

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 December 2014

Public Authority: North East Lincolnshire Council
Address: Municipal Offices
Town Hall Square
Grimsby
South Humberside
DN31 1HU

Decision (including any steps ordered)

1. The complainant has requested tender documentation for a specific procurement process. The Commissioner's decision is that North East Lincolnshire Council has correctly applied the exemption for commercial interests at section 43(2) of the FOIA. He does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

2. On 30 July 2014, the complainant wrote to North East Lincolnshire Council ('the council') and requested information in relation to 'Tender ref: 27229' in the following terms:

"In an effort to try and address where we are going wrong, we are writing to request sight of the winning tender documentation or the tender which was initially first choice which was then found to be non-compliant, as per the attached feedback received from [name redacted], under the FOA.

We are not really interested in the pricing (which may still be commercially sensitive) it is the overall responses which we hope will help us."

3. The council responded on 21 August 2014 and refused to provide the requested information citing the exemption at section 43(2) of the FOIA.
4. The complainant requested an internal review on 29 August 2014. She reiterated that she is not requesting prices and stated she was happy to receive the documentation for the bid which was subsequently found to be non-compliant rather than the winning bid.
5. The council provided its internal review response on 2 September 2014 in which it maintained its original position.

Scope of the case

6. The complainant wrote to the Commissioner on 9 September 2014 to complain about the way his request for information had been handled.
7. The Commissioner has considered the application of the exemption at section 43(2) to the withheld information.

Reasons for decision

Section 43(2)

8. 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.
9. In this instance the council has applied the exemption at section 43(2) to the bids it received from the 'preferred' and 'successful' bidders. It explained that the preferred bidder retracted from the competition and therefore the second ranked bidder (the 'successful' bidder) was selected. It said that disclosure would prejudice the commercial interests of the bidders as well as the council's own commercial interests. For the purpose of this decision, the Commissioner will first consider whether the exemption is engaged, and the public interest test correctly applied, on the basis of the bidders commercial interests.

10. 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;

"...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."

11. The Commissioner considers that participating in a tendering process is a commercial activity, because the procurement was a competitive process by which the council intended to select a provider to deliver a service (the provision of a Leisure Management system), and therefore the requested information does fall within the remit of section 43(2) FOIA.
12. 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.
13. In this case, the council considers that the prejudice "would" occur or "would be likely to" occur. The Commissioner considers that it is appropriate in this case to apply the lesser test of "would be likely to" occur.
14. The Commissioner has first considered how any prejudice to the commercial interests of the bidders would be likely to be caused by the disclosure of the requested 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.
15. The council said that by disclosing the requested information it would be giving away "all the tenderers' competitive advantage in terms of discernible value added offer built up through embedded commercial practice and operation", and therefore it, and the market, considers that the tenders in full should be withheld as disclosure would prejudice the

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commercial interests of the identified parties. It said that the bidders responses are exceptionally detailed and finitely evidences their commercial approach to delivering services and setting out their product in terms of :

- Risk management
- Commercial advantage
- Operational delivery
- Cultural integration
- Future development potential
- Presentation, organisation and prioritisation of the information to be communicated

16. 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 obtained statements from the 'preferred' and 'successful' bidders during the Commissioner's investigation.

17. The Commissioner has viewed these statements and notes that they support the council's reasons why disclosure would prejudice the bidders' interests, for example, one statement includes the following;

"It has taken us many years to differentiate our software and services that enables us to create a unique Product offering of exceptional value for our customers and you will appreciate that we diligently protect the core ingredients and principles that have made us the leading provider in the public leisure market."

The other statement, as well as detailing specific examples of how it would be prejudiced if its tender was disclosed, included the following;

"The detailed description of the technical solution and our methods are full of proprietary knowledge and information which has been accumulated over many years at considerable cost to us. In short this information is of key importance to our commercial success and is of commercial value to our competitors."

18. The Commissioner considers that the bidders are competing against others in a competitive marketplace and their success is determined, at least in part, by any competitive advantage they may have. If the council disclosed the requested information it may have a negative impact upon the bidders' positions in the marketplace because it would reveal to their competitors strategic information about their business which could be of benefit to their competitors.

19. 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

20. The Commissioner notes that the council's relevant public interest arguments are as follows:
- The public interest in understanding its activities, informing of its decision making, allowing decisions and actions of the council to be challenged, and participating in debate.
 - The public interest in ensuring the council can be held accountable for its decisions.
 - The public interest in ensuring that the council are providing value for money services.
21. The complainant has said that disclosure would aid its understanding of where its tenders have proved to be inadequate.
22. 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

23. The Commissioner notes that the council's relevant public interest argument is as follows:
- The affect disclosure would have on the commercial interests of the bidders in a competitive environment.
24. 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 bidders. Having found the exemption engaged, he must take into

account that there is automatically some public interest in maintaining it.

Balance of the public interest

25. The Commissioner is satisfied that disclosure of the information would prejudice the bidders commercial interests and he considers that there is a public interest in ensuring that companies are able to compete fairly. He also recognises that there is a public interest in ensuring that there is competition for public sector contracts.
26. However, as stated in his guidance on Commercial Interests² he also considers that;

“Increasing access to information about a tendering process may in fact encourage more potential suppliers to enter the market. A better understanding of the process, the award criteria, knowledge of how successful bids have been put together, could also lead to improved bids being submitted in the future. This will lead to more competition and so decrease costs to the public authority. Indeed where a contract comes up for renewal, limiting this kind of information may well favour the current contractor and reduce competition.”
27. The complainant in this case clearly wants the information in order to improve their chances at winning future tenders. Whilst the requester's identity or their motives in seeking the information are not relevant to the public interest test, the Commissioner has considered the public interest in allowing companies to improve their bids. In this case, he considers that the public interest relating to the companies involved in this procurement exercise has been partially met by the council providing individual feedback.
28. The complainant has said that the tender information is two years old. The Commissioner acknowledges that the contract has been awarded in this case. However, the council has informed the Commissioner that the leisure software contract expires in 2015, and therefore the earliest opportunity to retender that contract is imminent, and that other public sector organisations also seek leisure management systems. The Commissioner therefore considers that disclosure of the withheld information in this case could affect the commercial interests of the

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bidders in future tenders, particularly as the information contains details of methodology as opposed to just pricing which could become very quickly become out of date.

29. The Commissioner has considered both sets of arguments. While he considers the principles of transparency and accountability in the spending of public money to be important ones, in this case he considers that the damage to the commercial interests of the 'preferred' and 'successful' bidders to be the overriding factor. 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.
30. As the information has been correctly withheld on the basis of prejudice to the commercial interest of the bidders, the Commissioner has not needed to individually consider the interests of the council.

Right of appeal

31. 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

32. 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.
33. 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
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