

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 February 2023

Public Authority: Middlesbrough Council
Address: PO Box 500
Civic Centre
Middlesbrough
TS1 9FT

Decision (including any steps ordered)

1. The complainant requested from Middlesbrough Council ("the Council") information relating to the procurement of specific software. The Council withheld the requested information under section 43(2) (Commercial interests) of FOIA.
2. The Commissioner's decision is that the Council has failed to demonstrate that section 43(2) is engaged.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information, ensuring that any personal data is redacted subject to the terms of the Data Protection Act 2018.
4. The Council 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 6 April 2022, the complainant wrote to the Council and requested information in the following terms:

"I am writing under the Freedom of Information Act 2000 to request information about the use of risk based verification and about the Voicescape software.

Specifically, I am asking the following:

Any briefing, reports, audits, evaluations or impact assessments (such as Equality or Privacy Impact Assessments) relating to your Council's use of Voicescape's software.

Any training, information or guidance documents given by the software provider to your council.

Any sales documents or marketing material given to your council by the software provider.

Any contracts* you have with the software provider. Any documents or information on the performance of the software, particularly that giving assessment in relation to demographics and equalities.

What data sources are used to supply the software with information, please provide any relevant documents?

I am not asking for data that could identify any individuals who use your council's services.

Please provide all this information dated since Jan 1st 2019. This request was submitted on 6th April 2022 so I look forward to your response within 20 working days and no later than May 6th 2022."

6. The Council responded on 13 May 2022. It disclosed some information (a DPIA and a case study) and stated that the remainder was withheld under section 43(2).
7. Following an internal review, the Council wrote to the complainant on 14 June 2022. It maintained its position.

Reasons for decision

Section 43(2) – Commercial interests

8. 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).”

9. The term ‘commercial interests’ is not defined in the FOIA; however, the Commissioner has considered his guidance on the application of section 43¹, 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.”

Does the information relate to a person’s commercial interests?

10. The information withheld in this case is various information relating to the Council’s procurement of specific software. The Commissioner accepts that such information is commercial in nature.

The likelihood of the prejudice occurring

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

12. The Commissioner has been guided on the interpretation of the phrase **“would, or would be likely to”** by a number of First-tier Tribunal (Information Rights) (“the 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; i.e., either prejudice ‘would’ occur, or prejudice ‘would be likely to’ occur.

13. With regard to ‘would be likely to’ prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner*

¹ <https://ico.org.uk/for-organisations/foi-guidance/section-43-commercial-interests/>

(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).

14. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that **"clearly this second limb of the test places a stronger evidential burden on the public authority to discharge"** (Tribunal at paragraph 36).

The Council's position

15. In this case the Council has stated that disclosure of the information 'would' prejudice the commercial interests of itself, and the third party.
16. The Council has provided the Commissioner with a copy of the withheld information, which comprises the following documents:
 - Contract (80 pages)
 - Counter signed contract (13 pages)
 - Performance tracker (1 workbook)
 - Presentation (21 slides)
 - Statement of work (11 pages)
 - End of trial analysis (1 workbook)
 - Service implementation guide (10 pages)
17. The Council has informed the Commissioner that it considers that disclosure of the information would prejudice the commercial interests of itself, and of the software provider - Voicescape. The Council has provided evidence of the software provider's concerns, which include concerns that disclosure of the information would provide a commercial advantage to its competitors. The Council further argues that disclosure of the information would result in disadvantage to the Council in the event of future procurement negotiations with suppliers.

The Commissioner's conclusion

18. The Commissioner has reviewed the withheld information, in conjunction with the Council's arguments. The Commissioner notes that the Council has applied section 43(2) to a significant volume of information spread across 114 pages of text, 2 Microsoft Excel workbooks, and a

presentation of 21 slides. This includes the entirety of the 80-page contract.

19. The Council has seemingly applied section 43(2) to the information simply on the basis that it relates to the procurement of the software. No distinction has been made between the content and sensitivity of the information, and no clear explanation has been provided in respect of the claimed prejudice and how, in the circumstances of this matter, that prejudice would occur in respect of the various information that the Council has applied the exemption to.
20. It is evident to the Commissioner that, due to the subject matter (the procurement of software) some of the information may cause prejudice to the commercial interests of Voicescape. However, having had regard to the simplistic arguments made by the Council – in conjunction with the Council applying the exemption so widely to a substantial volume of information – the Commissioner is not satisfied that the Council has demonstrated the claimed prejudice.
21. For the above reasons, the Commissioner does not consider that the Council has provided compelling evidence that prejudice would be likely to occur. As this test is not met, there is no requirement for the Commissioner to proceed any further. On this basis he finds that the exemption is not engaged.

Other matters

22. The Commissioner has previously issued a range of similar decision notices (e.g., FER0771845, IC-40526-Y9V6, IC-42754-K5L1, etc.) finding that a public authority has sought to apply an exemption in a 'blanket' approach, without considering the differing content and sensitivity of information.
23. The Commissioner reminds the Council that in cases where a public authority seeks to withhold information, this should be done with careful consideration of the actual content of the information, at a granular level if necessary. Should a public authority consider that such consideration would place a grossly oppressive burden upon it, due to the request seeking a substantial volume of information, from which the potentially exempt information cannot be easily isolated, then section 14(1) provides an exclusion from the duty to comply with the request.

Right of appeal

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: 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

Daniel Perry
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF