

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 November 2019

Public Authority: The Governing Body of Katherine Warington School

Address: Lower Luton Road
Harpenden
Hertfordshire
AL5 5FH

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the Governing Body of Katherine Warington School (the School) for a copy of a tender submission for a school uniform contract. The School refused the request under the section 43(2) (commercial interests) exemption.
2. The Commissioner's decision is that section 43(2) was correctly applied and the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

Request and response

3. On 12 March 2019 the complainant requested the following information concerning a school uniform contract:
'a copy of the tender submission by [supplier name redacted] and the scored results made on each of the awarded criteria for each supplier.'
4. On 10 April 2019 the School refused to provide the requested information citing section 43, commercial interests.
5. The complainant requested an internal review on 15 April 2019. The School sent him the outcome of its internal review on 1 May 2019 upholding the decision.

Scope of the case

6. The complainant contacted the Commissioner on 17 June 2019 to complain about the way his request for information had been handled. He argued that the *'schools scoring results holds no commercially sensitive information'*.
7. The Commissioner will first consider whether the School at the time of the request was a public authority for the purposes of FOIA as the School itself has queried this.
8. The Commissioner will then focus her investigation on whether the School correctly applied the exemption under section 43(2) of the FOIA to the complainant's request.

Reasons for decision

Is the School a public authority?

9. The School stated that it had responded to the Commissioner in its capacity as Katherine Warrington School (the School) which opened on 5 September 2019. At all times prior to this, decisions relating to the School were taken by the directors (the Directors) of Harpenden Secondary Education Trust (HSET), a private company limited by guarantee with registration number 09238779.
10. The School did not consider that HSET and/or the decisions of its Directors in March 2019 fell within the Schedule 1 definition of a 'public authority' for the purposes of FOIA as it was at most a 'prospective school'.
11. The Commissioner referred the School to Section 52A of Schedule 1 of FOIA:

(1) The proprietor of an Academy, in respect of information held for the purposes of the proprietor's functions under Academy arrangements.

(2) In sub-paragraph (1)-
"Academy arrangements" has the meaning given by section 1 of the Academies Act 2010;
"Proprietor" has the meaning given by section 579(1) of the Education Act 1996.]
12. The Commissioner considered that from its website it appeared that HSET is a Multi Academies Trust of schools and that the School had some legal entity or status before it opened its doors to pupils in September 2019.

13. In March 2019, the FOIA request was clearly addressed to the School and should have been dealt with by the body responsible for the School at the time of the request. From its website, the directors appear to fall into the definition of proprietor above.
14. In February 2019 a local newspaper published that '*a meeting of Herts county council's development control committee agreed on Monday that Katherine Warington School (KWS), should be built on farm fields east of Common Lane, off Lower Luton Road at Batford...with Tony Smith ..., as headteacher.*' (See <https://www.hertsad.co.uk/news/education/controversial-harpenden-secondary-school-plan-is-approved-1-5401862>)
15. Both the invitation to tender for the school uniform contract in November 2018 and the newspaper article above supports the Commissioner's view that the School had some legal entity or status before it opened its doors to pupils in September 2019.
16. Academies by virtue of the Academies Act 2010 are subject to FOIA and the Commissioner is satisfied that the School, with the directors of HSET acting on behalf of the School, was subject to the FOIA at the time of the request in March 2019.

Section 43(2) - Commercial interests

17. Section 43(2) of 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. The exemption is subject to the public interest test which means that even if it is engaged account must be taken of the public interest in releasing the information.
18. The exemption can be engaged on the basis that disclosing the information either 'would' prejudice someone's commercial interests, or, the lower threshold, that disclosure is only '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 is more probable than not.
19. For section 43(2) to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the School alleges would be likely to occur if the withheld information was disclosed has to relate to the commercial interests;
 - Secondly, the School must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests; and

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e. whether there is a real and significant risk of the prejudice occurring.

Commercial interests

20. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner has considered the meaning of the term in her awareness guidance on the application of Section 43. (<https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>). 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."

21. The School provided the following as a background:

- In November 2018 local school uniform providers were invited to pitch for the opportunity to be selected as the preferred supplier of school uniforms.
- As a brand new school starting with a single year of entry uniform sales for the first few years would be relatively low and so it was decided to only appoint one supplier for the initial 2 years.
- Four proposals were received and assessed to determine 'best value', which was not limited to price but included quality, ease of purchase, size range, environmental and sensitive skin considerations. One supplier was chosen in December 2018.
- One local school uniform provider requested feedback which was provided and the appeal process was explained.

22. The School explained that disclosing the requested information would be likely to prejudice the commercial interests of the bidders in the school uniform process *'by revealing confidential information about their bids, including pricing, stock levels and future intentions to a competitor'*.

23. The School was also concerned that revealing such information would affect its future procurement exercises.

24. The Commissioner is satisfied that the actual harm alleged by the School relates to its own commercial interests and that of the bidders in the school uniform process. Accordingly, she is satisfied that the first criterion is met.

Causal link

25. When investigating complaints which involve a consideration of prejudice arguments, the Commissioner considers that the relevant test is not a weak one and a public authority must be able to point to prejudice which is "real, actual or of substance" and to show some *causal* link between the potential disclosure and the prejudice.
26. The School has provided the Commissioner with details of the way in which it believes its commercial activities would be affected by disclosure of the requested information *'in future procurement exercises, where prospective bidders have reason to doubt that confidentiality in their responses will be maintained.'*
27. The School also pointed out that disclosure of *'confidential information about their bids, including pricing, stock levels and future intentions to a competitor'* would affect the commercial interests of the other bidders and *'the expectation of bidders would be that their bid would not be shared with competitors in their market, particularly as they were not so advised in advance of the tender submission.'*
28. The Commissioner is satisfied that the School has provided reasonable arguments to suggest that there is a causal link between the requested information and its commercial interests.

Likelihood of prejudice

29. In *Hogan and Oxford City Council v the Information Commissioner* [EA/2005/0026 and 0030] the Tribunal said:

"there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not."(paragraph 33)

30. As it is not absolutely clear which threshold the School has applied the Commissioner will consider the lower threshold, that disclosure is only 'likely' to prejudice those interests.
31. The Commissioner's view is that this places an evidential burden on the public authority to show that the risk of prejudice is more probable than not to occur (ie a more than a 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so).
32. The School has argued that disclosure of the tender submissions and the scored results for each supplier would be likely to prejudice its own commercial interests and its ability to compete in future procurement exercises, where prospective bidders would have reason to doubt that

confidentiality in their responses will be maintained. Although school uniform supplies do not involve School expenditure, the School stated that it had complied with the Academies Financial Handbook.

33. The Commissioner has seen the withheld information and she is satisfied that it would be of use to competing school uniform suppliers in the future. It would provide a valuable insight to the scoring assessment by the School of the school uniform suppliers. The Commissioner notes that the current supplier only has a uniform contract for 2 years while the School is new and that future contracts for the supply of school uniforms will be negotiated within 2 years and will attract greater volumes as the School grows.
34. This is not in itself a reason not to disclose the information under FOIA. However, it does indicate the importance that the School attaches to this information and the prejudice that would be caused if it was disclosed.
35. For all of these reasons the Commissioner has found that the section 43(2) exemption is engaged and therefore has now gone on to consider the public interest test.

Public interest test

36. 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

37. The complainant stated that *'the information requested would help prove that the tender was carried out in a fair and proper manner which is our sole aim'* and that the public interest would be better served by disclosing the winning supplier's *"offer", which affects parents directly'*.

Public interest arguments in favour of maintaining the exemption

38. The School has said that *'The procedure did not relate to the spending of school or other public funds. The appointment covers a relatively short period of time during which the School will be operating well below its full capacity. The original appointment effectively covered just the 2019 and 2020 Year 7 cohorts and any ad hoc purchases'*.
39. The School also stated that disclosure might lead to *'potential complaints from the other bidders arising out of the disclosure of their confidential information'*.

40. The School is *'satisfied that there is nothing improper about the decision to appoint [supplier name redacted] as the preferred supplier of school uniforms and that this would be borne out of the requested information. However, disclosure will ... risk exposing the School to the further distraction of complaints from the other bidders in relation to the disclosure of their confidential commercial information to a competitor'*.

Balance of the public interest arguments

41. 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.
42. However, the Commissioner's view is that in this case there is a stronger public interest in protecting the commercial interests of the new School and ensuring that it is able to procure school uniforms for its pupils in a fair and competitive way. This is particularly sensitive as the new School grows and suppliers will shortly compete for a larger volume of school uniforms.
43. The Commissioner understands that release of the detailed information into the public domain would undermine the School's future procurement. The Commissioner also considers that there is a public interest in maintaining the exemption to protect the commercial interests of the competing companies of school uniform to ensure that they are able to compete fairly. Companies should not be disadvantaged as a result of doing business with the public sector.
44. Therefore, the Commissioner has decided that in all the circumstances of the case, the public interest in maintaining the section 43(2) exemption outweighs the public interest in disclosure.

Right of appeal

45. 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

46. 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.
47. 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

Pamela Clements
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