

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 20 July 2018

**Public Authority:** Brighton and Hove City Council

**Address:** Kings House  
Grand Avenue  
Hove  
BN3 2LS

### Decision (including any steps ordered)

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1. The complainant submitted a request to Brighton and Hove City Council (the Council) for information it held about the due diligence it had undertaken in relation to the awarding of a heating services contract. The Council sought to withhold the requested information on the basis of section 43(2) (commercial interests) of FOIA. The Commissioner is satisfied that the requested information is exempt from disclosure on the basis of this exemption and that in all the circumstances of the case the public interest favours maintaining the exemption. However, the Council breached section 17(1) of FOIA by failing to respond to issue its refusal notice within 20 working days.

### Request and response

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2. The complainant submitted the following request to the Council on 21 September 2017:

*'I would be grateful if you could provide all information obtained and details of procedures followed when carrying out Due Diligence checks prior to the awarding of the Heating Services contract to K&T.'*

3. The Council responded on 13 December 2017 and explained that details of the procedures to be followed in relation to due diligence were shared with interested suppliers within the invitation to tender document and provided the complainant with a copy of this. However, the Council explained that the information it held about the due diligence specifically undertaken in respect of K&T Heating Services Ltd (K&T Heating) was

considered to be exempt from disclosure on the basis of section 43(2) (commercial interests) of FOIA.

4. The complainant contacted the Council on 17 December 2017 and explained that the information he requested concerned due diligence not the tender document. He contacted the Council again on 19 December 2017 and confirmed that he wanted an internal review of his request to take place.
5. The Council informed him of the outcome of the review on 18 January 2018. The review upheld the application of section 43(2) in relation to the due diligence undertaken in respect of K&T Heating's bid. However, the review concluded that he should have been provided with details of *'what the procedure is to check due diligence prior to the awarding of the contract'*. The Council therefore provided the complainant with these details.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 20 January 2018 in order to complain about the Council's handling of his request. He explained that he was dissatisfied with its decision to withhold information falling within the scope of his request and also with the length of time it took the Council to respond to his request.

### **Reasons for decision**

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#### **Section 43 – commercial interests**

7. 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).'*

8. 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.
9. 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

10. The Council explained that it had conducted a substantial viability assessment of K&T Heating's ability to provide the required products and services at the tendered price. However, it was of the view that disclosure of the information it held about this assessment would be likely to harm the trading position of K&T Heating. The Council's rationale for this was that the withheld information contained details of unit pricing for very specific services and these prices were key to the competitive market advantage enjoyed by the supplier and to disclose them to competitors would clearly undermine the pricing advantage K&T Heating had been able to build. The Council emphasised that these prices remained in place today. The Council also explained that the withheld information also contained details of how K&T Heating was able to deliver these prices. The Council therefore argued that the costs model is therefore specifically commercially sensitive to K&T Heating as it underpins its market position. The Council explained that in deciding to apply section 43(2) on this basis it had not entered into correspondence with K&T Heating. However, the Council explained that the commercial sensitivity in which K&T Heating held its pricing and supply chain information is known from the original due diligence discussions and undertakings of confidentiality which were made to them at the time of the due diligence checks.

11. Furthermore, the Council argued that disclosure of the withheld information would be likely to harm its commercial interests because the contract had provided significant value for public money and disclosure of the information, which would undermine the costs/pricing strategy of one its suppliers, would be inconsistent with its efforts to obtain value for public money.

#### The Commissioner's position

12. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the Council clearly relates to the interests which the exemption contained at section 43(2) is designed to protect.
13. With regard to the second criterion and K&T Heating, the Commissioner is satisfied that disclosure of the withheld information has the potential to harm its commercial interests. The Commissioner has reached this conclusion given that the withheld information contains details of K&T Heating's costs and pricing strategy and moreover includes details of how these were arrived at. In the Commissioner's view it is clearly plausible to argue that disclosure of this information has the potential to harm K&T Heating's commercial interests given the insight such information would provide to its competitors. With regard to the third criterion and K&T Heating, the Commissioner has no hesitation in accepting that this is also met and thus if the withheld information were to be disclosed there is clearly more than a hypothetical risk of prejudice occurring; rather there is a real and significant risk of this prejudice occurring. The Commissioner has reached this view given the level of detail contained in the material about K&T Heating's costs and pricing models, the fact that the prices remain current, and as the Council suggests, such information underpins K&T Heating's entire market position and thus disclosure of the information would clearly provide its competitors with a direct insight into its business model and thus harm K&T Heating's commercial interests.
14. With regard to the second criterion and the Council's own commercial interests, the Commissioner accepts that there is a causal link between disclosure of the information and the Council's commercial interests. That is to say, it is logical to argue that if disclosure led to an impact on K&T Heating's competitiveness – and the Commissioner accepts that it would be likely to – then when the Council came to re-tender for this contract the value for money achieved by the Council by contracting K&T Heating may be reduced. In terms of the third criterion, in the Commissioner's opinion whether this particular outcome is something which is more than hypothetical is more finely balanced judgement. However, she recognises that the Council has emphasised that this contract has delivered significant value for money and moreover that

the contract only runs until 2020, albeit with the potential for a two year extension. Therefore, the Commissioner is prepared to accept that if the withheld information was disclosed, at the point at which the Council was seeking to re-tender for this work then K&T Heating's commercial position could still be sufficiently undermined that the value for money it could offer the Council, should it chose to bid for any future tender, could be negatively impacted.

15. Section 43(2) is therefore engaged.

### **Public interest test**

16. Section 43 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
17. The complainant argued that if the withheld information was about companies that had responded to the tender invitation but had been unsuccessful then the reason for the Council's reliance could be seen as valid. However, he emphasised that his request sought information about a successful contract that should be open to scrutiny and this included information obtained during the due diligence process. He also explained that his request was as much about the process of due diligence as it was about the particular contract awarded and he was seeking the Commissioner's view on using section 43(2) in such circumstances.
18. The Council acknowledged that there was a public interest in transparency and accountability in public decision making. However, it argued that there was a strong public interest in withholding the information given that its disclosure would be likely to undermine the trading position of the supplier in the marketplace. The Council also argued that it would be against the public interest if its ability to secure best value for money was harmed.
19. The Commissioner recognises that there is significant public interest in the Council being open and transparent about decisions it takes involving public money and this includes information about how it assesses and analyses tender submissions. Disclosure of the withheld information would provide a detailed insight into the discussions and exchanges of information the Council had with K&T Heating as part of the due diligence process and disclosure could reassure the public about the thoroughness of this process. However, in the Commissioner's opinion there is very strong and inherent public interest in ensuring fairness of competition and in her view it would be firmly against the public interest if a company's commercial interests are harmed simply

because they have submitted tenders for public sector contracts. Furthermore, the Commissioner believes that there is an inherent, and very strong, public interest in ensuring that a public authority's ability to secure value for public money is not undermined. The Commissioner has therefore concluded that the public interest favours maintaining the exemption contained at section 43(2) and withholding the information falling within the scope of the request.

20. In reaching this conclusion, the Commissioner recognises that the complainant noted that he considered this request to be as much about the disclosure of information about the due diligence processes as it was about the particular information itself. In terms of the Commissioner's remit under section 50 of FOIA, this is limited to determining whether the particular information which has been requested is exempt from disclosure under FOIA. In the circumstances of this case, and for reasons set out above, she is satisfied that it is. Furthermore, the Commissioner would add that each case has to be considered on its own merits, including of course the specific information that had been withheld. Therefore, whilst information a public authority holds about the due diligence it conducted in terms one contract may be exempt from disclosure under FOIA, it is possible that the information concerning the due diligence undertaken in respect of a different contract process may not be.

### **Delay in responding to the request**

21. Section 17(1) states that:

*'(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—*

*(a) states that fact,*

*(b) specifies the exemption in question, and*

*(c) states (if that would not otherwise be apparent) why the exemption applies.'*

22. The time for complying with section 1(1) of FOIA is 20 working days as set out by section 10(1) of FOIA:

*'Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.'*

23. In responding to this request the Council breached section 17(1) of FOIA because the request was submitted on 21 September 2017 the Council did not respond to the request and issue its refusal notice citing section 43(2) of FOIA until 13 December 2017.

## Right of appeal

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24. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

25. 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.
26. 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 .....**

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**