

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 January 2021

Public Authority: Liverpool City Council
Address: Cunard Building
Water Street
Liverpool
L3 1AH

Decision (including any steps ordered)

1. The complainant has requested information relating to a stray dogs kenneling contract with Animal Wardens Ltd. Liverpool City Council disclosed some information and withheld other information under the exemptions for personal data (section 40) and commercial interests (section 43(2)).
2. The Commissioner's decision is that Liverpool City Council has failed to demonstrate that section 43(2) is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information, excluding that withheld under section 40(2), to the complainant.
4. 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 1 October 2019, the complainant wrote to Liverpool City Council (the "council" and requested information in the following terms:

"Please can you provide with me all the additional documents held by the council in relation to the contract with Animal Wardens Ltd, including, but not limited to, those documents set out above. I consider that each of these documents forms part of the contract with Animal Wardens Ltd, and that this request ought therefore to form part of my request ref: 608714, which has already been referred to the Information Commissioner's Office. It is not clear however whether Liverpool Council considered those documents to be part of the request and refused disclosure, or if the Council did not consider them to be part of the request."

6. The council responded on 28 February 2020 and disclosed some information. It withheld other information under the exemptions in section 21, section 40(2) and section 43(2) of the FOIA.
7. Following an internal review the council wrote to the complainant on 15 July 2020. It confirmed that it was maintaining its position.

Scope of the case

8. On 15 July 2020 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the requested information under section 43(2). In relation to the information identified by the council as being withheld under section 40(2) the complainant confirmed that they were happy for this to be excluded from the scope of their request.

Reasons for decision

Section 43(2) – Commercial Interests

10. Section 43(2) of the FOIA 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. This is a qualified exemption and is, therefore, subject to the public interest test.

11. The exemption can be engaged on the basis that disclosing the information either “*would*” prejudice commercial interests, or the lower threshold that disclosure “*would be likely*” to prejudice those interests. The term “*likely*” is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice would be more probable than not. For the Commissioner to accept that prejudice would result, she must be satisfied that this outcome would be more likely than not.

The withheld information

12. The council identified 4 documents that it was withholding under section 43(2):
 - Business Continuity Plan
 - Invitation to Tender
 - Managing Subcontractors
 - Method Statement
13. The Commissioner has examined the council’s arguments in relation to each of the documents in turn.

Business Continuity Plan

14. The council confirmed that it had withheld Animal Warden’s Ltd’s (the “contractor”) Business Continuity Plan (BCP) in full and that it considered that disclosure would be likely to result in prejudice to the contractor’s commercial interests.
15. In relation to the BCP, the council has argued that any disclosure in whole or part would be regarded as having a high probability and substantial likelihood of resulting in contractual frustration. The council has argued that this, in turn would manifest in the form a direct reduction in income generation by the service provider. The council considers that this would then necessitate actions including service of redundancy notices on personnel within the remainder of the current financial year in the absence of contracts being in place.
16. In relation to the council’s own commercial interests, it has argued that disclosure of the BCP would be highly likely to result in the council suffering commercial prejudice in the absence of a provider and, as a result of the extent of disclosures sought, there is a high probability this would have an ongoing chilling effect on any emergency procurement process undertaken to put in place alternative suppliers of services.

17. The council has further argued that it will also be highly likely to suffer resultant financial and commercial prejudice in the event that physical disruptions to the commercial activities of the service provider would, as a result of the disclosure of the BCP, result in such disruptions directly negating continuity of service provision under the BCP. The council considers that this would result in an immediate urgent requirement on the council to put in place alternative service provision and would require emergency procurement. The council also considers that disclosure of the BCP would have an ongoing chilling effect on any emergency procurement process undertaken to put in place alternative suppliers of services.
18. The council confirmed that, in keeping with recommended practice set out in the code of practice issued under section 45 of the FOIA, it consulted with the contractor and sought its views on the request, as a potentially affected third party¹.
19. The Commissioner has had sight of the relevant correspondence but finds that there are no submissions from the contractor which identify factors relevant to the application of section 43(2).
20. Having considered the council's arguments and referred to the withheld information the Commissioner is not convinced by the relatively high level arguments from the council. She considers that the arguments appear generic in nature and not even directly linked to any specific elements of the withheld information. As noted above, the council has received no direct evidence from the contractor which would support its claims as to the effects of disclosure. This suggests to the Commissioner that the council's grounds for withholding the information are speculative in nature and not founded on any evidential or logical grounds.
21. In relation to the ascribed effects of disclosure on the council's commercial interests, again, the Commissioner considers the arguments put forward are highly speculative, relying on grounds regarding the effects of disclosure on the contractor that are unconvincing. The Commissioner does not see how disclosure of the information would result in the contractor withdrawing from its contractual arrangement

¹ The Code of Practice is available online here:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

with the council and it has not been explained how or why this would happen.

22. In conclusion, in relation to the BCP, the Commissioner finds that the council has failed to demonstrate that the exemption is engaged. As such, she has not gone on to consider the public interest.

Invitation to Tender

23. The council confirmed that it had disclosed a redacted version of the Invitation to Tender (ITT) document to the complainant.
24. The council explained that the purpose of an ITT as part of any procurement process is to enable a company or organisation to submit commercial, financial and operational data relating to both its current activities together with how it proposes to commercially deliver a service.
25. The council clarified that, in the case of the withheld information, limited redactions relating to other clients information as well as financial information relating to the operations of the company were applied under Section 43(2).
26. The council confirmed that the redactions related to financial details in relation to the internal operations of the contractor together with information on other clients utilising the services of the contractor. The council has argued that, were this information to be disclosed it would provide a detailed analysis of how the contractor operates in delivering services for both the public and private sector. The council argued that this is fundamental core commercial information, the disclosure of which would result in substantive prejudice to the contractor.
27. The council argued that disclosure of extensive and fundamental commercial, financial and intellectual property as contained within an ITT raises a real and substantive risk of contractual frustration and legal proceedings, and place significant commercial and operational arrangements in the public domain for the benefit of competitor organisations – again resulting in clear commercial and financial prejudice.
28. The council argued that competitors can use confidential commercial arrangements and contingencies to rationalise their own delivery arrangements and compete with the service provider in imbalanced and prejudiced circumstances.
29. In reaching her conclusions the Commissioner has referred to the specific withheld information and to the council's arguments. As with the BCP above, the Commissioner notes that the council has not relied

on any direct arguments from the contractor in this case, save for the reference to potential legal proceedings against the council. The Commissioner does not consider this to be a relevant factor in relation to the engaging of the exemption. At most such proceedings would have an impact on financial considerations, a separate matter to commercial interests.

30. In relation to the actual information withheld from the ITT, the Commissioner is entirely unconvinced that its disclosure would produce or would even be remotely likely to produce the widescale effects identified by the council. The council's failure to identify the nature of any competition to the contractor's position as service provider and the manner in which the information would assist any competitor also suggests that the information has been withheld on a general basis. The sweeping, dramatic effects of disclosure identified by the council do not appear to bear any relation to the actual information that is being withheld or at least, it is unclear how disclosure would possibly produce the effects.
31. Having considered the relevant evidence the Commissioner has concluded that the council has failed to demonstrate that disclosure of the information would or would even be likely to prejudice the commercial interests of any party. As the exemption is not engaged the Commissioner has not gone on to consider the public interest.

Managing Subcontractors

32. The council explained that the purpose of a procurement process was in this instance to secure the provision of goods and or services to discharge a range of statutory objectives. The council clarified that it was reasonable for it to understand the principles whereby a service provider may appoint subordinate suppliers. The redacted information in this case, therefore, relates to the method by which the third party service provider assesses any sub contractors it uses.
33. The council has not provided any specific arguments to explain why disclosure of this information would (or would be likely to) result in prejudice to the contractor's commercial interests.
34. In relation to the grounds for withholding the information, the council has stated that

"...no reasonable and legitimate private enterprise – as in this instance – would expect to see disclosure of every single aspect of their commercial method. There ceases to be any mandate or prerogative to engage in the provision of services to public authorities who in turn will be unable to discharge statutory objects."

35. The Commissioner considers that any third parties entering into contractual arrangements to provide goods and/or services to public authorities should be aware that any information associated with this might be the subject of a request for information.
36. Where third parties have specific concerns about the potential ill effects of disclosure on their commercial activities, these can be made known. However, it is not the case, as suggested by the council, that contractors should assume that not all information they provide to a public authority as part of this process will be disclosed in response to a request for information. Where there are legitimate arguments for withholding information these can and should be made.
37. The council has provided no specific explanation of why disclosure of the information redacted from the Managing Subcontractors document would or would be likely to result in specific prejudice to the contractor's commercial interests. To suggest that as some information has been disclosed, it is inappropriate or unreasonable to disclose more or that the contractor would not expect the information to be disclosed are not relevant arguments in the context of this exemption.
38. In the absence of any specific reasons for withholding the information the Commissioner has concluded that it has not been shown that prejudice would or would be likely to result from disclosure of the information. As the exemption is not engaged she has not gone on to consider the public interest.

Method Statement

39. The council explained that the purpose of a procurement process was in this instance to secure the provision of goods and or services to discharge a range of statutory objectives. The Method Statement, withheld by the council in full, assists the council in understand the commercial methodology proposed for delivery, naturally extending to include intellectual property and method.
40. In relation to the Method Statement the council further rehearsed arguments relating to the contractor pursuing legal action should the information be disclosed. As such arguments do not relate to the specific content of the information or the putative impact of disclosure on the contractor's commercial interests, the Commissioner has not considered them further. She does not consider that threatening a public authority with legal action for disclosing information without setting out what specific harm disclosure might cause, are relevant or appropriate grounds for applying the exemption.

41. The council also provided the following arguments for applying section 43(2):

"In the event that private sector organisations were to see their entire operating method and intellectual property being disclosed, there are substantial and compelling reasons to expect the current provider to regard the current contractual relationship as frustrated, given that information which attracted a quality of confidence by virtue of commercial or financial sensitivity would have been disclosed in full. This results in an anti-competitive situation, prejudicing any provider who may tender and ultimately be successful in seeking to provide services or goods to a public authority."

42. In brief, the council is arguing that, as a general principle, the contractor would object to all the information they provided to the council being disclosed in response to a request. According to the council's argument, the grounds for this objection are that the information would become available to a competitor of the contractor to the detriment of its commercial interests. The council considers that, in addition to prejudicing the contractor's interests, disclosure would also harm its own commercial interests.
43. The Commissioner recognises the general principle that commercial operators will benefit from having insight into their competitors' strategies. She accepts that showing how the disclosure of information might cause this and, in turn, result in a rival changing its strategy in a way that prejudices the commercial interests of the contractor, might be legitimate grounds for engaging section 43(2).
44. However, the Commissioner considers that it is for authorities to show in each particular instance why disclosing specific information would have this effect and to demonstrate the causal sequence which would produce the effect. The Commissioner is simply not convinced that a contractor engaged in a service contract with a public authority would abandon it simply because information relating to it has been placed in the public domain. It is also unclear how disclosure of this information would inhibit the contractor's ability to continue to provide its services to the council as a commercial activity. No explanation of how these events would come to pass have been provided by the council. Similarly, the council has not explained how disclosure would result in damage to its own commercial interests, other than suggesting that the contractor might pursue legal action. As noted above, this in itself, does not represent a commercial interest and is not, therefore, grounds for engaging the exemption.

45. In this case, the council has not linked the ascribed prejudice to any specific elements of the withheld information. This raises the concern that the information has been sought to be withheld on a general basis. In any event, the Commissioner considers that the council has failed to show why disclosing the information would or would be likely to produce the identified prejudice. As the exemption is not engaged the Commissioner has not considered the public interest test.

Right of appeal

46. 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@justice.gov.uk

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

47. 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.
48. 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

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