

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 September 2017

Public Authority: Devon County Council
Address: County Hall
Topsham Road
Exeter
EX2 4QD

Decision (including any steps ordered)

1. The complainant has asked Devon County Council for a copy of a contract between the Council and Babcock Learning and Development Partnership ("Babcock LDP"), including information concerning the Key Performance Indicators, monitoring of the contract, service specifications and the full financial values of the contract. The Council initially confirmed that it holds the information requested by the complainant but it refused to disclose this information on the grounds that it is commercially sensitive and subject to the exemption to disclosure provided by section 43 of the FOIA. The Council's position was reversed at internal review and information was disclosed to the complainant via the Council's website.
2. The Commissioner's decision is that Devon County Council has provided the complainant with the information she had requested and thereby it has satisfied section 1(1) of the FOIA.
3. The Commissioner has also decided that the Council has breached section 10 of the FOIA by failing to provide the information requested by the complainant within the twenty working days compliance period which section 10 requires.
4. The Commissioner requires the Devon County Council to take no further action in this matter.

Request and response

5. On 4 November 2016, the complainant wrote to Devon County Council and requested information in the following terms:

"[A]* Please forward a copy of the publicly funded commissioned contract between Devon County Council and Babcock LDP partners in education joint venture. If this consists of different contracts within education please provide all contracts within this joint venture.

[B] The date this contract commenced, it's timeline, to conclusion The Key Performance Indicators Full monitoring of the contract since inception The full financial values of the contract Full copy of the contract and any variations of it, including the current contract Please forward a full copy of the Service Specification Thank you"

*The Commissioner has split the complainant's request into two parts to reflect the way in which the Council responded to it.

6. On 2 December 2016, the Council responded to the complainant's request by advising her that the contract was arranged in 2012 and information about the contract was disclosed at that time in the form of a press release. The Council said that the full copy of the contract included details of the joint venture which are sensitive to the way in which the Council has arranged ventures of this kind and may do so again. The Council also stated that the contract is due to conclude in 2019 and may be renewed. Accordingly, the Council determined that the complainant's request should be refused in reliance on section 43 of the FOIA, on the grounds that its disclosure would be prejudicial to commercial interests.
7. The Council answered part B of the complainant's request by confirming that it holds information regarding the monitoring of the contract. The Council advised the complainant that, "disclosure of the Key Performance indicators, details of the full monitoring of the contract and the full financial values of the contract are also considered sensitive for the same reasons".
8. The Council stated that it will need to consider the monitoring information for the purposes of renewing the contract in 2019 and therefore it is in the public interest for this information to be kept confidential.
9. Having received the Council's response, the complainant wrote to the Council on 2 December to complain about its failure to comply with her request within the twenty working days required by the FOIA. The complainant asserted that the Babcock document which the Council had sent her is not the information she had asked for because it is a press release. The complainant also asserted that the press release was not fully legible due to the Babcock logo "obliterating the full written content of the document". Finally, the complainant complained that the "poorly reproduced document" contains none of the information she had

requested, which included the Service Specification, Key Performance Indicators and information concerning the monitoring of the performance and service delivery of the contract.

10. Later on 2 December, the Council acknowledged the complainant's complaint and it advised her that it would be investigated and responded to within twenty working days.
11. The complainant responded to the Council's email – again on 2 December, by stating that she did not consent to waiting a further twenty days and she complained that the Council was using "obfuscatory gatekeeping time delaying avoidance tactics" in order to prevent her access to the information she had requested.
12. On 5 December, the complainant wrote to the Council to insist that her complaint should not be forwarded to the Council's Customer Relations Team, but rather that it was for the Council's interim Information Governance Manager to deal with.
13. The Council responded to the complainant's email later on 5 December, advising her that it was the Council's intention to review her concerns and that this would be done by one of its Senior Information Governance officers.
14. On 1 March 2017, the complainant wrote to the Council to complain about its failure to respond to her complaint.
15. In the period from 20 February to 16 March, the Commissioner understands that the complainant had a number of telephone conversations with staff in the Council's Children's Department, and had engaged in email correspondence which referred to her information request and the Council's failure to properly respond to it.
16. On 3 March, the Council provided the complainant with information which it considered was outstanding from her original request. The Council also apologised for its delay in resolving this matter.
17. On 16 March, the Council wrote to the complainant about her information request. The Council referred to Annual Reports which it had sent the complainant and also to her assertion that these were inadequate for the purpose of her request. The Council also referred to a voicemail the complainant had left in which she had complained about the Council's failure to provide her with the value of the contract with Babcock LDP. The Council's email stated:

"...I can confirm that the Council's view is that the contract in question is very much about supporting and improving educational outcomes for children in Devon. Therefore we report on outcomes (i.e. how we support educational attainment), not inputs (i.e. number of meetings

held). The annual reports give a great deal of information about that, and are relevant to this contract and how it is managed. It is a joint venture arrangement which clearly shows it is actively managed, with its focus being on supporting educational outcomes for children in Devon.

As the contract is managed with a focus on outcomes, the annual reports are an important disclosure in relation to contract management. Furthermore I can confirm that the Council has disclosed the value of spend with Babcock LDP throughout the life of the contract. For these reasons, Devon County Council considers we have complied with your request and we therefore consider the matter closed..."

18. On 17 March, the complainant wrote again to the Council. The complainant made clear that she considered a private company's annual reports do not constitute the proper monitoring of the Babcock contract. Later in a separate email, the complainant wrote to the Council and complained that the Council's response of 16 March did not address her request for information. The complainant stated that the Council had failed to disclose any information for over two months and she asserted that she had not received "the Full Service Specification in this request of a Publicly Funded Commissioned Contract, the Key Performance indicators set out by the contractor [...] or the Monitoring of the Contract Performance, Value for Money and outcomes – the contractors not the contractees own evaluation of itself Babcock."
19. The complainant's email referred to the Council's 'links' for annual reports of a private company, which she considered have no relevance to her request. The complainant stated that, "they are the annual report of a private company and not the request for information you hold as the contractor..." Again, the complainant asked the Council, "where is the full service specification, the Key Performance indicators for the contractor and the Council's Monitoring of the Contractors as holder of it?"
20. The complainant complained that the Council had only supplied her with links to annual reports and had not sent them, even though they are not the Council's annual reports and are not the information she had requested. The complainant pointed out that they are the annual reports of a PLC and she asserted that it is the Council's responsibility to provide the information because, as the contractor, it is the Council's responsibility to monitor the contract's performance, the meeting of the key performance indicators and the performance of the outcomes. The complainant went on to complain about the Council's failure to respond to her request after four and a half months of her making it.
21. Additionally, also on 17 March, the complainant wrote to the Council to complain about its handling of her request. She complained about the time taken by the Council to respond to her request and also about its

failure to provide the information which she seeks. To complainant said that she would now seek an ex-gratia compensation payment to compensate her for the time and resources she had spent in dealing with her request.

22. In another email on 17 March, the complainant informed the Council that she was still waiting for its internal review decision.

Scope of the case

23. The complainant contacted the Commissioner on 1 March 2017 to complain about the way her request for information had been handled.
24. The initial focus of the Commissioner's investigation was to determine whether the Council had breached section 10 of the Act (time for complying with a request) and whether it was entitled to rely on the exemption to disclosure provided by section 43 of the FOIA – Commercial interests. However, in its response to the Commissioner's enquiry, the Council advised her that it no longer relied on section 43(2) of the FOIA and furthermore the Council advised the Commissioner that it considered it had complied with the terms of the complainant's request.
25. In the light of the above, the Commissioner's decision concerns only sections 1(1) and 10.
26. An "Other matters" section is included with deals with complaints raised by the complainant concerning procedural matters.

Reasons for decision

Section 1 – general right of access to information held by public authorities

27. Under section 1(1) of the FOIA, any person who makes a request for information to a public authority is entitled to be informed whether the authority holds that information, and if it does, to have that information communicated to him.
28. The Council has informed the Commissioner that it originally withheld information from the complainant on the grounds that it was exempt under section 43(2) of the FOIA. However, on completion of its internal review the Council's reliance on this exemption was withdrawn and the information requested by the complainant was provided by way of links to appropriate websites.

29. In view of its internal review decision, the Council considers that it has provided the complainant with "all the relevant information held which meets the scope of this request".
30. To support its position, the Council has provided the Commissioner with copies of two letters which it had sent to the complainant by email in connection to her request: The first letter is dated 24 February 2017 and the second is dated 3 March 2017.
31. The first letter, in response to the complainant's point 6, contains the following explanation:

"After reconsidering our position on this matter the Council is pleased to provide you with a copy of our contract with Babcock LDP. I can confirm that the Babcock LDP service specification is included as part of the contract provided. However further insights into this specification are also provided in a separate document entitled "Statement of Service Requirements". We believe this document, when read in conjunction with the contract, will be of assistance to your enquiry. Both documents are available to view via the links below."

32. Links were provided to:
 - Devon County Council contract with Babcock LDP
 - Statement of Service Requirements
33. The Council's internal review noted that the complainant has also asked for information concerning the monitoring of the contract and also on the key performance indicators. The reviewer advised the complainant that the Council was continuing to pursue this matter and taking further advice. The complainant was therefore advised that the Council would provide a separate response to those components of her request as soon as possible.
34. The Council's second letter provided the complainant with links to four annual reports for the period 2012 to 2106 inclusive which cover the lifespan of the contract. The Council advised the complainant that:

"Contract monitoring is undertaken by way or reviews against core areas of the contract. The results of contract monitoring including performance indicators are published as part of jointly produced contract monitoring reports."
35. In addition to the information above, the Council provided the complainant with a table specifying the Council's spend with Babcock LDP/Babcock 4S Ltd since the inception of the contract and a link to the service specification. The service specification is contained in a document entitled 'Delivery of Education and Inclusion Service General

Terms and Conditions of Contract: Specifications forming part of Schedule 1'.

36. The Council informed the complainant that the names of some Council and Babcock representatives contained in the service specification document had been removed [redacted] on the basis that they are not senior enough to have a reasonable expectation their names would be disclosed to the public. Therefore the Council has applied the exemption provided by section 40(2) of the FOIA – third party personal data.
37. On 16 March 2017, referring to a telephone conversation between the complainant and the Council, the Council confirmed its view that:

“...the contract in question is very much about supporting and improving educational outcomes for children in Devon. Therefore we report on outcomes (i.e. how we support educational attainment), not inputs (i.e. number of meetings held). The annual reports give a great deal of information about that, and are relevant for this contract and how it is managed. It is a joint venture arrangement which clearly shows it is actively managed, with its focus being on supporting educational outcomes for children in Devon.

As the contract is managed with a focus on outcomes, the annual reports are an appropriate disclosure in relation to contract management. Furthermore I can confirm that the Council has disclosed the value of spend with Babcock LDP throughout the life of this contract. For these reasons, Devon County Council considers we have complied with your request and we therefore consider the matter closed and do not propose to enter into further communications with you regarding this matter.”

The Commissioner's decision

38. Having considered the representations made by both the complainant and the Council, and in particular the assurance given by the Council that it has disclosed to the complainant all the information it holds which is relevant to her request, the Commissioner considers that, on the balance of probabilities, the Council has satisfied its duty under section 1(1) of the FOIA by providing the complainant with information it holds relevant to the terms of her request.
39. Notwithstanding the above, the Commissioner has decided that the Council has contravened the requirement of section 10 of the FOIA.
40. The Council's failure to meet the twenty working day compliance period is primarily due to its failure to collate all of the information falling within the scope of the complainant's request and to properly coordinate its response.

41. The Councils failure to provide a single and unified initial response, together with the delays encountered when seeking seek senior management input and third party consultation, served to exacerbate matters.
42. The Commissioner accepts the Council sent the complainant its refusal notice within the twenty day compliance period required by section 10. However, following the conclusion of its internal review, where the Council reversed its decision to apply the exemption provided by section 43(2), it subsequently provided the information the complainant had requested. This change in the Council's position brought about its compliance with section 1(1) but significantly after the twenty day compliance period had passed. The Council accepts this contravention.

Other matters

43. The complainant maintains that the Council failed to provide her with an internal review which properly explains whether it continued to rely on section 43(2)
44. This position is not supported by the facts of this case which indicate the Council had overturned its reliance on section 43(2).
45. The complainant also argues that the responses made by the Council in respect of her request indicate that it was being obfuscatory and employing time delaying tactics.
46. The Council has assured the Commissioner that any delay in its responses to the complainant were not the result of any deliberate time-delaying tactics. Nevertheless, the Council accepts that its initial response fell short of its own expectations and did not provide a detailed explanation as to why the exemption at Section 43(2) applied.
47. During its internal review investigation the Council considered it necessary to seek clarity on why the section 43 exemption applied. Unfortunately, due to internal circumstances at the time when the Council undertook its internal review, its responses to the complainant were delayed.
48. It was apparent to the Council that one of its officers had not collated nor had sight of the documentation requested by the complainant, and this failure contributed to further delays in the handling of the internal review. It therefore became necessary to undertake further consultation with Council senior managers and at Babcock LDP to collate the documentation which the complainant had requested. Once collated it was necessary to extend this consultation to help inform the Council's final decision.

49. The Council also drew the Commissioner's attention to "Difficulties" it had in handling the complainant's contact with the authority, which the Council says "lead to staff being diverted from their day-to-day duties", and contributed to the delays experienced in this case.
50. The Council has advised the Commissioner that it has undertaken a reflective learning exercise to ensure that any mistakes which occurred during the handling of this request do not happen again. The Council has identified and adopted a number of procedures and actions which it hopes will prevent, or at least reduce, such delays in the future.
51. The Commissioner is content with the earnest approach adopted by the Council in terms of the procedures it has put in place.

Right of appeal

52. 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

53. 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.
54. 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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