

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 March 2013

Public Authority: Haringey Council
Address: Civic Centre
High Road
Wood Green
London
N22 8LE

Decision (including any steps)

1. The complainant has requested information about a contract the public authority has for the supply of staff. The public authority has provided some information but has withheld the remainder citing section 43(2) of the FOIA. The Commissioner's decision is that the public authority was only entitled to withhold a small amount of the information under section 43(2). Having found the contract to include some 'personal data' he also considered this but found that section 40(2) was not engaged. He also found procedural breaches.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - It should disclose the information requested except for some pricing details in Schedules Two, Three, Four, Fifteen and Seventeen¹, and some personal data in Schedule One².
3. 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

¹ This is listed in a non-confidential annex at the end of this notice.

² This was 'scoped out' of the investigation with the complainant's agreement.

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

4. The Contract that is the subject of this complaint was due to run for a period of five years from 3 April 2006 with an option to continue for up to a further two years.
5. The Contract includes a section explaining the public authority's duties under the terms of the FOIA. In addition to the main Contract there are also 17 Schedules, numbered 1 through 17.

Request and response

6. On 28 February 2012, the complainant wrote to the public authority and requested information in the following terms:

"You have an agreement with Hays HR for the supply of temporary help and permanent staff and this agreement is also used by other London boroughs.

Please can you tell me if:

- 1 Huxley Associates Ltd were one of the supplying agencies on 7 June 2010?*
- 2 If SThree Staffing UK Ltd or SThree UK Ltd, both trading as Huxley Associates, were supplying agencies on 13 December 2010 and/or on 13 June 2011*
- 3 Please provide a copy of the contract with Hays HR [the "Contract" and the "Contractor"].*
- 4 Please provide a list of the supplying agencies which are currently part of this agreement".*

7. On 29 March 2012 the public authority advised the complainant that it needed more time to provide a response; it gave no reasons.
8. The public authority responded on 5 April 2012. It provided some information but withheld the Contract, citing no exemptions.
9. The complainant asked for an internal review on 5 April 2012. Following this the public authority wrote to him on 20 June 2012. It provided most of the main Contract, withholding three sections, but it

withheld all seventeen of the associated Schedules in their entirety citing section 43(2).

Scope of the case

10. On 28 July 2012 the complainant contacted the Commissioner to complain about the way this request for information had been handled.
11. The Commissioner clarified with him that he wanted an investigation of the withholding of the Contract at part (3) of his original request.
12. During his investigation the Commissioner advised the complainant that there was some 'personal data' about the Contractor's staff in one of the Schedules which was presented in a 'curriculum vitae' style. When invited to do so, the complainant advised that he was happy to forego disclosure of this and it has therefore been removed from the scope of the complaint (the remaining 'personal data' has been considered below).

Reasons for decision

Procedural requirements

Section 10(1) - Time for compliance

13. 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."

14. 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."

15. The Commissioner finds that the public authority breached section 10(1) by failing to inform the complainant whether or not it held the requested information within 20 working days of the request.

Section 17(1) - Refusal of request

16. Section 17(1) of the Act provides that:

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,*
- (b) specifies the exemption in question, and*
- (c) states (if that would not otherwise be apparent) why the exemption applies."*

17. In failing to provide a valid refusal notice within the statutory time limit, the public authority breached section 17(1).

Section 43(2) – commercial interests

18. The public authority has cited section 43(2), which provides an exemption from disclosure of information which would, or would be likely to, prejudice the commercial interests of any person.

19. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers that three criteria must be met.

- First, the actual harm which the public authority alleges *would*, or *would be likely*, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure '*would be likely*' to result in prejudice or disclosure '*would*' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.

20. The Commissioner notes that on this occasion the public authority has consulted with the service provider and obtained its view regarding disclosure of the information.

The public authority's position

21. The public authority's position is that disclosure of the withheld information *would* prejudice the commercial interests of both itself and the company which submitted the winning tender, Hays Specialist Recruitment Limited (the "Contractor"). It advised that its own commercial interests would be prejudiced because full disclosure of the information requested would impact on its own ability to negotiate such contracts in the future as its bargaining position may be weakened and that this would therefore impact on its ability to obtain best value.
22. In order to support its position, the public authority provided the Commissioner with the submission it had itself received from the Contractor in which it explained why it believed that disclosure of the withheld information would prejudice its commercial interests. He has summarised the points made by the Contractor below.
23. The Contractor advised the public authority that the withheld information contains details of its pricing and delivery methods and stated that it has to compete with many other companies when providing its services to local authorities in what is a very competitive market. The Contractor believes that disclosure of the information would result in losing its 'competitive edge' and that the information would be used by its competitors meaning it could lose lucrative contracts in the future. It advised that the withheld information contained details of insurance levels which could be used by third parties to bring claims. Furthermore, it advised that the schedules contained detailed delivery models showing how it would provide the service and that these were trade secrets, disclosure of which would again give competitors an advantage. (The Commissioner here notes that the public authority did not cite section 43(1) so he has not considered whether or not the information contains any 'trade secrets').
24. The Contractor also advised that the information details a bespoke service that it has created specifically for the public authority and that it is its own intellectual property. It particularly referred to the pricing schedule saying that its disclosure would allow other recruitment companies to undercut its costs which could mean it losing subsequent tenders thereby giving its competitors an unfair advantage. It advised that this may result in it losing a valuable client which could in turn lead to job losses.

25. Finally, the Contractor argued that the contract includes details of screening methods for gaining employment with the public authority and that it may be possible for someone to use this to unfairly gain a position of employment with the public authority. The public authority has also concurred with this position.

The Commissioner's position

26. The Commissioner has considered the public authority's arguments in respect to the prejudice it states would occur in respect of itself. Namely, that it would affect its ability to negotiate such contracts in the future and also that there is sufficient detail to provide a potential employee with some way of circumventing its proper recruitment process.
27. The Commissioner acknowledges that there is a common concern amongst public authorities about the impact that the disclosure of information may have on their relationships with contractors. However, he considers that commercial organisations which wish to enter contracts with the public sector should now be aware and understand that, as a result of the Act, there will be a greater degree of public scrutiny of these contracts than those in the private sector – in fact this forms part of the wording of the Contract itself so the Contractor is fully aware of the possible consequences.
28. In light of these factors, the Commissioner does not consider that disclosure of the information in question would unduly affect the relationship between the public authority and either this contractor or future contractors. Contracts of this nature are highly lucrative to the successful party and it is unlikely that they would willingly exclude themselves from tendering for contracts in the public sector because of the provisions of the Act. He does not therefore accept that the public authority's own position would be prejudiced by disclosure.
29. In addition, although he notes the public authority's concerns about the screening process and its belief that disclosure could allow some a person so minded to circumvent the proper recruiting process, the Commissioner does not agree that this would be any more likely than at present. The recruiting process should be clear to an applicant prior to them applying for employment and any vetting or other processes involved should be sufficiently rigorous to forego any such risk. Having viewed the full contract, the Commissioner does not agree that disclosure of the associated information would put the public authority at any more risk than it would already be subject to were an unscrupulous person so minded to attempt to gain employment unfairly.

30. The Commissioner will now consider the Contractor's own commercial interests separately. He notes that it was consulted by the public authority and that it provided details of its concerns which clearly relate to its commercial interests. Therefore, the Commissioner is satisfied that the first limb for engaging this exemption is met because the nature of the harm envisaged, namely prejudice to the commercial interests of the Contractor, clearly relates to the interests which section 43(2) is designed to protect.
31. However, with regard to the second limb, a public authority must demonstrate that the disclosure of information would lead (or would be likely to lead) to the harmful consequence claimed. These arguments must focus on the content of the information requested, what it would reveal to a member of the public, and the consequences disclosure would have. Generic arguments about "information of this kind" will be less convincing.
32. The Commissioner is only partly satisfied that there is a causal link between disclosure of the withheld information and the prejudice which the public authority states would occur. Whilst he accepts that it is logical to argue that disclosure of detailed pricing details and the related methodology would be advantageous to competitors, the actual financial details within the Contract and its Schedules are limited, whereas the exemption has been applied in a 'blanket' fashion to all seventeen of the Schedules.
33. Those parts of the main Contract which have been withheld are those entitled 'Payment and Pricing', 'Professional Negligence' and 'Indemnity and Insurance'. The former section contains no actual prices, other than an interest rate to be levied on unpaid invoices, and the Commissioner does not consider it to be sensitive. Similarly with the other two sections, the only pricing information is what the Commissioner would class as being 'standard' amounts that are regularly included in public authority contracts such as this one. He does not accept that any prejudice would occur to the Contractor were this information disclosed and he does not find the exemption engaged in respect of the main Contract.
34. Similarly, in respect of all the Schedules except Two, Three, Four, Fifteen and Seventeen, the Commissioner is not convinced that there is any evidence to support the view that their disclosure would prejudice the Contractor's commercial interests. The Contract is over six years old and the processes described within the Schedules will be well known within the public authority by those staff involved and also by those employees who have, presumably, been recruited as part of that process. Methodology which explains how the project will be managed is included at a fairly generic level includes staff roles and

responsibilities within the process which the Commissioner does not consider to be commercially sensitive. Some of the content is 'general' information which the Commissioner would expect a Contractor to provide to an interested party which was considering its services. He does not find that the information is of sufficient technical detail to cause any concerns and he is not convinced by the limited arguments provided that disclosure of this information would prejudice the Contractor's commercial interests. The Commissioner therefore concludes that the exemption is not engaged for these Schedules.

35. However, in respect of Schedules Two, Three, Four, Fifteen and Seventeen, the Commissioner does note that there is some 'financial information' which could be considered to be of commercial value to the Contractor's competitors; however, this does not mean that these Schedules should be withheld in their entirety. (The sections containing figures which the Commissioner considers to be pertinent are listed in an appendix to this notice). In respect of this information only, the Commissioner finds that a causal relationship does exist with the potential disclosure of this information and the prejudice which the exemption is designed to protect. Furthermore, he is satisfied that the resulting prejudice to the Contractor's interests would clearly be one of substance as such contracts are clearly of some considerable value.
36. With regard to the third limb, the Commissioner notes that the public authority has argued that the exemption is engaged at the higher threshold, ie that prejudice *would* occur if the withheld information was disclosed; this limb of the test places a much stronger evidential burden on the public authority to discharge. To establish that disclosure '*would prejudice*', prejudice must be at least more probable than not.
37. In practice, to accept that an exemption has been engaged on a *would* basis, it will be necessary to judge that:
 - either the chain of events is so convincing that prejudice is clearly more likely than not to arise – this could be the case even if prejudice would occur on only one occasion or affect one person or situation;
 - or, given the potential for prejudice to arise in certain circumstances, and the frequency with which such circumstances arise (ie the number of people, cases or situations in which the prejudice would occur), the likelihood of prejudice is more probable than not.
38. Having viewed the withheld information and having taken into account the submissions made, the Commissioner is not satisfied that either party has demonstrated that disclosure of the financial information

would prejudice the Contractor's commercial interests. However, he will now consider the lower threshold of *would be likely*.

39. In the case of *John Connor Press Associates Limited v The Commissioner* the Information Tribunal confirmed that, when determining whether prejudice would be likely to occur, the test to apply is that "*the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk*" (paragraph 15). In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote.
40. The Commissioner accepts, after reviewing the withheld financial information, that its disclosure would be likely to result in prejudice to the commercial interests of the Contractor as it would reveal information which *would be likely* to be of use to its competitors.
41. Consequently, the Commissioner accepts that section 43(2) is engaged in respect of the financial information. As it is a qualified exemption, he will go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the information

42. The public authority provided the following arguments in support of disclosure:

"Promoting transparency and the accountability of use of public funds, ensuring that public money is being used effectively, and that the local authority is obtaining value for money when purchasing goods and services."

43. It also advised the Commissioner that:

"Whilst we accept the genuine public interest in being able to scrutinise high value contracts awarded by the Council, we consider that interest is satisfied in this instance with the information which has already been released".

44. The Commissioner recognises that there a general public interest in accountability and transparency in relation to the activities of public authorities. This is particularly the case where the public body is obtaining services from third parties in an effort to secure the best value for money. The release of this type of information would facilitate debate and allow the public to assess whether or not the public authority has received a 'good deal' and spent public money effectively.

Public interest arguments in favour of maintaining the exemption

45. The public authority provided the following arguments in favour of maintaining the exemption:

"The Council needs to be able to attract a wide range of bidders confident with the way in which the council would handle their information and how this may affect the price the council (and therefore the public) would have to pay for its services.

Releasing information such as Hay's pricing mechanisms, or how it will provide a bespoke service for the Council could mean that the company could lose its competitive advantage when negotiating other contracts in a very competitive recruitment market.

We do not believe it would be in the public interest for this information to be placed in the public domain as this would affect the ability of the Council to negotiate such contracts in the future".

46. It also advised the Commissioner that:

"As in the ICO decision FS50447357 we think it would be against the public interest that third parties have their commercial interests prejudiced because they have entered into contracts with the Council. We also consider that full disclosure would impact on our own ability to negotiate such contracts in future as our bargaining position may be weakened and would impact on our ability to obtain best value from suppliers".

47. The Commissioner notes that the decision notice cited above (which can be viewed on his website) related to different circumstances. Much of the requested information in that case was provided to the complainant when requested. During the Commissioner's investigation, it was ascertained that the remaining information consisted of five separate documents; three of these were subsequently disclosed in full so only two items remained and arguments were presented accordingly. However, in this particular case the public authority has provided 'blanket arguments' to all seventeen Schedules and the Commissioner does not therefore consider the position to be at all comparable.

Conclusion

48. After weighing the public interest arguments, the Commissioner has determined that the public interest factors in favour of maintaining the

exemption outweigh the public interest factors in favour of disclosure. Consequently, he has decided that the public authority correctly applied section 43(2) to the financial information within the Contract.

Section 40(2) – personal data

49. Although not cited by the public authority, the Commissioner notes that Schedule One of the Contract contains information about employees. As regulator of both the Data Protection Act (the “DPA”) and the FOIA, the Commissioner regards it as his duty to consider any issues in connection with the possible disclosure of ‘personal data’ even when this has not been cited by the public authority concerned. He does however note that, in this particular case, the public authority has applied section 43(2) to the withheld information in its entirety so it had not found it necessary to consider this additional exemption.
50. As the public authority has not cited this exemption it has not put forward any arguments.
51. Section 40(2) provides an exemption for information which is the ‘personal data’ of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied. One of the conditions, listed in section 40(3)(a)(i), is where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act 1998 (the “DPA”).

Is the requested information personal data?

52. Section 1 of the DPA defines personal data as data which relates to a living individual who can be identified from that data, or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
53. The relevant information consists of the names and job roles of senior employees with the Contractor. The Commissioner considers that this is their ‘*personal data*’ as they are easily identifiable by this information.
54. Having satisfied himself that the requested information is personal data, the Commissioner must next establish whether disclosure of that data would breach any of the data protection principles under the DPA. He considers the first principle to be the relevant one on this occasion. This states that:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

*(a) at least one of the conditions in schedule 2 is met, and
(b) in the case of sensitive personal data, at least one of the
conditions in Schedule 3 is also met."*

55. The Commissioner considers that the primary issue is whether disclosure of the information would breach the first data protection principle by being unfair / unlawful.

Would disclosure breach one of the data protection principles?

56. The data protection principles are set out in schedule 1 of the DPA. The relevant principle in this case is the first principle which states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness. In considering fairness, the Commissioner balances the reasonable expectations of the individual and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

57. The Commissioner makes a general distinction between information relating to one's professional life and information which relates to one's private life and generally considers the latter attracts more privacy and warrants more protection. The information in this case consists of the following:

- the employee's name;
- the employee's job title; and,
- the employee's job role in fulfilling the Contract.

58. In considering whether disclosure of this information would contravene the requirements of the first data protection principle, the Commissioner has taken into consideration the following factors:

- the reasonable expectations of the employees;
- the amount of personal data which would be disclosed by the information sought; and,
- the consequences of disclosure.

Reasonable expectations

59. The Commissioner notes that the information concerned relates to employees of the Contractor rather than employees of the public authority. However, as mentioned earlier in this notice, the Contractor was advised of the public authority's duties under the terms of the FOIA so it was fully aware of the possibilities of future disclosure. He further notes that it was consulted in connection with disclosure and

provided no concerns regarding disclosure of information about its staff.

60. The Commissioner is satisfied that the information under consideration only relates to those employees concerned in a 'professional' capacity and which has a direct bearing on the Contractor's interaction with the public authority in fulfilling the Contract. The four staff concerned are all proposed 'key players', who are identified as such, and all four are either managers or hold more senior positions.
61. Accordingly, the Commissioner concludes that they should have a reasonable expectation that this sort of information would be made available to the general public when undertaking this type of work with a public authority.

The amount of personal data which would be disclosed

62. As mentioned, the information concerned is limited. It includes the names of four individuals, their job titles - all of which are 'manager' or above - and their role in connection with the Contract. The Commissioner is of the opinion that such a limited disclosure would be proportionate and would not be unfair to those individuals concerned.

The consequences of disclosure

63. There is only a small amount of personal data concerned, the disclosure of which the Commissioner considers would have little bearing on those individuals concerned. This is in part because he has found information online which would, apparently, already link those named parties with the Contractor. Therefore, the consequence of disclosure is limited in that it only formalises the potential role of those individuals in connection with this particular Contract.

Legitimate interests and lawfulness

64. Having decided that the disclosure of each employee's name, job title and role in fulfilling the Contract would not be unfair in the terms expressed by the first data protection principle, the Commissioner has gone on to consider whether the information should be disclosed. This requires an 'enabling' condition from Schedule 2 of the DPA to be met. The applicable condition is the sixth; condition 6(1) provides that:

"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason for prejudice to the rights and freedoms or legitimate interests of the data subject."

65. In order for the condition to be met, the Commissioner considers that disclosure must satisfy a three-part test:
 - (i) there must be a legitimate interest in disclosing the information;
 - (ii) the disclosure must be necessary for that legitimate interest; and
 - (iii) even where the disclosure is necessary it must not cause unwarranted harm to the rights, freedoms and legitimate interests of the data subjects.
66. Scrutiny of public sector contracts to ensure that they are effective and represent best value for money is an area of genuine public interest. Knowing that a contractor has put forward suitable personnel to undertake such high value work, who have both appropriate seniority and experience, is an issue which the Commissioner considers warrants a legitimate interest in disclosure.
67. The Commissioner's view is that disclosure of this information would not cause an unfair degree of intrusion into individuals' privacy and that there is a legitimate public interest in such disclosure. He considers that disclosure of the information is necessary for this legitimate interest and it would not cause unwarranted harm to the rights of the data subjects.
68. It is also necessary, when considering disclosure of personal data, to be satisfied that the disclosure would not be unlawful. The Commissioner's guidance indicates that disclosure would be unlawful if it would involve a breach of confidence, of an enforceable contractual agreement or of a statutory bar to disclosure (or, indeed, if disclosure would amount to a criminal offence).
69. The Commissioner has not received arguments to suggest that disclosure would lead to a breach of confidence, contract or a statute. The actual wording of the Contract does not reveal any such effect and the Contractor did not raise any such concerns when it was consulted by the public authority. The Commissioner therefore has no reason to consider that disclosure would be unlawful.
70. Having already established that the processing is fair, the Commissioner is also satisfied that the release of the information would not cause any unnecessary interference with the rights, freedoms and legitimate interests of the data subjects. He is therefore satisfied that the schedule 2 condition is met. In addition, he does not consider that disclosure would be unlawful.

Other matters

71. Although they do not form part of this decision notice the Commissioner wishes to highlight the following matters.

Internal review

72. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his '*Good Practice Guidance No 5*', the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
73. The Commissioner does not consider this case to be 'exceptional', so is concerned that it took over 40 working days for an internal review to be completed.

Right of appeal

74. 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

75. 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.
76. 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

**Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Appendix

Section 43(2)

Those areas where the Commissioner considers this exemption to be engaged, and therefore upheld, are as follows:

Schedule 2

- All monetary values and percentages provided by the Contractor.

Schedule 3

- All monetary values and percentages provided by the Contractor.

Schedule 4

- All monetary values and percentages provided by the Contractor.

Schedule 15

- All monetary values and percentages provided by the Contractor.

Schedule 17

- All percentages provided by the Contractor.

Section 40(2)

Those areas which the Commissioner considers to fall outside the scope of the investigation, as agreed by the complainant, are as follows:

Schedule 1

- The overview section about the member of staff on page 17.
- The CV overview section about the member of staff on page 19.
- The CV overview section about the member of staff on page 21.