Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **25 September 2018**

Public Authority: **Brighton and Hove City Council**
Address: **Kings House**
Grand Avenue
Hove
East Sussex
BN3 2LS

Decision (including any steps ordered)

1. The complainant requested a full copy of an agreement between Brighton and Hove City Council and Brighton and Hove Seaside Community Homes Ltd.

2. The Commissioner's decision is that Brighton and Hove City Council has correctly applied the exemption at section 43(2) – commercial interests, to the redacted information.

3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 21 August 2017, the complainant wrote to Brighton and Hove City Council ('the council'). With reference to information previously provided by the council, he requested information in the following terms:

> *"It is not acceptable to redact the Management Agreement document and it is necessary to provide a full copy of the Agreement between BHSCH* [Brighton & Hove Seaside Community Homes Ltd] *and B&HCC* [the council]*, of which this agreement is Schedule 8, in order to understand the full meaning of the content."*

5. The council responded on 3 November 2017 and provided information within the scope of the request. *It stated "After further consideration and review we have decided to disclose a copy of the management agreement with only Part of para 5.5.4 redacted".* It cited the exemption at section 43 of the FOIA (commercial interests) as the basis for the redaction. The clauses which remained redacted are:

   Page 12- Clause 15.5.5, Clause 15.6

   Page 108-Clause 5.5.4 (in part)

6. Following an internal review the council wrote to the complainant on 6 February 2018. It maintained its position, citing section 43 of the FOIA as the basis for the redactions.

Scope of the case

7. The complainant contacted the Commissioner on 23 February 2018 to complain about the way his request for information had been handled. Specifically that *"Information has been redacted on the grounds of commercial confidentiality despite the managerial contract between BHSCH (a registered Charity as well as a company) and the City Council not having been tendered or open to any other company. In essence it was part of the agreement between the two bodies with BHSCH having been established by B&HCC* [the council]*."*

8. The Commissioner therefore considers that the scope of this case is to decide whether the council is correct to cite section 43 of the FOIA as the basis for the redactions to the management agreement.

Reasons for decision

Section 43 – commercial interests

9. 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).'

10. 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 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.

11. 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

12. The council advised that the redacted information relates to performance incentives which have been built into the contract with Brighton and Hove Seaside Community Homes Ltd ('BHSCH').

13. The council confirmed that it was satisfied that disclosure of the withheld information would be likely to prejudice the commercial interests of BHSCH. It stated it had consulted with BHSCH to verify this position.

14. The council argued that *"Seaside Homes may wish to refinance or negotiate or tender out the management of its properties in the future and the disclosure of the withheld information would put Seaside Homes at a disadvantage in the negotiations. Specifically, Seaside may wish to:*

    a. Refinance the entire project with an alternative lender in the future to benefit from improved contractual terms.

    b. Tender out the management of its properties in the future and any release of current agreed rates, indexation or bonuses

would put Seaside at a disadvantage when negotiating a new contract with a new supplier."

The Commissioner's analysis

15. The Commissioner notes that she has previously considered the status of BHSCH and identified that it is not a public authority for the purposes of the FOIA (decision notice FS506388841).

16. The potential prejudice described by the council clearly relates to the interests which the exemption contained at section 43(2) is designed to protect. Having considered the withheld information, the Commissioner is therefore satisfied that the first criterion has therefore been met.

17. The Commissioner is convinced by arguments that the release of details of performance incentives within the current contract could potentially weaken BHSCH's position in any future commercial negotiations. The Commissioner is therefore satisfied that a causal link between the release of the withheld information and potential harm to the commercial interests of BHSCH has been demonstrated and the second criterion is met.

18. The council have argued that disclosure 'would be likely to' result in prejudice to BHSCH. The ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged. With regard to 'would be likely to' prejudice, the Information Tribunal in John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15).

19. The Commissioner considers that during a future refinancing or tendering negotiation, insight into the performance incentives could clearly impede the negotiation of terms favourable by BHSCH. The Commissioner is therefore persuaded that the third criterion is met.

20. The Commissioner therefore finds that Section 43(2) is engaged.

Public interest test

21. Section 43 is a qualified exemption. As such, the Commissioner must consider the public interest test and whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest test arguments in favour of disclosure

22. The complainant raises concerns about transparency, stating that the management contract had not been "*tendered or open to any other company. In essence it was part of the agreement between the two bodies with BHSCH having been established by B&HCC* (the council)*".*

23. The council acknowledged that there is a strong public interest in transparency around expenditure of public money, and *"in maintenance of a level playing field for private sector organisations to compete fairly."*

Public interest in maintaining the exemption

24. The council advised that "*the clauses that were redacted were essentially those where an element of incentive was applied to the contract should the provider over-achieve the nominal requirements of the contract. They do not therefore affect public funds, because the contract, it's funding and risk management are based only on its nominal terms. These clauses are therefore primarily of interest to the provider in terms of negotiating finance and/or considering different delivery options for the performance of the contract."*

25. The council argues that *"disclosure of these terms, would reduce the ability of Seaside Homes to execute delivery options with the aim of over-performing against the nominal contract terms. If achieved, over-performance against the nominal contract terms is advantageous to both the Council and Seaside Homes."*

26. The council's position is that the response to the request *"satisfied the public interest in transparency of expenditure of public funds and that for the small amount of redacted information, the public interest in refusal outweighs the public interest in disclosure".*

Balance of the public interest arguments

27. The Commissioner appreciates the complainants concerns regarding the need for transparency. However she also notes that the council has released the majority of the agreement. She considers that the remaining redactions are minimal and do not detract from the public's understanding of the main factors of the agreement.

28. The Commissioner accepts that disclosure of the incentive terms for over-achieving against the contracts nominal requirements could harm the negotiating power of BHSC in the future. She notes that the over-performance of the contracted terms is also beneficial to the council and is therefore in the public interest.

29. The Commissioner accepts the council's argument that the redacted clauses do not affect public funds.

30. The Commissioner has therefore decided, with due consideration of the arguments provided, that the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exception.

Right of appeal

31. 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

32. 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.

33. 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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SK9 5AF