still reveal the bidding method of each company. Consequently, the Council argued that revealing the bids would lead to the risk of competitors taking away points about how to write a successful submission and what content public authorities want to see in such bids and moreover, how such information is presented.

20. The Council provided the Commissioner with copies of its correspondence with each of the three companies who submitted the tenders.

The complainant's position

21. The complainant argued that he could see no reason why the information he requested could not be provided. He explained that he had spoken to a company that specialises in advising organisations who submit tenders to local councils and that specialist suggested that they make regular FOI requests and have never had any problems obtaining this kind of data. The complainant emphasised that he was merely asking about the successful bidders in order to learn lessons about how bids should best be constructed in future. The complainant noted that he was not interested in the facts and figures but as a failed bidder would simply like to know what more his organisation could have included in its bid and to learn lessons in bid writing to give themselves a better chance for future tender opportunities.

The Commissioner's position

22. With regard to the three limb test referred to at paragraph 17, the Commissioner is satisfied that the first limb is met given that the nature of prejudice envisaged to the three companies' commercial interests are clearly ones that fall within the scope of the exemption provided by section 43(2).
23. With regard to the second limb, the Commissioner accepts that there is some causal link between disclosure of the three bids and prejudice to the commercial interests of the organisations in question. This is because he accepts that it is logical to suggest that the bids are likely to be used by other organisations to inform their future bids that they may make for similar contracts. Indeed the complainant has stated as such in his own submissions. Furthermore, in the Commissioner's view it seems reasonable to suggest that access to such information would be likely to provide these other organisations with some inherent advantage in any future bidding process given that that they could tailor their own tenders in light of the content of the withheld information, ie the three highest scoring bids for this particular contract. Furthermore, the Commissioner is satisfied that the resultant prejudice which is alleged is real and of substance.
24. With regard to the third limb, given the content and indeed the length of each of the bids, it seems clear to the Commissioner that some parts of each tender are likely to be more commercially sensitive than others. That is to say disclosure of particular parts would be likely to provide a greater insight into the specific approach to the contract a particular

organisation intended to take. Nevertheless, having taken into account the detailed nature and length of each submission, the Commissioner is persuaded by the Council's line of argument that disclosure of the tenders even in a redacted form would provide other organisations with an informative insight into how they structured their high scoring bids. That is to say, disclosure in a redacted form would still reveal the level of detail, the topics and issues each organisation covered and moreover how each organisation chose to present their tender. The Commissioner accepts that such a level of detail could be used by competitor organisations to effectively (and potentially successfully) inform future bids they may make for similar contracts in the future. Consequently, the Commissioner accepts that the likelihood of prejudice occurring even if a redacted version of each contract was disclosed is one that is more than hypothetical.

25. However, two of the organisations in question, Affinity Trust and company B, informed the Council that they could accept a redacted version of their tenders being disclosed. (The former explicitly noting that it was content for some of its information to be disclosed and the latter advising the Council of the information that, at a minimum, it wanted redacted.) In light of these submissions the Commissioner simply cannot accept that the entirety of Affinity Trust's tender and the entirety of company B's tender are exempt from disclosure under section 43(2). This is because the two organisations themselves have appeared to concede that such information can be disclosed without harm occurring to their own commercial interests.
26. The third bidder, company C, maintained its position that the entirety of its bid was exempt from disclosure. In light of the Commissioner's comments above, he is persuaded that the disclosure of this entire contract would be likely to prejudice company C's commercial interests.
27. In conclusion and in light of his comments in paragraph 24, the Commissioner has concluded that:
 - The entirety of company C's tender is exempt from disclosure on the basis of section 43(2).
 - Affinity Trust's tender is exempt from disclosure on the basis of section 43(2). The only exception to this is the information it identified in its letter to the Council of 17 April 2014 as not being commercially sensitive.
 - Company B's tender is exempt from disclosure on the basis of section 43(2) with the exception of the information it did not redact from the copy of the T52 Supporting Business Plan it provided the Council on 22 April 2014.

Public interest test

28. Section 43(2) is a qualified exemption. Therefore the Commissioner must consider the public interest test contained at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption in relation to the information that he accepts is exempt from disclosure outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

29. The Council argued that it was firmly against the public interest to disclose information that would be likely to prejudice the commercial interests of private companies. It noted that such companies are not subject to FOI and in fact only one of the three companies in question actually won the contract and thus no public money was actually spent on the services offered by two of the organisations.

Public interest arguments in favour of disclosing the withheld information

30. As noted above, the complainant suggested that disclosure of this information would allow other organisations to better structure future bids they may make and thus allow the Council to select from a stronger field of potential suppliers for such services.

Balance of the public interest arguments

31. In the Commissioner's opinion there is an inherent public interest in the disclosure of information which would reveal how public authorities have spent money. Disclosure of the information that the Commissioner has concluded is exempt from disclosure on the basis of section 43(2) would provide the public with an insight into the range of bids that the Council received for this contract, albeit arguably somewhat of a limited one as was the request only sought the top three bids. The Commissioner accepts that this could potentially provide the public with some understanding as to the decision making process the Council faces when selecting a provider of such services. Furthermore, the Commissioner accepts that the complainant's line of argument deserves some weight; there is clearly a public interest in the Council – or indeed any local authority – being able to choose from the strongest range of tenders as possible in order to ensure the effective spending of public money.
32. However, in the Commissioner's opinion disclosure of the withheld information clearly risks undermining the distinctive nature of each organisation's tender; it would allow their competitors to copy their approach, both in respect of drafting the tender and providing the services in question. In Commissioner's opinion such an outcome

actually risks the homogenisation of the tenders with the organisations in question being unable to provide a genuinely distinct proposal to local authorities without this potentially being replicated by a competitor. In the Commissioner's view such an outcome would be firmly against the public interest as it would actually result in the Council being less likely gain best value for money.

33. Furthermore, the Commissioner believes that there is an inherent public interest in ensuring fairness of competition; in that respect he concurs with the Council that it is firmly against the public interest for the commercial interests of third parties to be undermined simply because they have submitted a tender to a local authority.
34. In light of the above, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

Section 12 – costs

35. Section 12 of FOIA allows a public authority to refuse to comply with a request if it estimates that the cost of complying with the request would exceed the appropriate cost limit.
36. The Council suggested to the Commissioner that it had considered going through the requested information and extracting non-exempt information but considered the process of doing so would exceed this cost limit, ie £450.
37. However, in the Commissioner's opinion a public authority cannot take into account the staff time taken in removing exempt information as part of the permitted activities when calculating whether complying with a request would exceed the cost limit under section 12 of FOIA.³
38. Therefore the Commissioner is of the view that the Council cannot rely on section 12 to refuse to comply with steps that this decision notice orders.

Section 10 and section 17

39. Section 10(1) of FOIA requires public authorities to respond to a request promptly and in any event within 20 working days of receipt.

³ See the Commissioner's guidance, in particular paragraphs 14 to 16:
https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

40. Section 17(1) of FOIA explains that if a public authority intends to refuse to comply with a request it must provide the requestor with a refusal notice stating that fact within the time for compliance required by section 10(1). Section 17(3) allows a public authority to extend its consideration of the public interest for a reasonable period of time if necessary. The Commissioner considers a reasonable period of time to be an additional 20 working days.
41. In the circumstances of this case the complainant submitted his request on 13 February 2014 but the Council did not inform him that it intended to rely on section 43(2) until 11 April 2014, at which point it cited the exemption in question and explained that it needed further time to consider the balance of the public interest test. The Council then took until 18 September 2014 to complete its public interest test considerations.
42. Consequently the Commissioner has found that the Council has breached section 17(1) of FOIA by failing to issue a refusal notice within 20 working days and furthermore has breached section 17(3) by failing to inform the complainant of the outcome of its public interest deliberations within 40 working days of his request.

Right of appeal

43. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

44. 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.
45. 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

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