

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 14 September 2011

Public Authority: Liverpool City Council
Address: Municipal Buildings
Dale Street
Liverpool
L2 2DH

Summary

The complainant requested detailed information about payments made by the council to Liverpool Direct Limited. The council provided some of the information, refusing the remaining information on the basis that it was not held. During the Commissioner's investigation the council confirmed that it did hold the remaining information requested and refused to disclose it, applying the exemption contained at section 43(2) of the Freedom of Information Act. The Commissioner has considered the application of section 43(2) and has upheld the council's decision to withhold the information; he does not require the council to take any further action.

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 "Act"). This Notice sets out his decision.

Background

2. In 2001, a joint venture company called Liverpool Direct Ltd ('LDL') was set up between the council and BT to manage all IT, tax and payroll services within the council. A contract was signed between the council and LDL in 2001 for this work and is due to run until 31 March 2017. The contract included a break clause which could be exercised by the council in March 2011. The consideration of the break clause started in June 2010 and was therefore ongoing at the time this request was received.

The council subsequently made the decision not to implement the break clause and to allow the contract to run until 2017. It has however re-negotiated some of the terms and conditions. More information is available via the council's website:

<http://liverpool.gov.uk/news/details.aspx?id=198796>

3. At the time of this request, BT was in the process of tendering for similar joint venture companies with other councils within the UK.

The Request

4. The complainant contacted the council on 28 July 2010 to request the following information:

"1. Please confirm how much money Liverpool City Council has paid to BT/Liverpool Direct Limited in the past two financial years (2008/09 and 2009/10), and for what services/goods that money was paid.

2. I would be grateful if this information could be provided in the form of spreadsheets detailing invoices with all payments and a description of the payment reason."

5. The council responded on 27 August 2010 in which it provided the information requested at part 1. In response to part 2 of the request, the council stated that it did not hold invoices.
6. The complainant requested an internal review on 1 September 2010 with regards to part 2 of his request.
7. The council provided the outcome of the internal review it had carried out in a letter dated 30 September 2010; the council upheld its original decision.

The Investigation

Scope of the case

8. On 30 September 2010, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the council's refusal of part 2 of his request.

Chronology

9. The Commissioner wrote to the council on 11 March 2011 to inform it that he had received a complaint. In this letter the Commissioner asked the council about the searches it had carried out in order to determine that it did not hold the information.
10. The council replied to the Commissioner on 23 March 2011 to inform him that it did in fact hold the information requested at part 2. The council stated that it would provide the Commissioner with a substantive response once it had re-considered the information it held.
11. In a letter dated 26 April 2011, the council informed the Commissioner that it did indeed hold all of the information requested at part 2 and that it wished to withhold it by virtue of section 43 – Commercial Interests.
12. The Commissioner contacted the council on 3 May 2011 to ask that the council provide him with copies of the withheld information and further arguments in respect of the application of section 43.
13. The council provided the Commissioner with the withheld information on 8 June 2011 and provided a substantive response in relation to the application of section 43 on 27 June 2011.

Analysis

Exemptions

Section 43(2) – commercial interests

14. Section 43(2) provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is therefore subject to the public interest test. The full text of section 43 can be found in the Legal Annex at the end of this Notice.
15. In this case the council has stated that disclosure of the requested information would be likely to prejudice the commercial interests of the council, BT and LDL.
16. In order to determine whether the exemption is engaged the Commissioner has first considered whether the prejudice claimed relates to the commercial interests of the council or LDL.

17. The term 'commercial interests' is not defined in the Act. However the Commissioner has considered his awareness guidance on the application of section 43. This comments that,

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."

18. The Commissioner considers that the information requested relates to the commercial interests of both the council and BT/LDL.
19. The Commissioner therefore believes that the withheld information falls within the scope of the exemption.
20. The Commissioner therefore went on to consider how any prejudice to the commercial interests of the council and BT/LDL would be likely to be caused by the disclosure of the invoices in question.
21. In support of its use of this exemption the council contacted the chief executive of LDL. The chief executive explained that disclosure could disadvantage the commercial interests of both BT and LDL. Disclosure would put information into the public domain relating to the pricing arrangements in place, which in turn would provide an advantage to both BT's and LDL's competitors when tendering for future contracts.
22. The Commissioner is mindful of the Tribunal's decision in Hogan & Oxford City Council v Information Commissioner EA/2005/0026 and EA/2005/0030 in which it was commented that, "Second the nature of the 'prejudice' being claimed must be considered. An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and prejudice and 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." The Commissioner has therefore sought to determine whether the prejudice claimed is "real, actual or of substance".
23. The Commissioner is also mindful of the Tribunal decision in the case of Derry City Council v the Information Commissioner EA/2006/0014. In this case the council argued that the commercial interests of a third party, Ryanair, would be likely to be prejudiced if the requested information were disclosed. The council did not ask Ryanair for its views as to whether it believed its commercial interests would be likely to be prejudiced nor did Ryanair present any evidence to the Tribunal. The arguments put forward by the council to the Commissioner as well as to the Tribunal were based upon the council's thoughts on the point and not on representations made by Ryanair. In the absence of any evidence

from Ryanair the Tribunal stated that it was unable to conclude that Ryanair's commercial interests would be likely to be prejudiced.

24. The Commissioner acknowledges that in this case the council did contact LDL for its views in relation to the withheld information.
25. The council has therefore based its submissions on its own and LDL's experience in this area.
26. The council confirmed that LDL regarded this information to be a trade secret and that if it were to be released LDL would consider it an unauthorised disclosure and would be obliged to consider legal action against the council. However, the council did not agree with LDL on this point and have not considered LDL's arguments further.
27. The council confirmed that LDL has a specific pricing arrangement for key business items, if this information was to be released in whole or in part it would have significant business implications for LDL. Release of LDL's pricing model, which would closely relate to the pricing used by BT, would enable its competitors to interrogate and analyse LDL's pricing through software programmes. Furthermore, the release of the information would also disadvantage BT during the tendering process it was going through with two other councils at the time of the request.
28. The council advised that LDL regard the pricing arrangement under this contract to be very much 'live' and disclosure would be likely to prejudice it in the market place. LDL also stressed that its competitors would not be able to gather LDL's pricing from any other source.
29. The withheld information contained a detailed breakdown of the amounts paid by the council to LDL. Disclosure of this information would enable a competitor to work out BT's pricing arrangement, as the major shareholder of LDL, which would then provide a competitor with a more detailed overview of the rates charged for certain activities by BT. The council stated that this information would be very useful to LDL's competitors, as it would reveal the pricing agreed for this contract which could then be used to outbid BT in future tenders with other councils. LDL confirmed to the council that BT was in the process of bidding for two further local authority contracts within the UK. Therefore, release of this information would be likely to prejudice BT's ability to compete fairly for the contracts it had tendered for.
30. In its submissions both the council and LDL referred the Commissioner to The Office of Government Commerce's (OGC) guidance, 'Freedom of Information (civil procurement) policy guidance', on the disclosure of contractual information. Both the council and LDL referred to the OGC's view on the disclosure of pricing structures, and confirmed that the OGC

considers this type of information is commercially sensitive and should be withheld.

31. In the Information Tribunal hearing of the Department of Health v Information Commissioner EA/2008/0018 the Tribunal referred to the OGC guidance and stated that it is:

"a useful approach to dealing with an information request".

And that it would expect:

"...the DOH in any future case to consider the information request by direct reference to these guidelines and in the event that the guidance was not followed in any respect, be able to provide the Commissioner with a clear explanation of why it was departing from the general principles set out".

The Tribunal therefore indicated that it considered this guidance is a useful starting point for all public authorities considering the disclosure of contractual information.

32. At paragraph 90 of its decision, the Tribunal provided a table of the information it considered was exempt from disclosure. It considered similar information to that being considered here and reached the decision that "pricing figures and structure" should be withheld as it could be indexed and provide competitors with information to undercut price and undermine the contractor's approach.
33. While the Commissioner agrees with this approach and considers the OGC guidance is a useful starting point for public authorities when considering disclosure of contractual information, each case should still be considered on a case by case basis. He will therefore now go on to consider the arguments presented by the council in support of its application of this exemption.
34. The council stated that it was pertinent to withhold the information due to the consideration of the break clause. The release of the pricing arrangements in place with LDL, at the time of the request, show prices for individual items and payments made for specific services and would arguably give potential competitors a detailed insight of what the council was paying, which in turn would be likely to affect the council's bargaining position if it decided to exercise the break clause and enter the market place for a new supplier.
35. In addition to the above, the value of the contract the council has in place with LDL is significant. The council argued that the release of the information may result in the council achieving a marginal reduction in prices quoted by LDL; however the council would have the potential to

achieve greater reductions if competitors were price blind at the point of tender. This would allow the council to determine the correct market value of goods and services.

36. The Commissioner considers that if the requested information were to be disclosed, the council's bargaining position may be strengthened as competitors may use the information as a benchmark. This would mean that any competitors of BT/LDL could pitch below the current price being paid by the council or offer additional services in an attempt to secure the contract, therefore the council would have the potential to achieve good or better value for money and as such its commercial interests would not be likely to be prejudiced.
37. The council referred the Commissioner to the argument presented by the appellant in the recent *BBC & One Transport v Information Commissioner and Mathew Davis* (appeal no EA/2010/0150). In which they relied on The Office of Government Commerce's guidance, 'Freedom of Information (civil procurement) policy and guidance', published for the benefit of government departments. This provides that there is an assumption that price breakdown information should not be disclosed throughout the term of the contract [O166]. The European Court of Justice has recognised that the asymmetric disclosure of pricing information, as would be the case if the council were required to disclose the disputed information "could be used to distort competition or to prejudice the legitimate interests of economic operators who participated in the contract award procedure".
38. To support the position in paragraph 37 above, the council stated that its and LDL's refusal to disclose the disputed information was consistent with the Information Tribunal's previous approach to the disclosure of pricing information in the matter of *Department of Health v Information Commissioner EA/2008/0018*. In that case, the Tribunal decided that all pricing information should be withheld from disclosure pursuant to S43(2) FOIA, applying the Office of Government Commerce working assumptions, on the grounds that the disclosure of the disputed information would prejudice both the Department of Health and its third party supplier in "*current and future negotiations, and because of damage done, harm relationship between the Department of Health and its 3rd party supplier. Risk could impact on those willing to tender in the future.*"
39. Similarly, the Commissioner is mindful of the Tribunal's findings in the decision at paragraph 38 above, in that the Tribunal refers to the OGC Guidance and states that it adopts 'a useful approach to dealing with an information request' (para 80). The Tribunal states at para 87 that it would expect 'the DOH in any future case to consider the information request by direct reference to these guidelines and in the event that the

guidance was not followed in any respect, be able to provide the Commissioner with a clear explanation of why it was departing from the general principles set out'.

40. The Commissioner is of the view that the OGC Guidance is a useful starting point, but it is important to consider each case on its own merits. In this instance, the Commissioner is minded to accept the approach due to the size and nature of the contract and the ability to read across a number of the relevant principles.
41. The council concluded by informing the Commissioner that if the break clause was executed, it would be the first tender of this particular contract following the council's transition to outsourcing.
42. The Commissioner is of the view that this factor is relevant to the interests of both parties. The council is setting new parameters upon which tenders will be invited and needs to maximise the potential benefits that this might bring, and the contractor is still entitled to a 'fair crack of the whip' when it comes to considering its position with regard future business. These factors add weight to the likelihood of prejudice occurring.
43. The Commissioner therefore considers that if the information regarding the pricing arrangement between the council and BT/LDL was disclosed, it is more probable than not that the council's, BT's and LDL's commercial interests would be likely to be prejudiced. He has therefore concluded that section 43(2) of the Act is engaged. As section 43 is a qualified exemption, he has gone on to consider the public interest test.

Public interest arguments in favour of disclosing the requested information

44. The council has identified the following arguments in favour of disclosing the requested information:
 - the public interest in being able to demonstrate that public money is being used effectively, that the public authority is getting value for money and that the public authority's approach to the spending of public funds is generally transparent; and
 - the public interest in demonstrating that the procurement process is being used in an open and honest way.

Public interest arguments in favour of maintaining the exemption

45. The council has identified the following arguments in favour of maintaining the exemption:

- the public interest in allowing the public authority to protect its bargaining position to negotiate future contracts;
- the public interest in allowing the council to protect its commercial interests in obtaining value for money
- the significant risk of legal action being taken against the council due to a breach of contract between the council and LDL at the expense of public funds. BT/LDL consider the information in question to be a trade secret and as such informed the council that disclosure of the requested information would obligate LDL to consider legal action.

Balance of the public interest arguments

46. The Commissioner acknowledges the public interest in openness and accountability; however the Commissioner considers that the public interest in guarding against the risks to the bargaining positions of the council, BT and LDL outweighs the public interest in the information being disclosed.
47. The Commissioner gives considerable weight to following:
- The council's argument that it is in the public interest for the council to be able to obtain the best possible value for money when spending public funds.
 - The effect that releasing the requested information would have on BT/LDL's ability to compete for future contracts.

Procedural Requirements

Section 10

48. Section 10(1) of the Act states that:

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

49. The dates referenced in paragraphs 3 and 4 shows that the council took 22 working days to respond to the request.
50. The Commissioner considers that the council has breached section 10(1) of the Act as it failed to respond to the request within twenty working days following the date of receipt.

The Decision

51. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- The council correctly applied section 43(2) to the withheld information

52. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The council breached section 10(1) by failing to respond to the initial request within 20 working days.

Steps Required

53. The Commissioner requires no steps to be taken.

Right of Appeal

54. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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.

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 14th day of September 2011

Signed

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

Legal Annex

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Commercial interests.

Section 43(1) provides that –

“Information is exempt information if it constitutes a trade secret.”

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).”

Section 43(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”