

Freedom of Information Act 2000 ('FOIA')

Decision notice

Date: 28 March 2017

Public Authority: Hart District Council
Address: Harlington Way
Fleet
Hampshire
GU51 4AE

Decision (including any steps ordered)

1. The complainant has requested information relating to Hart District Council's outsourcing agreement with Everyone Active. The Commissioner's decision is that Hart District Council has correctly applied the exemption for commercial interests at section 43(2) of the FOIA to Appendix E of the requested contract. She does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

2. Following enquiries regarding leisure centres, on 16 March 2016 the complainant made the following request for information to Hart District Council ('the council'):

"...can you please provide me with all information relating to HDC's Outsourcing Agreement with Everyone Active?"
3. On 23 March 2016, the council informed the complainant that the outsourcing agreement contains commercially sensitive information and is not available for general viewing. It directed the complainant to the relevant section of its website where he could view what is available. The complainant replied on the same day stating that the fact the agreement may contain commercially sensitive information does not prevent it being made public and asking the council to confirm that the request is being dealt with as a request under the FOIA and to give proper consideration as to what can be released.

4. On 31 March 2016, the council provided a copy of the contract, the minimum operating standards specification, and the agreed pricing policy. On 7 April 2016, the council provided Everyone Active's method statement 5 (Fees and Charges). The council confirmed that it has released all the documents it is permitted to on 19 April 2016.
5. On 20 April 2016, the complainant asked the council to state which exemption of the FOIA is being used. On the 9 May 2016, the council said that the two most relevant exemptions are section 41 and 43.
6. The complainant requested an internal review on 7 June 2016 detailing why he believes the request was not dealt with correctly.
7. On 6 and 21 July 2016, the council provided its internal review responses in which it confirmed that information is being withheld under the exemption at section 43 of the FOIA. Further queries were then made by the complainant and some responses provided by the council.
8. The Commissioner is aware that there have been numerous items of correspondence between the council and the complainant regarding this request and the details of the requested contract. However, for clarity, only correspondence which is most relevant to this complaint is detailed above.

Scope of the case

9. The complainant contacted the Commissioner on 14 September 2016 to complain about the way his request for information had been handled.
10. During the course of the Commissioner's investigation, the council released further contract documentation to the complainant on 13 March 2017.
11. Following a telephone conversation on 20 March between the complainant and the Commissioner, on 21 March 2017 the complainant said that if the Commissioner agrees with his assertion that none of the information submitted as part of the tender can be "commercially sensitive" because the company agreed that any and all of it could be released under FOIA, then he believes that all of the requested information should be released. However, he also said that if the Commissioner concludes that it can be claimed that the information is "commercially sensitive" despite the clause in Schedule 2 Section 14 of the contract, then he is happy to limit the scope of his complainant to consideration of Appendix E of the requested contract.

12. The wording of Schedule 2 Section 14 of the contract is reproduced as an annex to this decision notice. The Commissioner does not consider that Schedule 2 Section 14 of the contract equates to the company agreeing that any and all of the contract can be released under the FOIA as it clearly states that it will be the council's responsibility to determine whether any of the content of the information is exempt from disclosure under the FOIA. The Commissioner is aware that the wording, or similar, of Schedule 2 Section 14 is common in contracts between public authorities and private companies in order to bring attention to public authorities FOIA obligations.
13. Towards the end of the Commissioner's investigation, the council disclosed a copy of Appendix E showing the format and headings but with the financial information redacted. The Commissioner has therefore considered the application of the exemption for commercial interests at section 43(2) of the FOIA to financial information within Appendix E only.
14. The complainant also raised some issues relating to personal data. The Commissioner has created a data protection case (reference RFA0666969) to deal with these issues separately from this decision notice.

Reasons for decision

Section 43(2) – Commercial interests

15. Section 43(2) of the FOIA 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.
16. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43¹. This comments that:

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.ashx

"...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."

17. In this instance the council has applied section 43(2) to Appendix E of a contract. Appendix E is the 'Contract Sum Appendix' which sets out information with regard to contract price and bid. The Commissioner considers that this relates to the commercial activity of bidding for a contract and therefore the requested information does fall within the remit of section 43(2) FOIA.
18. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.
19. In this case the council considers that the prejudice to the company's interests 'would' occur'.
20. The Commissioner needs to consider how any prejudice to commercial interests would be caused by the disclosure of the withheld information. This includes consideration of whether the prejudice claimed is "real, actual or of substance" and whether there is a causal link between disclosure and the prejudice occurring.
21. The council said that Appendix E sets out highly sensitive information with regard to contract price and bid. It said that disclosure would prejudice the company's competitive position in the current market. It pointed out that Appendix E contains information on all sites including the total cost for 11 years, the annual cost for each year 12 to 16, detailed income and expenditure for each facility, detailed staffing schedule for each facility, total capital provision and revenue cost, and individual site utilities consumption and tariff summary. The council explained that none of this was decided upon through negotiation but separately through the formal tendering exercise where other bidders were invited to bid for the contract and therefore this information would be of value to a competitor.
22. The council recognised that, in a commercial environment, the timing of the disclosure is important as circumstances will change over time. However, it said that in this instance, the new contract for the outsourcing and management of the leisure centres in Hart has only recently been negotiated and therefore the information is current and commercially sensitive at this time. It explained that this is because the company are still in the market place looking for other

outsourcing/management opportunities which is evidenced by its recent success in securing major leisure management contracts at Chichester District Council (February 2016), LB Southwark (April 2016), and Westminster City Council (May 2016). The council said that there is no doubt that any rival bidder across the county would find it commercially useful to be able to gauge the nature, tactic and ethos that lies behind the company's bids and its approach to achieving viable profit margins.

23. The council acknowledged that there is an expectation that the contract would be a public document, but said that there was nevertheless clearly an explicit expectation that the sensitive information such as that set out in Appendix E would not be released at such an early stage in the contract .
24. When claiming that disclosure would prejudice the commercial interests of a third party, the Commissioner expects a public authority to obtain arguments from the third parties themselves. In this case, the council has provided the Commissioner with a letter and an email from the company explaining its concerns regarding prejudice to its commercial interests. It said that the company are in the market and it must take its representations about the likelihood of commercial prejudice occurring seriously. The council said that the company has no reason to object to disclosure if no commercial harm would be likely to occur so it has to give weight to its position and that it has no market or other intelligence which leads it to a different conclusion.
25. The Commissioner notes that the concerns of the company support the council's reasons why disclosure would prejudice its commercial interests. It pointed out that it clearly marked its tender as confidential and commercially sensitive when submitted to the council and that the council owes it a duty of confidence. It said that it considers the withheld information to be clearly commercially sensitive falling within the section 43 exemption of FOIA on the basis that disclosure would prejudice its commercial position in relation to future tenders. It explained that its main competitors, who operate on a national level through competitive tender processes with local authorities across the country, will be able to, essentially, copy its innovative and distinctive ways of working and pricing strategy.
26. The Commissioner notes that companies compete against each other in a competitive marketplace and success is determined, at least in part, by any competitive advantage a company may have. If the council disclosed the requested information in this case it may have a negative impact upon the company's position in the marketplace because it would reveal to their competitors strategic information about their business which could be of benefit to their competitors. Disclosure of the financial information withheld in this case may enable competitors to change

their behaviour in future tenders which would distort procurement processes.

27. The Commissioner therefore considers that the prejudice claimed is real, actual and of substance; that there is a sufficient causal link between disclosure and the prejudice occurring; and that the likelihood of prejudice is real and significant therefore section 43(2) of the FOIA is correctly engaged. As section 43(2) is a qualified exemption, the Commissioner has gone on to consider the public interest arguments in this case.

Public interest arguments in favour of disclosing the requested information

28. The council said that there is public interest in the scrutiny of how public money is spent and that where a public authority is purchasing goods or services, there is a public interest in ensuring it gets value for money.
29. The company recognised that there may be public interest in transparency and accountability.
30. The complainant has said that the council are essentially lending two multi-million pound leisure centres (paid for by council tax payers) to a private company and what the council, council tax payers, and leisure centre customers receive in return is clearly in the public interest. He said that without the financial details contained within Appendix E the public do not even know if the council are paying the private company or the private company is paying the council and therefore a public interest test should conclude that the interests of the public outweigh those of the private company in this case. He questioned whether there is an alternative way to access the cost (or income) to the council of the contract, for example, by it being publicly reported in a council meeting or document, or detailed explicitly in financial accounts.
31. 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 could 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

32. The council said that there is a public interest in ensuring that companies are able to compete fairly and in ensuring that there is competition for public sector contracts. It also said that it has taken into account any reputational damage that disclosure might cause. As

detailed above, it said that the timing of the disclosure is important and at the time the request was made the new contract for the outsourcing and management of the leisure centres in Hart had only recently been negotiated and therefore the information is current and commercially sensitive at this time.

33. The company said that disclosing the requested information is not in the public interest as doing so would:
- “be destructive of SLM’s distinctiveness – put simply because competitors would be able to copy from SLM in future tenders both in the local area and across the country;
 - similarly erode any incentive for SLM to invest in that distinctiveness – because without this commercial sensitivity, SLM cannot exploit that distinctiveness;
 - be contrary to the Council’s seeking of the “most economically advantageous tender” and best value for money. If SLM’s (and, for that matter, any tenderer’s) commercially sensitive information were shared between potential providers and partners, the market would become homogenised in terms of price and capability, and there would be no incentive to innovate. Whilst we appreciate that another tenderer is not specifically requesting this information, the complainant is making any information received by the Council public and, in any event, a disclosure under FOIA is a disclosure to the world at large meaning that disclosure will amount to disclosing SLM’s tender to its competitors.”

It also said that there is public interest in ensuring fair competition in a mixed economy, and through this fair competition the most effective use of public funds. It explained that disclosing its commercially sensitive information prejudices future fair competition, both within the local authority area and outside, which erodes the market’s ability to deliver best value for money and the proper use of public funds.

34. The Commissioner recognises that there is a public interest inherent in prejudice-based exemptions, in avoiding the harm specified in the exemption – in this case harm to the commercial interests of the company. Having found the exemption engaged, she must take into account that there is automatically some public interest in maintaining it.

Balance of the public interest

35. The Commissioner is satisfied that disclosure of the information would prejudice the company’s commercial interests and she considers that there is a public interest in ensuring that companies are able to compete

fairly. She also recognises that there is public interest in ensuring that there is fair competition for public sector contracts.

36. The Commissioner has considered both sets of arguments. In relation to the complainant's argument that the public need to know whether this contract is a good deal for the council, she notes that there is financial information regarding this contract already in the public domain. This refers to the income that the council will receive from the company as part of the contract for 2017/18 and forms of a line in the council's budget report that was approved by Cabinet in February 2017². The Commissioner notes that the income figure is £334,000 and that the total 'Draft Budget Requirement' for Leisure Centres is -£37, 944. The Commissioner appreciates that this information post-dates the request in this case but considers that it does reinforce the council's commitment to transparency in the matter.
37. While the Commissioner considers the principles of transparency and accountability in the spending of public money to be important ones, in this case she considers that the damage to the commercial interests of the company, and subsequent damage to the procurement process and to ensuring that companies are able to compete fairly, to be the overriding factors. Therefore on balance, the Commissioner considers that the public interest arguments in favour of disclosing the information are not outweighed by the public interest arguments in favour of maintaining the exemption.

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https://www.hart.gov.uk/sites/default/files/4_The_Council/Council_meetings/B_February/17%2002%2002%20Budget%202017-18.pdf

Right of appeal

38. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

39. 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.
40. 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

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

Annex

Schedule 2 Section 14 of the requested contract states the following:

“14. Freedom of Information Act 2000 and Environmental Information Regulations 2004

- 14.1 The parties acknowledge that the Council is (and the Contractor may be) subject to the provisions of the FOIA and/or the EIR.
- 14.2 If the Contractor (or any of its Sub-Contractors) receives any request for Information pursuant to FOIA or EIR (regardless of whether such request complies or does not comply with the strict requirements of FOIA or EIR) it shall:
 - 14.2.1 make no response to such request other than a bare acknowledgement of receipt stating that the request has been passed to the Council;
 - 14.2.2 pass such request (and a copy of the acknowledgement referred to in sub-clause 14.2.1) to the Council within twenty [sic] (24) hours of receipt of the request by the Contractor;
 - 14.2.3 take no further action in regard to such request save at the direction of the Council.
- 14.3 The Contractor shall upon request by the Council (and within such period as the Council may specify) provide the Council with all assistance and Information under its control to enable the Council to respond to a request for Information within the time for compliance prescribed by section 10 of FOIA or regulation 5 of EIR.
- 14.4 Following receipt of a request for Information pursuant to FOIA or EIR and up until such time as the Contractor has provided the Council with all the Information referred to in clause 14.3, the Contractor may make representations to the Council as to whether or not or on what basis Information requested should be disclosed, and whether further Information should reasonably be provided in order to identify and locate the Information requested, provided always that the Council shall be responsible for determining at its absolute discretion:
 - 14.4.1 what Information is to be disclosed pursuant to a request for Information (regardless of whether such Information originates from the Council or the Contractor);

- 14.4.2 what Information (if any) is exempt or excepted from disclosure pursuant to the provisions of Part II FOIA or regulation 12 of EIR; and
- 14.4.3 whether or not to include any category of Information in its Publication Scheme.

and in no event shall the Contractor respond directly, or allow its sub-contractors to respond directly, to a request for Information unless expressly authorised to do so by the Council.

- 14.5 The Contractor acknowledges that the provisions of this clause 14 and of FOIA and of EIR may override any obligation of confidentiality as between the Council and the Contractor and that the Council may be obliged to disclose Information without consulting the Contractor or having consulted the Contractor but in opposition to the views of the Contractor.
- 14.6 The Contractor will comply with all requests from the Information Commissioner or his office including any request to carry out an inspection.
- 14.7 The parties acknowledge that the Contractor's Tender is not Exempt Information and the Council shall be responsible for determining in its absolute discretion whether any of the content of the Tender is exempt from disclosure in accordance with the provisions of the FOIA or EIR.
- 14.9 Each party shall bear its own costs of compliance with this clause 14.
- 14.10 Without prejudice to the generality of the indemnity in clause 24 (Indemnity), the Contractor shall indemnify the Council against all Losses incurred in connection therewith by the Council as a result of any breach of this clause 14 by the Contractor its Employees Sub-Contractors or agents."