

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 October 2018

Public Authority: Cheshire East Council

Address: Municipal Building

Earle Street

Crewe

Cheshire

CW1 2BJ

Decision (including any steps ordered)

1. The complainant has requested information about the clients of Civance Ltd, a company wholly owned by Cheshire East Council. The Council refused to supply the information citing section 43(2) of the FOIA – release of the information would be prejudicial to the Council's and Civance Ltd's commercial interests.
2. The Commissioner's decision is that Cheshire East Council is entitled to rely of section 43(2) to withhold the information, and that the public interest in maintaining the exemption outweighs the public interest in disclosure.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 22 January 2018 the complainant wrote to Cheshire East Council and requested information in the following terms:

'I would like to request information relating to Civicance Ltd, which is wholly owned by Cheshire East Council and provides the Planning and Building Control functions.

Can you please provide the following information:

- 1. Provide Information about the clients of Civicance Ltd, comprised of:*
 - 1a. A list of the companies / commercial entities which have engaged the consultancy services of Civicance Ltd.*
 - Against each company name, show the following information:*
 - 1b. The total monetary value of the consultancy fees received by Civicance Ltd*
 - 1c. Show the Consultancy fees broken down by type of service provided.*

The above information should be split by each financial year (6th April) since the formation of Civicance Ltd and include data right up to the present day (partial financial year).

Note that this data needs to exclude any standard planning application fees collected as per the normal Planning and Building Control processes, which i believe are passed straight to CEC's accounts.'

5. The Council responded on 14 February 2018. It stated that section 43 of the FOIA applied (commercial interests) and it was therefore withholding the information.
6. On 16 February 2018, the complainant requested a review of the Council's response to his request, and on 5 March 2018 the Council replied. It maintained its position, clarifying that section 43(2) of the FOIA applied.

Scope of the case

7. The complainant contacted the Commissioner on 27 March 2018 to complain about the way his request for information had been handled.

As Civicance Ltd is a company wholly own by Cheshire East Council, the complainant considers it is in the public interest to have transparency over its financial affairs and public oversight of its governance.

8. The Commissioner therefore considers the scope of the case to be whether Cheshire East Council correctly applied section 43(2) to the withheld information falling within the scope of the request, and whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

Reasons for decision

Cheshire East Council and Civicance Ltd

9. The Council describes Civicance Ltd as 'an alternative service delivery model wholly owned by Cheshire East Council'. Some services are provided on behalf of the Council, and others are entirely commercial in nature and not operated on behalf of the Council. A proportion of profits made by the company through its commercial activities provide an income for the Council.
10. The complainant has requested information about the commercial services of Civicance Ltd that are not provided on behalf of the Council. Regardless of this, the withheld information is held by the Council and the complainant made his request directly to the Council rather than Civicance Ltd, and the Council have responded. Therefore for the purpose of this decision notice the Commissioner considers the public authority to be Cheshire East Council.

Section 43(2)-commercial interests

11. Section 43(2) of the FOIA provides an exemption from disclosure of information which would, or would be likely to, prejudice the commercial interests of any person (including, but not limited to, the public authority holding it).
12. Section 43(2), is a prejudiced based exemption. The Commissioner's approach to the prejudice test is based on that adopted by the Information Tribunal in *Christopher Martin Hogan and Oxford City council c the Information Commissioner* (EA/2005/0026 and 0030, 17 October 2006) (referred to as 'Hogan'). This involves the following steps:
 - Identifying the "applicable interests" within the relevant exemption

- Identifying the “nature of the prejudice”. This means showing that the prejudice claimed is “real, actual or of substance”, and showing that there is a “causal link” between the disclosure and the prejudice claimed.
- Deciding on the “likelihood of the occurrence of prejudice”.

Applicable interests

13. The Council must show that the prejudice it is envisaging affects the particular interest that the exemption is designed to protect – in this case commercial interest. The withheld information relates to the client list and associated fees held by Civance Ltd for services provided outside of any services it delivers on behalf of the Council. These commercial services generate income for Civance Ltd, which is shared between the company and the Council. The main aim of these services is to make a profit and are undertaken in a competitive environment. The Commissioner is therefore satisfied that the withheld information relates to the commercial interest of both the Council and Civance Ltd.

Nature of the prejudice

14. The Council has argued that releasing Civance Ltd’s commercial client list and associated information into the public domain would inform competitors of the costs of its services and thereby undermine any competitive advantage held by the company. These services are provided in a competitive market where other public and private sector organisations sell similar services. Undermining of the competitive advantage held by Civance Ltd would affect its ability to raise revenue for both itself and the Council, and thus be financially damaging to both organisations.
15. The Council has confirmed that, in line with the section 45 Freedom of Information Code of Practice, it has consulted directly with Civance Ltd regarding the requested information, who have confirmed that ‘disclosure of this information will commercially damage the company. This will be at a financial cost to Civance Ltd itself and ultimately to Cheshire East Council’ and that ‘it will lose clients to its competitors should the list of commercial clients be released to the world’.
16. The Commissioner is therefore satisfied that there is a causal link between the disclosure of the client list information and alleged financial damage to both Civance Ltd and the Council, and that this damage is real or of substance.

Likelihood of prejudice

17. In the Hogan case, the Tribunal said: *"there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not."* (paragraph 33).
18. The first limb identified relates to 'would'. 'Would' is therefore taken to mean more probably than not i.e. more than a 50% chance of disclosure causing the prejudice. This does not mean that the Council has to show it that it will definitely happen, but that the chain of events is so convincing that it is clearly more likely than not to arise.
19. The second limb identified relates to 'would be likely'. This means that there must be more than a suggestion or hypothetical possibility of the prejudice occurring, so although the probability is less than 50%, it is still a real and significant risk. This interpretation was relied on by the Information Tribunal in *John Connor Press Associates v Information Commissioner* (EA/2005/0005, 25 January 2006), who said *"We interpret the expression "likely to prejudice" as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk."*
20. In this case, the Council has relied on the lower limb of likelihood i.e. 'would be likely to prejudice'. Although the list of commercial clients utilising Civicance Ltd services is small, this doesn't necessarily reduce the likelihood of the prejudice envisaged. In this particular case, whether one client is charged x amount for service 'a', or ten clients are charged x amount for service 'a', the fact that the cost of service 'a' is made available to competitors would be likely to harm any economic advantage held by the company in securing future clients. The Commissioner is satisfied that the chance of this harm occurring is real and not remote, and that therefore section 43(2) is appropriately engaged by the Council.

The public interest test

21. The exemption under section 43(2) is subject to the public interest test. This means that, even when a public authority has demonstrated that the exception is engaged, it is required to consider the balance of public interest in deciding whether to disclose the information. The public interest is not a tightly defined concept, and can cover a range of principles including, but not limited to: transparency and accountability;

good decision-making by public bodies; upholding standards of integrity; ensuring justice and fair treatment for all; securing the best use of public resources and in ensuring fair commercial competition in a mixed economy.

The Complainant's view

22. The complainant has concerns about the various functions of Civicance Ltd and a potential conflict of interest that arises as a result. The complainant states that the company was created by the Council to run all of its planning, building control and land charge services, and also engages in other profit making commercial activities akin to 'consultancy services'. The complainant therefore maintains that the company, which has statutory planning and building control responsibilities that it enforces, may at the same time be providing its commercial services to organisations that are subject to its statutory responsibilities. He says that if this is the case *'it is clearly a huge conflict of interest issue as they are also in control of the decision making and enforcement processes which would related to the same clients that they need to keep happy in order to make a profit from their additional service'*.
23. The complainant believes that by refusing to provide the requested information, the Council and Civicance Ltd are indicating that they have something to hide. He is concerned that recent local planning decisions in the area have been affected by this conflict of interest and feels that the information should be made available to 'show transparency around income/expenditure of public funds and allow public oversight and governance of their activities'.
24. The complainant does not consider that Civicance Ltd is providing a 'competitive commercial activity' as its main purpose is to deliver publicly funded planning and building control services. Consequently he does not consider that Civicance Ltd or the Council has any commercial interest for it to be able to rely on section 43(2) to withhold the information.

The Council's view

25. The Council acknowledges that there is a general public interest in the openness and transparency of its operations, particularly relating to the income and expenditure of public funds. It also recognises that informing the public of any activities carried out on its behalf allows for more scrutiny, and that disclosure could provide reassurance to the public that it is achieving value for money.

26. However, the Council argues that release of Civicance Ltd's commercial client list and associated information would weaken its position against competitors and thereby damage its income generation abilities. As both Civicance Ltd and Cheshire East Council benefit directly from any profits made by the company, which for the Council then subsidise statutory functions, any loss of income would be detrimental to the public purse and not in the public interest.
27. The Council notes that other private providers of similar services against whom Civicance Ltd is competing would not be compelled to reveal their client lists and charges and that from a competition perspective, it would not be in the public interest to expose one commercial operator's clients and cost model.

Balance of the public interest

28. The Commissioner considers that there is always strong public interest in the transparency of public services and finances, in order to facilitate public awareness and understanding of how public authorities operate and encourage public debate and involvement in decision-making.
29. In the specifics of this case, the complainant has concerns about the conflict of interest created by the statutory building and planning functions of Civicance Ltd i.e. compliance and enforcement, and the possibility that it is also offering commercial services which may be provided to the same companies subject to its compliance and enforcement activities.
30. The Commissioner understands this concern, but notes that Councils operate in complex legal and statutory environments and that 'wearing two or more hats' will not be unusual, particularly in a building and planning environment e.g. where a local authority is landowner selling to a developer but is also the planning authority responsible for granting or refusing planning applications for the same site.
31. In this case, all the services provided by Civicance Ltd, including those of a commercial nature, are fully available on its website. It does not follow that just because a business or developer is subject to the company's planning or building controls, that provision of commercial services will create a conflict of interest. Release of a client list may show that an organisation uses multiple services of the company but it cannot be assumed that creates a conflict of interest.
32. Moreover, the Commissioner accepts the Council's position that release of Civicance Ltd's client list and associated information would put the company at a disadvantage against its competitors and that competitors

would be able to either target clients, or alter their pricing strategies to the detriment of Civicance Ltd and that this would cause financial damage to Civicance Ltd and the Council, who both benefit from the profits of the company. Although the client list is small, the company is trying to develop this part of its business and there is therefore potential for increased income from these commercial services. The Commissioner is therefore satisfied that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Right of appeal

33. 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

34. 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.
35. 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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