

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 23 March 2016

**Public Authority:** Ealing Council  
**Address:** Perceval House  
14-16 Uxbridge Rd  
London  
W5 2HL

#### **Decision (including any steps ordered)**

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1. The complainant has requested from Ealing Council ("the Council") details of tenders submitted for the procurement of a service. The Council refused to disclose some of the requested information ("the withheld information") citing section 43 of FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that the Council has correctly applied section 43(2) to the withheld information, although section 43(1) does not apply.
3. The Commissioner therefore requires no steps to be taken.

#### **Request and Response**

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4. On 14 May 2015, the complainant wrote to the Council and requested information in the following terms:

"I would be grateful if you could provide me with the details of all tenders submitted for the procurement of the Supply of a Nurse Led Absence Management Service (Tender Reference Number: 1078). Excluding any financial information that is deemed exempt under section 43, or exempt personal information per section 40, but including:

1. Any presentations that were made by tendering parties;

2. The actual PQQ and ITT tender documents submitted by all tenderers;
  3. The identities of all bidders who submitted PQQ or ITT questionnaire responses to the Procurement;
  4. Any spreadsheets or other records showing any scores assigned and the evaluators' comments regarding the PQQ or ITT questionnaire responses of any bidder to the Procurement whether in manuscript or electronic form;
  5. Any individual panel members' electronic, manuscript or handwritten notes made when evaluating the PQQ or ITT questionnaire responses of any bidder to the Procurement;
  6. Any minutes of the evaluation panel meeting (or meetings) and any records made of the meeting(s) whether in manuscript or electronic form;
  7. Any minutes and papers of any meeting (or meetings) and any records made of the meeting(s) whether in manuscript or electronic form where the Procurement was referred to."
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5. The Council responded on 12 June 2015. It refused to disclose the requested information, citing the exemption under section 43 of FOIA as a basis for that refusal.
  6. Following an internal review the Council wrote to the complainant on 10 August 2015. It disclosed some information in relation to part 3 of the complainant's request, however it refused to disclose the remainder citing sections 43(1) and 43(2) of FOIA as a basis for non-disclosure.

### **Scope of the case**

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7. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The Commissioner has considered the Council's application of section 43 of FOIA to the withheld information.

## Reasons for decision

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### Section 43(1) of FOIA

9. Section 43(1) of FOIA provides that information is exempt information if it constitutes a trade secret. There is no statutory definition of a "trade secret" but the Commissioner will follow the Information Tribunal's preferred view of the meaning of trade secret as outlined in the case of *Department of Health v Information Commissioner* at paragraph 50. The Tribunal referred to the *Lansing Linde V Kerr [1991] WLR 251*, *Staughton LJ* Court of Appeal case.
10. It is generally accepted that, for information to constitute a trade secret it must fulfil the following criteria: -
  - it must be information used in a trade or business
  - it must be information which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret
  - the owner must limit the dissemination of the information, or at least, not encourage or permit widespread publication
11. The Council stated that the information requested in parts 1, 2, 4, 5, 6 and 7 is exempt from disclosure under section 43(1) of FOIA as it contains trade secrets of the supplier who won the contract.
12. It is the Commissioner's view that a trade secret implies that the information is more restricted than information which is commercially sensitive. It involves something technical, unique and achieved with a great deal of difficulty and investment. Although the Commissioner notes the Council's arguments on behalf of the supplier, he is not convinced that the withheld information in the parts of the request named above has the highest level of secrecy which the term 'trade secret' would appear to merit. Therefore he is not satisfied that section 43(1) of FOIA would apply to the withheld information.
13. As the Council has applied section 43(2) of FOIA to the remaining withheld information, the Commissioner has exercised his discretion to consider whether section 43(2) could apply to the entirety of the withheld information.

## Section 43(2) of FOIA

14. Section 43(2) 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.
15. The withheld information relates to a tender exercise for the awarding of a contract for the supply of a Nurse Led Absence Management Service. The Commissioner is, therefore, satisfied that the information is commercial in nature and falls within the scope of the exemption. The Commissioner accepts that the relevant commercial interests are those of the Council and of the supplier which won the contract for the supply of the service. He has therefore gone on to consider whether disclosure of the withheld information would, or would be likely to, prejudice those commercial interests.
16. For the Commissioner to agree that section 43(2) of the Act is engaged, the Council must first demonstrate that prejudice would or would be likely to occur to the commercial interests of the aforementioned company. In the Information Tribunal hearing of *Hogan v The Information Commissioner and Oxford City Council*<sup>1</sup> the Tribunal stated that the application of the 'prejudice test' should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption... Second, the nature of 'prejudice' being claimed must be considered. A third step for the decision-maker concerns the likelihood of occurrence of prejudice."
17. When considering the nature of the prejudice, the Tribunal stated in the hearing of Hogan that:

"An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thoroton 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." As stated above, the third step of the prejudice test is to consider the likelihood

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<sup>1</sup> EA/2005/0030

of occurrence of the prejudice claimed. The Commissioner notes that there are two limbs to this test; "would be likely to prejudice" and "would prejudice".

18. The first limb of the test places a lesser evidential burden on the public authority to discharge. "Would be likely to prejudice" was considered in the Information Tribunal hearing of *John Connor Press Associates Limited v The Information Commissioner*.<sup>2</sup> The Tribunal stated that: "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk".
19. The second limb of the test "would prejudice" places a much stronger evidential burden on the public authority to discharge. Whilst it would not be possible to prove that prejudice would occur beyond any doubt whatsoever, it is the Commissioner's view that prejudice must be at least more probable than not.
20. The Council has stated it considered prejudice to the commercial interests of the company to be "likely" to occur should the withheld information be disclosed. The Commissioner will therefore proceed to consider the lesser threshold of "would be likely to".

### **Affected parties and nature of the prejudice**

21. The Council has confirmed that it considers that disclosure of the information would prejudice its own commercial interests and the interests of the supplier who won the contract. The Commissioner has considered the relevant arguments under the headings below.

### **The commercial interests of the supplier**

22. Where prejudice relates to the commercial interests of third parties, in line with the Information Tribunal decision in the case *Derry Council v Information Commissioner*<sup>3</sup>, the Commissioner does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Both the code of practice issued under section 45 of the FOIA and the Commissioner himself recommend that authorities should consult directly with relevant third parties in such cases and seek their views.

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<sup>2</sup> Ea/2005/0005

<sup>3</sup> EA/2006/0014

23. In this case the Council confirmed that it approached the supplier and sought its opinion on whether the information should be disclosed. The Council provided the text of the supplier's argument against disclosure and stated that the supplier was of the view that disclosure would be likely to be very damaging to its commercial interests.
24. The Council argues that, as the supplier was the only bidder in the tendering process for the contract to supply the service, any information disclosed would be directly linked back to the supplier.
25. The Commissioner, having perused the withheld information, accepts that it contains details which would be likely to damage the supplier's ability to win new business opportunities for its services and to perform them within a commercially competitive market because other contracting authorities and competitors would be aware of the strengths and weaknesses of its delivery model and methodology.
26. Having considered the supplier's arguments, the Commissioner accepts that the disclosure of scoring information would provide competitors with an insight into their relative strengths and weaknesses and this would give them a commercial advantage, to the detriment of the supplier as this would be likely to prejudice the supplier's position in any future tendering opportunity.

### **The commercial interests of the Council**

27. The Council has indicated that its own commercial interests would be likely to be prejudiced by disclosure of the withheld information. The supplier provided the information voluntarily to the Council as part of a tendering opportunity in the reasonable expectation that it would be kept confidential. Therefore, disclosure of the withheld information could affect the Council's ability to tender for contracts as potential bidders may not want to risk their information being given to third parties or competitors.
28. The Commissioner considers that there are a number of weaknesses in this argument. Firstly, more generally, since the passing of the FOIA, public authorities should make all prospective tenderers aware of their responsibilities under the FOIA and the possibility that information might be the subject of a request. Indeed, in this case, this is written into the standard Form of Tender provided by the Council and completed by the supplier. Secondly, the Council has not provided any evidence which supports its assertion that disclosure of the information in this instance would be likely to result in the prejudice it has described.

29. Thirdly, the Commissioner considers it unlikely that suppliers would exclude themselves from possibly lucrative public sector contracts purely on the basis that their information may be disclosed to others. Finally, the withheld information is focused on evaluation scoring rather than on submissions provided by the supplier at the outset of the tendering exercise. For these reasons the Commissioner considers that the Council has failed to demonstrate that disclosure of the withheld information would be likely to cause prejudice to its commercial interests.
30. Having concluded that the commercial interests of the supplier are likely to be prejudiced, although those of the Council are not, the Commissioner has concluded that the exemption as set out in section 43(2) is engaged in relation to the withheld information and must next consider the application of the public interest test.

### **Public interest test**

#### **Public interest in disclosure of the withheld information**

31. The Council accepts that disclosure of the withheld information may satisfy the general principles of transparency and accountability and assist public understanding. It also accepts that it would help ensure the probity of decision making and the use of public resources.
32. The Council also accepts that there is a public interest in providing reassurance that value for money has been achieved and that its commercial activities are conducted in an open and honest way.
33. The Commissioner accords significant weight to the above arguments and also considers that disclosure of the information would assist public understanding of the competitive tendering process and help prospective suppliers put together successful bids. This would result in stronger future bids being submitted and enhance the competitiveness of the commercial market.

#### **Public interest in maintaining the exemption**

34. The Council has argued that, whilst the tender process has now been completed, the information could still prejudice the supplier's abilities to win other tenders. The Commissioner notes the general principle that the sensitivity of commercial information is time-relative. Information disclosed during a live tendering process is generally much more likely to be damaging to a party's commercial interests than after a tender has been awarded.



35. If the tendering process is complete, competitors would be unable to take advantage of commercial insights, at least in relation to that specific tender exercise. In this case, the Council confirmed that the contract was awarded on 1 June 2015 and the request for information was submitted in May 2015, therefore the request was submitted during the tendering process. Although the process is now complete, the awarding of the contract was so recent that the details contained within the withheld information would be likely to still be of use to competitors.

### **Balance of the public interest arguments**

36. In considering where the balance of the public interest lies in this case, the Commissioner has given due weight to the general public interest in averting the damage to commercial interests which the exemption is designed to protect.
37. In relation to the Council's argument that the information retains its ability to cause harm despite the completion of the tender process, the Commissioner has considered whether the severity of such harm would meet the relevant threshold. The Council opted for the threshold of "would be likely to" here, meaning that it is necessary to demonstrate that disclosure would be more likely than not to result in the harm described.
38. The Commissioner understands that, to compete in a commercial market, it is necessary to be able to provide something which a competitor cannot. If details of the supplier's methodology, pricing, skills and qualifications were to be disclosed to a competitor, this would provide the competitor with an unfair market advantage. Having perused the withheld information, the Commissioner accepts that its disclosure would be likely to provide competitors with an insight into the supplier's unique way of working, and information and knowledge which could be used by such competitors, to the commercial detriment of the supplier.
39. Having taken into account all of the public interest arguments in favour of and against disclosure of the withheld information, the Commissioner has concluded that the public interest in maintaining the exemption, and therefore protecting the commercial interests of the supplier and preserving its ability to compete fairly in a commercial market, outweighs the public interest in disclosure in all the circumstances of the case.



## Right of appeal

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40. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

41. 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.
42. 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 .....**

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