

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 June 2011

Public Authority: Manchester City Council
Address: PO Box 532
Town Hall
Albert Square
Manchester
M60 2LA

Summary

The complainant asked the Council for information relating to tender bids from a private company for a large Council redevelopment project. The Council responded to the complainant's request and disclosed some of the requested information, however it refused to disclose the remainder ("the withheld information") citing section 43(2) of the FOIA. The Commissioner concluded in this case that the withheld information was exempt from disclosure under section 43(2) of the FOIA. The Commissioner is also satisfied that the public interest favours maintaining the section 43(2) exemption. The Commissioner has ordered no steps to be taken.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "FOIA"). This Notice sets out his decision.

Background

2. The complainant made the following request on 18 January 2010: -

"Under the FoIA please could you provide me with the following information.

1. *All internal correspondence regarding the tender and granting of contract to Claremont Group for supplying furniture for the THEX*

redevelopment.

2. *Correspondence between Manchester City Council and Claremont Group regarding this contract tender.*
 3. *The details of the contract given to Claremont Group.*
 4. *How much the council are paying Claremont Group for the contract.*
 5. *The initial offer made by Claremont Group when the tender went out."*
3. Manchester City Council ("the Council") provided the above information to the complainant on 15 February 2010. The request which is the subject of this notice arose out of the Council's response to the complainant's original request.

The Request

4. The Commissioner has received a complaint which states that, on 15 February 2010 the complainant made the following request for information to Manchester City Council: -

"Could you forward me copies of the three documents referred to in section 5 [of the Council's response dated 15 February 2010] about Claremont's separate offers and the agenda and minutes of any meeting at which they were discussed."
5. The Council treated this as a further request under the Act and issued a refusal notice on 24 February 2010, in which it refused to disclose copies of the three documents requested ("the withheld information"), citing section 43(2) of the FOIA as a basis for non-disclosure. It provided the complainant with the agenda and meeting minutes requested.
6. On 7 March 2010 the complainant requested an internal review of the Council's decision not to disclose the withheld information. The Council wrote to the complainant on 28 May 2010 with the outcome of that review, upholding the original decision not to disclose the withheld information under the provisions of the section 43(2) exemption.
7. On 28 May 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

The Investigation

Scope of the case

8. The complainant specifically asked the Commissioner to consider the Council's application of the exemption under section 43(2) of the FOIA to the withheld information.
9. The complainant in his correspondence with the Commissioner raised the point that section 15 of the Audit Commission Act 1998 (ACA) provided him with a right to inspect the withheld information. Therefore he believed that it should not be withheld by the Council under section 43(2) of the FOIA as it was available to him and other interested parties under other legislation. The Commissioner has outlined his position in relation to the complainant's point in the "Findings of Fact" section at paragraphs 13-18 below.

Chronology

10. On 28 July 2010 the Commissioner wrote to the Council, requesting a copy of the withheld information and specific details as to why the exemption applied to each part of the withheld information. The Commissioner wrote to the complainant on the same day to acknowledge receipt of his complaint.
11. On 25 August 2010 the Council replied to the Commissioner, providing a copy of the withheld information and further details regarding its application of the specified exemption.
12. On 25 January 2011 the Commissioner wrote to the complainant to inform him that his complaint had been allocated to a case officer. He wrote to the Council on 2 February 2011 to ascertain whether it had any further submissions to make regarding the matter. The Council replied on 6 April 2011 providing further submissions as to its application of the exemption.

Findings of Fact

13. Section 15 of the ACA (full text is in the Legal Annex to this Notice) provides that "interested persons" may, for a 20 working day period, inspect and make copies of the accounts to be audited of a local authority (other than a health service provider) and all documentation relating to these. The Commissioner is of the view that "interested persons" includes local government electors, domestic rate payers and those with a financial or contractual relationship with the body in

- question. However, he does not consider that "interested persons" means anyone simply having an interest in the information. Therefore the information would not be widely accessible, in his view, to the public at large in the same way as, for example, information deemed to be exempt under section 21 of the FOIA.
14. The complainant asserts that the information should not be withheld under the FOIA as being "commercially sensitive" as it is available to interested parties under the ACA, albeit for a limited period of time.
 15. The Council confirmed to the Commissioner that the tender contract was awarded in late December 2009. The first set of Council accounts to include expenditure relating to this contract was for the financial year ending 31 March 2010 (2009/10). The complainant submitted his request on 15 February 2010, before the end of the financial year and before the accounts for 2009/10 were prepared. The provisions in the ACA are not engaged until the end of the financial year when the accounts have been prepared. Therefore, at the time of the request, the complainant would not have been able to exercise his right of inspection under section 15 of the ACA.
 16. Under section 15 of the ACA, there is an obvious potential for commercially sensitive information to be revealed by the disclosure of a full tender contract setting out the terms and conditions of the agreement between the public authority and contracting business.
 17. If an individual has exercised their rights under the ACA then the Commissioner will consider the circumstances of each case (taking into account the effect of any disclosure via section 15) to determine whether an additional and subsequent disclosure under the FOIA would cause further prejudice, for example, to the public authority's future negotiating position.
 18. However, since the complainant at the time of the request could not exercise any right he may have had under the ACA, and since he has not exercised such a right since, the Commissioner considers that this does not impact upon the Council's decision not to disclose the withheld information under section 43(2) of the FOIA.

Analysis

Exemptions

Section 43 -Commercial Interests

19. Section 43(2) states that information is exempt if its disclosure would, or would be likely, to prejudice the commercial interests of any person, including the public authority holding it.
20. For the Commissioner to agree that section 43 of the FOIA is engaged, the Council must demonstrate that prejudice would or would be likely to occur to the commercial interests of the Council and/or the third parties concerned if the information were disclosed and that the prejudice claimed is real and of substance. This view is taken from the Information Tribunal ("the Tribunal") hearing of *John Connor Press Associates Ltd v Information Commissioner (EA/2005/005)* ("*Connor*") and its decision, which outlined the tribunal's interpretation of "likely to prejudice". The tribunal confirmed that "*the chance of prejudice being suffered should be more than a hypothetical possibility; there must be a real and significant risk*". Secondly and once the prejudice test is satisfied, the Council would then need to apply the public interest test, weighing up the arguments for and against non disclosure.
21. The information being withheld by the Council under this exemption consists of the detailed costs breakdown of tender bids from a private company (the Claremont Group) regarding the supply of furniture to the Council for a redevelopment project. The Council provided the Commissioner with arguments in favour of engaging the exemption which reflected the concerns of both the Council and the Claremont Group. The Commissioner is also in possession of evidence from the Claremont Group that disclosure of the withheld information would be likely to harm its commercial interests.
22. The Council explained that the three documents requested by the complainant were three separately priced technical design options which were assessed by the Council as part of the tender evaluation process. The Council felt that disclosure would be likely to prejudice the commercial interests of the Claremont Group because it would provide its competitors with information that would be highly advantageous to them in the bidding process for other contracts. The Council said that the Claremont Group's competitors could copy their methodology and undercut prices. It also confirmed that the Council was about to tender for a further £3 million contract for fixtures, furnishing and equipment in relation to the Directorate of Transformation's Town Hall Complex Transformation Project.

Disclosure of the withheld information would therefore also be likely to prejudice the commercial interests of the Council in relation to the negotiation of the aforementioned contract and other agreements for similar projects as it would disclose the commercial terms accepted by both parties.

23. When considering the application of a prejudice-based exemption, the Commissioner adopts the three step process laid out in the Information Tribunal case of *Hogan v the ICO and Oxford City Council* ("Hogan") (Appeal no EA/2005/0026 and EA/2005/0030). In that case the Tribunal stated that: -

"The application of the 'prejudice' test should be considered as involving a numbers of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption.....Second, the nature of 'prejudice' being claimed must be consideredA third step for the decision-maker concerns the likelihood of occurrence of prejudice" (paragraphs 28 to 34).

The Commissioner has followed the test set out above when considering the representations put forward by the Council.

Relevant applicable interest

24. The Commissioner has considered the wording of the exemption under section 43(2) which refers to "commercial interests". The Council has informed the Commissioner that it believes disclosure of the relevant information would be likely to prejudice the commercial interests of both the Council and the Claremont Group. The Commissioner is satisfied that the Council has demonstrated that the prejudice would be likely to occur to those commercial interests, which are obviously relevant and applicable to the exemption in question.

Nature of the prejudice

25. When considering the nature of the prejudice, the Commissioner has noted the Tribunal's comments in *Hogan* (paragraph 30):

"An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, as Lord Falconer of Thoronton has stated, "real, actual or of substance" (Hansard HL, Vol. 162, April 20, 2000, col. 827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected. There is therefore effectively a de minimis threshold which must be met."

26. Therefore, the Commissioner takes the view that, for the exemption to be engaged, the disclosure of the information must have a causal effect on the applicable interest, this effect must be detrimental or damaging in some way, and the detriment must be more than insignificant or trivial.
27. If he concludes that there is a causal relationship between potential disclosure and the prejudice outlined in the exemptions *and* he concludes that the prejudice that could arise is not insignificant and is not trivial, the Commissioner will then consider the question of likelihood.
25. The Council has argued that disclosure of the withheld information in this case would be likely to prejudice the commercial interests of both the Council and the Claremont Group as it would reveal the commercial terms agreed by both parties and would also reveal market-sensitive information which would be likely to be of use to the Claremont Group's competitors.
28. Having considered the arguments above, the content of the withheld information and the context in which the material was created the Commissioner accepts that disclosure could harm the commercial interests of both the Council and the Claremont Group. Therefore he is satisfied that a causal link has been established.
29. The Commissioner further considers that any harm caused to the commercial interests of the Council and the purchasers would not be trivial or insignificant. In view of this the Commissioner has gone on to consider the likelihood of such harm arising.

Likelihood of prejudice

30. In *Connor* the Tribunal confirmed that "*the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.*" The Commissioner considers this to mean that the risk of prejudice need not be more likely than not, but must be substantially more than remote.
31. In this case the Commissioner accepts that there would be a real and significant risk of prejudice to the commercial interests of the Claremont Group. It would allow the Group's competitors to analyse the cost breakdown of its tender bid, affording those competitors a huge advantage and seriously compromising the Claremont Group's ability to compete for contracts of a similar nature in the future.

32. The Commissioner further accepts that the risk of prejudice to the Council's commercial interests would be real and significant. It would disclose the commercial terms the Council is prepared to accept, meaning that the Council would be disadvantaged when negotiating for future tender contracts.
33. For the reasons explained above, the Commissioner is satisfied that the relevant information, if it were to be disclosed, would be likely to prejudice the commercial interests of both the Council and the Claremont Group and therefore that this exemption is engaged.

The public interest test

34. Section 2 of the FOIA sets out the circumstances under which a public authority may refuse a request for information (see Legal Annex). According to this section, where a public authority has identified a qualified exemption, it must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosing the information. This is often referred to as the "public interest test".

Public interest arguments in favour of disclosing the requested information

35. The Commissioner believes that there is a general public interest in transparency and openness in public bodies as it affords better public understanding of decisions made by public bodies. The Council accepts this argument.
36. The Commissioner also believes that, where public funds are being used in large redevelopment projects carried out by private sector companies, it would be in the public interest to know that the funds are being used in the most cost-effective manner.

Public interest arguments in favour of maintaining the exemption

37. The exemption under section 43(2) is designed to recognise that there are certain circumstances in which it is appropriate to withhold information that would harm the commercial interests of a third party. The Commissioner believes that there is a public interest in ensuring that the commercial interests of a third party are not prejudiced, where this would not be warranted and proportionate.
38. The Commissioner accepts that there is an inherent public interest in ensuring that competition is not distorted and that companies are able to compete fairly and in ensuring that there is fair competition for public sector contracts.

39. The Council has also argued that disclosure of commercially sensitive information would not be in the public interest as it might have the effect of discouraging companies from dealing with the Council because of fears that their commercially sensitive information could be disclosed and could cause them commercial damage. However, the Commissioner has not afforded this argument any great weight as he considers that private companies entering into public sector contracts should appreciate that there will be a greater expectation of transparency and accountability and should reasonably expect that some of their information may be disclosed. He considers that many private sector companies would view that risk as a small price to pay for being awarded a valuable and lucrative public sector contract.

Balance of the public interest arguments

40. Having considered and balanced the public interest arguments, the Commissioner has concluded that in all the circumstances of the case the public interest is weighted in favour of maintaining the application of the exemption. Therefore the withheld information should not be disclosed. In reaching this conclusion, the Commissioner has been particularly persuaded by the fact that the Council has released the total bid price into the public domain. This would be sufficient to reassure the public that public funds are being utilised in a cost-effective manner without damaging the wider commercial interests of either the Council or the Claremont Group.

The Decision

41. The Commissioner's decision is that the Council dealt with the request for information in accordance with the FOIA.

Steps Required

42. The Commissioner requires no steps to be taken.

Right of Appeal

43. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

44. 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.
45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 29th day of June 2011

Signed

**Faye Spencer
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (iii) section 41, and
 - (iv) section 44"

Section 21 – information reasonably accessible to the applicant by other means

- 1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
- (2) For the purposes of subsection (1)—
 - (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
 - (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.
- (3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

Section 43 -Commercial interests

Section 43(2) provides 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).”

Audit Commission Act 1998

15 Inspection of documents and questions at audit.

s.15 (1) – At each audit under this Act, other than an audit of accounts of a health service body, any persons interested may –

- (a) inspect the accounts to be audited and all books, deeds, contracts, bills, vouchers and receipts relating to them, and
- (b) make copies of all or any part of the accounts and those other documents [emphasis added].

