

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 February 2023

Public Authority: Dacorum Borough Council
Address: The Forum
Marlowes
Hemel Hemstead
Hertfordshire
HP1 1DN

Decision (including any steps ordered)

1. The complainant requested information in respect of a winning tender in relation to a Traffic Regulation Order Consultancy tender. Dacorum Borough Council ('the Council') refused the request citing section 43(2) (commercial interests) FOIA.
2. The Commissioner's decision is that the council was not correct to apply section 43(2) to withhold most of the information. The Commissioner has also recorded a breach of sections 10(1) and 17(1) in respect of its handling of this request for information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose a copy of the withheld information to the complainant, with information on staff rates, company costs and prices redacted.
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. On 13 July 2021, the complainant wrote to Dacorum Borough Council ('the Council') and requested the following information in respect of the Dacorum Parking Services tender process:

"1. A full copy of the winning tender, both quality submissions and their response to the subsequent Clarification Form.

In addition, we would also like to receive a copy of the full evaluation comments from the tender evaluations of the winning tender."

6. The Council queried the request on 27 July 2021 stating that it did not hold relevant information and asked if the request was in relation to the Traffic Regulation Order Consultancy tender. The Complainant confirmed that this was what they were requesting.
7. The Council responded on 17 January 2022, refusing the request on the basis of section 43(2) (commercial interests) FOIA.
8. Following an internal review the Council wrote to the complainant on 18 February 2022. It upheld its original decision.

Scope of the case

9. The complainant is not satisfied with the Council's reliance on section 43(2) FOIA or with the time taken to provide its response.
10. During the course of the Commissioner's investigation the Council disclosed some previously withheld information to the complainant. The complainant subsequently confirmed that he remained dissatisfied with its response as what had been disclosed appeared to be corporate Council policies, with the key tender information still being withheld.
11. The scope of the Commissioner's investigation is to consider the Council's reliance on section 43(2) in respect of the remaining withheld information, and its procedural handling of the request.

Reasons for decision

Section 43(2) – Commercial interests

12. 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)."

13. The term 'commercial interests' is not defined in the FOIA; however, the Commissioner has considered his guidance on the application of section 43, which clarifies that:

"A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent."

14. The following information is being withheld under section 43(2) in this case:

- Original tender document
- Brochure produced for the Council April 2021
- Company Process Flow Diagram
- Clarification of tender document

15. The Commissioner notes that tenders are part of a commercial procurement process: a competitive process to provide services to another party. The Council considers that a disclosure of the information would be likely to impact upon the successful tenderers competitiveness in future tenders if the information were to be disclosed.

16. The Commissioner accepts that the interests in question are therefore the commercial interests of the successful tendering company.

17. In order for the exemption to be engaged, it must be demonstrated that a disclosure of the information would, or would be likely, to result in some identifiable commercial prejudice which would affect one or more parties.

18. The Council considers that disclosure of the above documents would be likely to prejudice the commercial interest of the successful tenderer. It has argued that disclosure would provide an unfair advantage to other bidders. It added that if a bidder knows how a competitor costs an item or service it can exploit this for profit.

19. The Council has further argued that the unsuccessful bidders' responses remain confidential and has stated it could be taken to court if it were to disclose these.

20. The Council further informed the Commissioner that the winning bidder has refused to give its consent to disclose the requested information.

21. The Commissioner has reproduced the third party's response below:

"In a sense most of it is commercially sensitive as if the losing bidder is able to view our answers to the questions raised in the tender or our fee rates etc. then this can simply be copied and used by the losing bidder in future tenders with DBC when this contract ends as well as other tender processes for TRO work in which we may wish to undertake with other Local Authorities etc. We feel that the answers and methodologies we submitted are what makes us stand out in terms of the specialist service and knowledge of the TRO process that we are able to offer."

22. The Complainant informed the Commissioner that they were one of the unsuccessful bidders for the tender in question, and as a firm involved in numerous tendering exercises, it has been involved in FOI for many years. They added, that when the situation is reversed, they have been consulted by tendering authorities to release copies of the winning tender material, which is usually provided subject to redaction of the more commercially sensitive information. However, in this case, the Council has applied a blanket use of section 43(2) to information which the complainant argues would generally be disclosed.

23. The complainant added that the more commercially sensitive information such as staff rates, costs and prices, tends to be redacted whilst the remaining information including methodology, appreciation of key issues, and company experience is disclosed.

24. The complainant further argued that details such as the approach to studying parking controls, survey tasks, stakeholder groups for engagement, programme/schedule and quality checking, all form the basis of the bidder's methodology for developing Traffic Regulation Order's (TRO's) which, they state, are public documents. The complainant added, that all bidders should be following the government's national approach set out in the Local Authorities' Traffic Orders (Procedure) (England and Wales) Regulations 1996, which is a public document. A simple check of the winning bidder's methodology can confirm it is compliant in its approach with the sensitive parts of the tender redacted.

The Commissioner's position

25. The Commissioner has viewed all four documents and considered the arguments put forward by the various parties. In his view, both the Council and the third party have applied a blanket approach to the documents rather than considering the actual information within the documents themselves.

26. The Commissioner considers that much of the information within the documents is generic and of no value to the third party's competitors. He also understands that some company information is likely to be in the public domain via Companies House.
27. Therefore, whilst the Commissioner is satisfied that section 43(2) is engaged in respect of staff rates, company costs and prices, he considers that the Council (and the third party) have failed to demonstrate that it is engaged for the remainder of the information.
28. As section 43(2) is subject to the public interest test, the Commissioner has gone on to consider the public interest solely in respect of the information which engages section 43(2) as specified in paragraph 27 of this notice.

Public interest test

29. Both the Commissioner and the Council accept that there is a general public interest in transparency and accountability so that members of the public are aware of how decisions are being taken with regard to the expenditure of public money.
30. However, this will be met if the Council discloses the information minus the redactions for staff rates, company costs and prices. It is not in the public interest to disclose sensitive commercial information which would allow the third party's competitors an unfair advantage for future similar tenders going forward. Indeed, to ensure value for money for public sector contracts, it is in the public interest to ensure a level playing field between competitors when it comes to tendering for commercial ventures.
31. For these reasons, the Commissioner has concluded that the balance of the public interest is weighted in favour of maintaining the exemption.

Section 10(1) time for compliance and section 17(1) refusal of a request

32. Section 10 of the FOIA states that, subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event no later than the twentieth working day following the date of receipt.
33. Section 17 of the FOIA concerns the refusal of the request and section 17(1) states that:

"A public authority which, in relation to any request for information, is to any extent relying on a claim ... that information is exempt

information must, within the time for complying with section 1(1) give the applicant a notice..."

34. The Commissioner notes that the complainant submitted their request for information on 13 July 2021, with clarification provided on 27 July 2021. However, in failing to provide its refusal notice until 17 January 2022, the Council has breached section 17(1) FOIA .
35. Additionally, as the Council disclosed previously withheld information to the complainant during the Commissioner's investigation, it has also breached section 10(1) of the FOIA.

Right of appeal

36. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

37. 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.
38. 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

**Catherine Dickenson
Senior Case Officer
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Wycliffe House
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