

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 September 2024

Public Authority: Oxford City Council

Address: Town Hall
St Aldate's
Oxford
OX1 1BX

Decision (including any steps ordered)

1. The complainant requested a breakdown of the costs of scaffolding and portacabins for work on a covered market. Oxford City Council (the "Council") provided some information and withheld the requested costs under the exemption for commercial interests (section 43).
2. The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of section 43(2) and that in all the circumstances of the case the public interest favours maintaining the exemption. However, in failing to issue a refusal notice in time, he finds that the Council breached section 1, 10 and 17 of FOIA.
3. The Commissioner does not require any further steps to be taken.

Request and response

4. On 28 February 2024 the complainant wrote to Oxford City Council (the "Council") and requested the following information:

"Croft Building & Conservation Ltd stopped work on the Covered Market Roof Restoration Project on 08 September 2023. Despite no subsequent work taking place, scaffolding and porta-cabins used by Croft's remained in place until it began to be dismantled on 26 February 2024. During this period of time the Council were paying £4,172.20 excl. Vat. per month for the hire of scaffolding and porta-cabins.

Please provide the individual total costs of the scaffolding and portacabins since the work on the covered market ceased.

Why was the scaffolding and portacabins not removed once work ceased?"

5. The Council responded on 26 March 2024 and addressed the queries raised by the complainant. In relation to the request for a breakdown of costs, the Council suggested that it did not hold this information.
6. The Council issued a further response on 25 April 2024 which addressed supplementary queries raised by the complainant. In relation to the breakdown of costs it confirmed that it did not hold this information.
7. Following an internal review the Council wrote to the complainant on 23 May 2024. It confirmed that it was relying on the exemption for commercial interests (section 43) to withhold the requested breakdown of costs.

Scope of the case

8. On 23 May 2024 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner has considered whether the Council correctly handled the request for the individual total costs of the scaffolding and portacabins.

Reasons for decision

Section 43(2) – commercial interests

10. Section 43(2) states that:

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

11. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure ‘would be likely’ to result in prejudice or disclosure ‘would’ result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner’s view this places a stronger evidential burden on the public authority to discharge.

The Council’s position

12. The Council considers that disclosing the requested breakdown of costs is likely to result in some prejudice to the commercial interests of the Council. The Council also considers that there is a higher risk of prejudice to the commercial interests of the roofing contractor and their sub-contractors/suppliers (collectively, the “Contractor”) of scaffolding and portacabins/containers which make up the monthly costs.

13. In relation to prejudice to its own commercial interests, the Council has identified concerns about disclosing this type of information in general, as many suppliers would have strong concerns that their confidential business information could be disclosed in potential future FOI requests and may refuse to engage, harming the Council’s ability to procure on the basis of quality and value for money.

14. In relation to prejudice to the commercial interests of the Contractor, the Council considers that there is a significant likelihood of prejudice occurring as these are specialised and specific costs for an exceptional part of the market roof project (the "Project") and are the charges of separate and relatively small businesses.
15. The Council considers that to disclose further details would prejudice the Contractor's competitive position for future works of this nature and provide competitors with a commercial advantage, including for any future phases of Project work that may be competitively tendered by the Council.
16. The Council confirmed that it consulted with the Contractor on a number of occasions on their position regarding the disclosure of Project information under the FOIA. The Council explained that the Contractor has previously agreed to the disclosure of information regarding the project and that the total, overall cost of the work has been disclosed. In relation to the requested breakdown, however, the Contractor has specified concerns about the potential damage of disclosure to its market position.

The complainant's position

17. The complainant disputes the Council's position that the information is commercially sensitive.

The Commissioner's position

18. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the Council clearly relates to commercial interests which the exemption contained at section 43(2) is designed to protect.
19. With regard to the second criterion the Commissioner is satisfied that disclosure of the withheld information has the potential to harm the Contractor's and the Council's commercial interests.
20. The Commissioner has reached this conclusion because the withheld information contains details of the Contractor's pricing strategy for work of this type. In the Commissioner's view it is clearly plausible to argue that disclosure of this information has the potential to harm the contractor's commercial interests given the insight such information would provide to its competitors.
21. In relation to the Council's interests, the Commissioner considers that, since the coming into force of the FOIA, any third parties engaging with public authorities should be aware of the possibility of information relating to this being disclosed. In addition, he considers it unlikely that

third parties would pass up the opportunity to secure potentially lucrative public sector contracts. However, the Commissioner considers that disclosing information which may have been provided to an authority with an explicit or tacit expectation that it would not be shared more widely presents a real reputational risk. He, therefore, accepts that disclosure of this specific information would be likely to prejudice the Council's ability to secure competitive and effective contracts.

22. With regard to the third criterion the Commissioner also accepts that this is also met and thus if the withheld information were to be disclosed there is clearly more than a hypothetical risk of prejudice occurring; rather there is a real and significant risk of this prejudice occurring. The Commissioner has reached this view given specific details of the contractor's pricing model and the fact such prices are likely to be used by the contractor for other similar contracts in the future.
23. Section 43(2) is therefore engaged.

Public interest test

24. Section 43 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in disclosing the withheld information

25. The complainant has expressed general concerns about the Council's management of the Project and suggests that transparency is necessary if it is to be held accountable for its decision making in this regard.
26. The Council has acknowledged that there is a strong public interest in this project and recognises that there is a public interest in being transparent regarding expenditure on the Project .
27. The Commissioner considers that there is a general public interest in public authorities being transparent, particularly in relation to decisions which have an impact on the local community and which involve the use of public money.

Public interest in maintaining the exemption

28. The Council has confirmed that it has already disclosed a significant amount of information and published a statement to give background and context to the Project. It confirmed that information that is now in the public domain include all payments to the Contractor since the project start; details of works undertaken; a number of operational and high level progress reports and Council meeting notes; Project

management arrangements and a wide range of correspondence on the Project between the Project manager and the Contractor as well as internal correspondence. The Council explained that the monthly cost for the phase of the Project identified in the request was also disclosed, despite concerns around prejudice to commercial interests.

29. The Council considers that there is a clear public interest in enabling it to procure future works at value for money and that suppliers can have confidence that the Council will not disclose information on costs/pricing that will lead them to risk being undercut by competitors, particularly given that future phases of the project are to be tendered.

Balance of the public interest arguments

30. The Commissioner accepts that there is a general public interest in the disclosure of information which would allow the public to understand costs incurred by the Council for particular services. He acknowledges that disclosure of a breakdown of the Contractor's costs would provide the public with a greater understanding of the basis of the total costs beyond the information already provided.
31. However, the Commissioner notes that the Council has disclosed a significant amount of information regarding the Project. Specifically, it has disclosed the overall costs for the phase of the project identified in the request. It is unclear to the Commissioner how disclosing a further breakdown of this expenditure would serve the public interest in this matter and the complainant has not identified any specific arguments in this regard. In the Commissioner's view the information disclosed by the Council meets its obligations for transparency and accountability in relation to this matter.
32. In the Commissioner's opinion there is very strong and inherent public interest in ensuring fairness of competition and in his view it would be firmly against the public interest if a contractor's commercial interests are harmed simply because they have entered into a contract with a local authority.
33. Similarly, the Commissioner has acknowledged that disclosure would be likely to harm the Council's own commercial interests and he does not accept that there is a countervailing or stronger public interest in disclosure which justifies this harm occurring. He recognises that the complainant has concerns about the Council's handling of the Project but he does not consider that disclosure of this specific information would represent a remedy for these concerns.
34. The Commissioner can appreciate why a breakdown of the costs might be of interest, however, he considers that the broader public interest in

this matter has been served by other disclosures made by the Council, specifically, by the disclosure of the total overall costs of the Project work.

35. Given the weight that the Commissioner considers should be attributed to the arguments in favour of maintaining the exemption, and taking into account the information the Council has already disclosed he has concluded that the public interest favours maintaining the exemption.

Procedural matters

36. The Commissioner has found the Council in breach of section 1, 10 and 17 of FOIA. This is because the Council failed to confirm it held the requested breakdown or issue a refusal notice citing the exemption in section 43(2) within 20 working days of the receipt of the request. It remedied this at the internal review stage.

Right of appeal

37. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

38. 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.
39. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Christopher Williams
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Information Commissioner's Office
Wycliffe House
Water Lane
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