

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 November 2018

Public Authority: Leeds City Council

Address: Civic Hall
Calverley Street
Leeds
LS1 1UR.

Decision (including any steps ordered)

1. The complainant has requested information relating to tender submissions for a procurement exercise undertaken by Leeds City Council.
2. The Commissioner's decision is that Leeds City Council has correctly applied FOIA section 43(2) – commercial interests, to the information that has been withheld and the public interest in maintaining the exemption outweighs the public interest in disclosure.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 16 March 2018 the complainant wrote to Leeds City Council ('the council') and requested information in the following terms:

*"Scheme ID: Housing Leeds Planned Works 2018: Window and Doors
Scheme Title: DN234442*

In respect of the above tender results I would like to make a Freedom of Information Request.

- 1. Please provide **only** the quality method statements submitted by the organisations ranked 1st and 2nd. For the avoidance of doubt these are the method statements written in response to the quality criteria as set out in section 8.5, in the tender schedule at appendix 1.*
 - 2. Please provide the feedback (strengths / weaknesses) on the quality method statements submitted by the organisations ranked 1st and 2nd. "*
5. The council responded on 12 April 2018 and withheld the information citing the exemption at FOIA section 43(2), commercial interests.
6. The complainant requested an internal review on 4 May 2018.
7. Following an internal review the council wrote to the complainant on 25 June 2018 and maintained its position.

Scope of the case

8. The complainant contacted the Commissioner on 19 June 2018 to complain about the way his request for information had been handled. Specifically regarding whether the council was correct to withhold information by way of the exemption at section 43(2).
9. The Commissioner considers the scope of this case is to establish whether the council has correctly engaged the exemption at section 43(2) to the withheld information. If it has, then she will consider where the balance of public interest lies.

Background

10. The procurement exercise started in 2017 and shortlisted bidders were invited to tender in June 2017 with submissions due in August 2017.

The award decision was published in late December 2017 and the resulting framework contract runs from 1 April 2018 to 21 March 2022.

Reasons for decision

Section 43 (2) – commercial interests

11. 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.
12. The term 'commercial interests' is not defined in the FOIA; however, the Commissioner has considered her 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."
13. The withheld information comprises of the method statements submitted by the top two contractors ('the contractors') in a competitive tender, and the council's feedback on them. Method statements give bidders the opportunity to outline how they intend to provide specified goods and services and to give insight into their operations. The information would be valuable to other competitors on similar bids. The Commissioner is satisfied therefore that the information is commercial in nature as it relates to the sale of goods and services.
14. Having determined that the information is commercial in nature the Commissioner has gone onto consider the prejudice which disclosure would or would be likely to cause and the relevant party or parties that would be affected.

The nature and likelihood of the prejudice occurring

15. The council considers that disclosing the information would be likely to prejudice the commercial interests of the contractors.

¹ <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

16. The council advises that the contract is of significant value, being £8m over 4 years of which £1m each has been awarded to the contractors in the first year. The council will raise similar value work packages in subsequent years. In the first year the work is awarded to the top two framework providers (who are the contractors referenced in this Decision Notice), for future years there is provision to win further work subject to a price-only competition between framework providers. The "*Tender evaluation results and proposed award of contracts*" report ('the tender evaluation') states that four organisations are to be appointed as framework providers.
17. It is established in the tender evaluation that out of a possible 'quality' score of 300 the contractors achieved quality scores that exceeded the third ranked supplier by 50 and 70 points. The council states this is "*a significant margin*".
18. The council advises that "*the method statements, which as you will see contain details of the processes, procedures, quality standards, resource allocation, staffing and reporting structures of the suppliers, were the key documents upon which the 'quality' scores were based*".
19. The council states it believes that the contractors would use the information contained in the method statements and feedback forms to bid for similar contracts with organisations that have large housing stocks in both the private and public sectors, for example neighbouring local authorities.
20. It also advises that "*There will be another similar tender opportunity for a contract with the Council for housing glazing related works, including installing windows and doors, and this will be advertised in Spring/Summer 2019.*"
21. The council argues therefore that "*Given the considerable value of these contracts, it follows that the potential prejudice to both companies of losing their competitive advantage on quality, is considerable.*"
22. The council maintains that the information requested would also be of significant interest to framework providers that ranked lower than the contractors as the information could be used to "*diminish their current competitive advantage in offering quality services to other similar housing providers, in future procurement exercises.*"
23. The council reports that whilst the feedback forms do not provide as much detail as the method statements, they still provide a summary of the ideas and methods used by the contractors and so the same risks apply.

24. The council states *"In our view therefore, it is established that there is a clear and significant risk of substantial prejudice to [the contractors] if this information is disclosed."*
25. The council has provided the Commissioner with statements from both contractors regarding the withheld information. Both maintain that releasing the information would diminish their competitive advantage by publicising commercially sensitive intellectual property, gained through investment in their services and bidding strategies. The contractors state it would give insight into the way they operate, pricing structures and service delivery which currently differentiates them from competitors.
26. The council advises that whilst it cannot be 'absolutely' certain that disclosure would have the prejudicial effect outlined, it is an assessment of risk and in this case therefore it finds it is 'almost' certain. As such the council is relying on the lower threshold that disclosure 'would be likely' to have a prejudicial effect.

The complainant's position

27. The complainant argues that the bid documentation outlines that the method statements will form part of a successful bidder's contract with the council and that tender documents are commercially sensitive *"save where it forms part of the contract."*
28. The complainant states that the council have disclosed *"albeit indirectly contract values submitted by each bidder with no anonymity for the tenderers."* He argues that the council have therefore already shared commercially sensitive information which would undermine commercial advantage and is inconsistent with its position on method statements.
29. The complainant argues that the method statements are *"project specific"* and there *"is no risk to the commercial interest of the bidders; the questions and responses are unique to the public contract in question"*.

The Commissioners position

30. The Commissioner's guidance on section 43 outlines that *"information about the procurement of goods and services by a public authority is usually considered to be commercially sensitive. This can include information provided during a tendering process"*
31. The Commissioner has reviewed the withheld documents and agrees that the information contained in both the method statements and the feedback forms is commercially sensitive. The contractors are operating

in a competitive environment bidding against other organisations offering similar goods and services. The contractors have, on this bid, distinguished themselves from the competition successfully on the basis of the method statements. The Commissioner concludes therefore that the contractors' interests in the information contained in the withheld information are commercial interests.

32. The Commissioner's guidance states that, as in this case, the public authority may argue that the disclosure of information may prejudice subsequent negotiations with another third party. However it qualifies that in such circumstances "*both the nature of the information and the degree of similarity between the transactions should be taken into account.*"
33. The Commissioner has considered the nature of the information, taking account of arguments presented by the council and the contractors. It is clear that the purpose of the withheld information is to differentiate pricing models, bid strategies and organisational structures such that competitive advantage can be gained. The scores achieved by the contractors in comparison to the other bidders is an indication of the economic value of the information which, as a consequence, needs to maintain confidentiality in order to protect this quality.
34. The Commissioner has also considered the complainants position and finds that she does not agree that the information is "*project specific*" or "*unique to the public contract in question*". The details contained provide insight into each of the contractors operations, contract delivery approach and tendering strategy which would be transferable to other bids. The Commissioner finds it reasonable to assume that similar opportunities will arise and therefore she is satisfied that the disclosure of information may prejudice subsequent negotiations with other third parties.
35. The complainant advises that the council have released information regarding contract values, submitted by bidders, with no anonymity which is inconsistent with its stance on the method statements. The Commissioner understands that the complainant finds this unfair and is sympathetic with his position that it has undermined him commercially. However, the action of releasing contract values does not in itself undermine the nature or value of the withheld information, and as such is not a reason for disclosure.
36. The Commissioner has investigated the complainant's contention that the bid documentation states tender documents are commercially sensitive "*save where it forms part of the contract.*" The council has confirmed that there is no plan to make the final contract documentation

between the council and each of the 4 framework contractor's public, rather that it has instead made the award decision report a public document. Therefore the Commissioner finds that any inclusion of information from the method statements into the contract documents does not in itself reduce the commercially sensitive nature of the withheld information.

37. The Commissioner's guidance on the application of section 43 states it is not sufficient for a public authority to speculate on the prejudice which may be caused by a third party. It must, therefore, have evidence that the reasons presented do in fact represent the concerns of the named third party. In this case the council has provided statements from both contractors which support the stated prejudice therefore the Commissioner is satisfied that the condition has been met.
38. The Commissioner is satisfied, on the basis of the arguments provided, that there is a more than hypothetical risk of prejudice occurring to the contractors if the withheld information was disclosed. Rather, the risk of such prejudice occurring can be correctly described as one that is real and significant. Given the nature of the information, and the nature of the goods and services to which it relates, it is likely that the same companies will compete against each other in similar competitive exercises. In the Commissioner's view, this increases the risk of prejudice occurring to contractors commercial interests, if the information was to be disclosed.
39. The Commissioner therefore concludes that section 43(2) is engaged and has gone on to consider the public interest test.

Public interest test

40. Section 43(2) is a qualified exemption which means that even where the exemption is engaged, information can only be withheld where the public interest in maintaining that exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

41. The complainant states that the method statements are contractual obligations that include matters such as "*how the supplier will communicate and engage with residents*". He argues that "*there is a public interest in knowing how the services will be delivered particularly as works take place in peoples' homes.*"
42. The council identified arguments in favour of disclosure for the purposes of:

- accountability especially where the expenditure of public money is concerned;
- providing assurance that a proper, transparent and lawful process has been followed;
- knowing that bids have been fully and fairly evaluated;
- providing assurance that the council is achieving best value and managing contracts properly; and
- understanding the factors taken into account by the council when awarding the quality scores for each contractor.

Public interest arguments in favour of maintaining the exemption

43. The council states that:

- the arguments above would have a stronger weighting if there was less of a margin between the scores of the contractors and the other bidders. Or if it had received any complaints or challenges regarding the bid from other bidders or members of the public;
- the only known interest disclosure would serve *"would be the private, commercial interests of direct competitors"*;
- disclosure would erode the contractors competitive advantage in similar procurement exercises; and
- there is a strong public interest in maintaining the integrity of procurement exercises because *"It is fundamental that these exercises are, and are perceived as being fair and equal to all parties, thereby ensuring that prospective bidders are not discouraged by fear that by taking part in and winning one such exercise, at their considerable expense, their competitive advantage will thereafter be lost for a substantial period of time."*

44. The council therefore concludes that the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Balance of the public interest arguments

45. The Commissioner considers that there is always some public interest in the disclosure of information. This is because it promotes the aims of transparency and accountability which, in turn, promotes greater public

engagement and understanding of the decisions taken by public authorities.

46. The Commissioner agrees with the complainant's view that there is public interest in knowing how services will be delivered. However, without further evidence of public dissatisfaction, she can only consider it to be a generic argument in this case.
47. The Commissioner has already established, on the basis of the arguments provided, that there is a more than hypothetical risk of prejudice occurring to the contractors if the withheld information was disclosed.
48. The Commissioner considers that release of the information would undermine the contractors' ability in competitive tenders with other companies.
49. In the Commissioner's opinion, there is also a very strong and inherent public interest in ensuring fairness of competition and it would be firmly against the public interest if a company's commercial interests were harmed simply because they have been awarded a public sector contract.
50. Therefore the Commissioners view is that, in this case, there is a strong public interest in protecting the commercial interests of the contractors and ensuring that they can compete fairly in relation to new tenders.
51. Therefore, the Commissioner has decided that the public interest in maintaining the section 43(2) exemption outweighs the public interest in disclosure.

Right of appeal

52. 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

53. 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.
54. 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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