

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 February 2016

Public Authority: Borough of Poole
Address: Civic Centre
Poole
BH15 2RU

Decision (including any steps ordered)

1. The complainant requested information relating to payroll and pension services provided by Borough of Poole (the Council) to schools. The Council disclosed some information, but withheld information recording how much the Council charges schools for these services under the exemption provided by section 43(2) (prejudice to commercial interests) of the FOIA.
2. The Commissioner's decision is that section 43(2) was engaged, but that the public interest favoured disclosure of the information. The Council is now required to disclose the withheld information.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information.
4. The Council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

Request and response

5. On 8 October 2015 the complainant wrote to the Council and requested information in the following terms:

"...the names of the schools (including all types of school and academies) that are currently supplied with your Payroll/pensions service to be broken down by the actual service given to those schools and charges made for those services for each school."

6. The Council responded initially on 6 November 2015 and disclosed a list of schools and stated that *"All receive a combined payroll and pension administration service"*. It did not address the request for the charges made to each school.
7. The complainant responded and asked that the request for the charges be addressed, at which stage the Council responded and stated that it considered that information to be exempt under section 43(2) (commercial interests) of the FOIA. The complainant subsequently requested an internal review, at which stage the refusal under section 43(2) was upheld.

Scope of the case

8. The complainant contacted the Commissioner on 26 November 2015 to complain about the part refusal of her information request. The complainant specified as her grounds for complaint the refusal to disclose some of the information requested and the errors made by the Council in the handling of her request.

Reasons for decision

Section 17

9. Section 17(1) of the FOIA requires that a response that refuses a request for information must be sent within 20 working days of receipt of the request. In this case the initial response sent to the complainant by the Council failed to address the request for the charges made. That request was only addressed after the complainant had contacted the Council again and the subsequent further response from the Council was not sent within 20 working days of receipt of the request.
10. In failing to address the request for charges within 20 working days of receipt of the request, the Council breached the requirement of section

17(1) of the FOIA. The Council must ensure that this breach is not repeated and that all future information requests are responded to in their entirety within 20 working days of receipt.

Section 43

11. The Council cited section 43(2) of the FOIA. This section provides an exemption in relation to information the disclosure of which would, or would be likely to, prejudice commercial interests. Consideration of this exemption involves two stages. First, the exemption must be engaged as prejudice to commercial interests would be at least likely to occur as a result of disclosure of the requested information. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
12. Turning to whether the exemption is engaged, the first step here is to establish which party's commercial interests are in question. On this point, the Council's arguments concerned its own commercial interests. It believed that disclosure would be likely to prejudice its own commercial interests.
13. In order for the Commissioner to accept that prejudice would be likely to result there must be a real and significant risk of that outcome occurring, rather than that outcome being of remote likelihood. As to whether there is a real and significant likelihood of disclosure of the information in question resulting in prejudice to the commercial interests of the Council, that information is the exact fee charged to each school by the Council for the provision of its services.
14. Given the nature of this information the Commissioner accepts that the Council has made an argument that, on the face of it, appears reasonable; knowledge of the exact fee charged by the Council could enable other providers to undercut that fee, with consequent harm to its commercial interests. The next step is to consider whether the circumstances in which the Council secures contracts with schools suggests that it being undercut by competitors is a likely outcome. If there was little competition for the provision of these services, for example, or if the schools were obliged to contract with the Council, this would suggest that there was not a strong likelihood of the outcome predicted by the Council occurring.
15. The Commissioner asked the Council questions about the process for securing contracts to provide payroll and pension services to schools and about the level of competition in this area. In response, the Council stated that no schools are obliged to use its services. Instead all schools are free to contract with other providers for these services.

16. As to whether a competitive process takes place in relation to these services, the Council stated that an open tender process takes place. It stated that in the majority of cases contracts are for 12 months, so schools may change providers annually, although the Council is seeking to move to longer contracts. It also stated that most schools are on individual contracts, although there is one case in which an agreement covers three schools.
17. On the issue of the level of competition in this sector, the Council stated that competition can be from both private sector contractors and from other local authorities. The Council stated that it regularly competes with other local authorities and with five *"private sector payroll companies that specialise in schools"*.
18. On the basis of these representations from the Council, the Commissioner accepts that the Council must regularly compete with other organisations to secure contracts with schools. He also accepts that competitors of the Council could use the requested information to gain an advantage against the Council by undercutting its fees. This would make it more difficult for the Council to secure contracts and this in turn would be harmful to the commercial interests of the Council.
19. For these reasons the conclusion of the Commissioner is that prejudice to the commercial interests of the Council through the disclosure of this information would be likely. His finding is, therefore, that the exemption provided by section 43(2) is engaged.
20. Having found that the exemption is engaged the next step is to consider the balance of the public interests. In forming a conclusion here, the Commissioner has taken into account the general public interest in the openness of the Council, as well as factors that apply in relation to the specific information in question here.
21. Covering first factors in favour of maintenance of the exemption, the key point here is the public interest inherent in the exemption; that is the public interest in avoiding prejudice to the commercial interests of the Council. There is a public interest in the Council having the ability to generate funds through its contracting work, which can then be used in support of its services and to deliver savings that benefit the public purse. The public interest in avoiding prejudice to the commercial interests of the Council, which the Commissioner has concluded above would be likely to result through disclosure, is a valid factor in favour of maintenance of the exemption.
22. Turning to the public interest in favour of disclosure, whilst the Commissioner has recognised above the public interest in avoiding prejudice to the commercial interests of the Council, inherent in the

reasoning from the Council for the exemption being engaged is that disclosure could be advantageous to the commercial interests of other organisations. As argued by the complainant, some, likely the majority, of those organisations would also be publicly funded bodies; schools and other public authorities.

23. The Commissioner found above that the exemption is engaged on the basis that competitors of the Council could undercut the prices it charges for payroll and pension services. In all cases, this would lead to a saving in public funds as a result of schools being required to spend less to secure these services. In cases where the rival contractor that benefits by securing the contract is another local authority, there would be no loss to the public purse as a result of the contract going to the private sector.
24. As a result, it is clear that there is a specific public interest on commercial grounds in favour of disclosing this information, as well as in favour of maintenance of the exemption. It is notable that whilst the public interest in favour of maintenance of the exemption is on the basis of harm to the commercial interests of a single public body, the public interest in disclosing this information relates to the commercial interests of a number of public bodies; all the schools in the list disclosed to the complainant, and other local authorities that win contracts as a result of disclosure of the information in question.
25. The view of the Commissioner is that there is a public interest in creating an environment in which publicly maintained schools can secure contracted services at a lower rate due to a competitive market. The question here is whether that public interest outweighs that in preventing likely harm to the commercial interests of the Council. The Commissioner's view is that it would. The public interest in favour of disclosure concerns the interests of a number of schools, as compared to the commercial interests of a single Council. Also, as already noted, the alternative contractor that would benefit from disclosure would, according to the argument made by the Council, be likely to be another public authority in some cases. The likelihood of benefit through disclosure to the commercial interests of other public bodies is a valid factor in favour of disclosure of the information of considerable weight.
26. The Commissioner does acknowledge here that the Council disclosed all the remainder of the information requested by the complainant, only withholding the fees information due to the specific harm it believed would be likely to result if that information was disclosed. This was the correct approach for the Council to take and was in the public interest.
27. In conclusion, the Commissioner has recognised public interest factors in favour both of maintenance of the exemption and in favour of disclosure

of the information on grounds closely related to the reasoning for the exemption being engaged. In reaching a view on the balance of these factors, the Commissioner has paid particular note to disclosure of the information being of potential benefit to the commercial interests of a number of public bodies, whereas the public interest in maintenance of the exemption concerns avoiding likely harm to the commercial interests of a single public authority. As a result, the finding of the Commissioner is that there is a greater public interest in the information being disclosed, and so the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure. At paragraph 3 above, the Council is now required to disclose the withheld information.

Right of appeal

28. 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: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

29. 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.
30. 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

Ben Tomes
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