

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 March 2017

Public Authority: Ceredigion County Council

Address: Penmorfa
Aberaeron
SA46 0PA

Decision (including any steps ordered)

1. The complainant requested details of a contract between Ceredigion County Council ('the Council') and PricewaterhouseCoopers ('PwC'). The Council provided some information but withheld details of the payment arrangements associated with the contract under section 43 of the FOIA. The Commissioner's decision is that the Council has correctly applied section 43(2) to the withheld information. She does not require any steps to be taken.

Request and response

2. On 25 April 2016, the complainant wrote to the Council and requested information in the following terms:

"Please could I request the following information under the freedom of Information Act (2000):

- Please provide details of the most recent contract agreed between Ceredigion County Council and PricewaterhouseCoopers (PwC) for the Efficiency Partner Project".

3. The complainant later clarified that his request was for:

"Please provide the following details of all contracts between Ceredigion County Council and PricewaterhouseCoopers (PwC), past or present:

- The name of the agreement, e.g, Efficiency Partner Project.
 - Start date and end dates;
 - The payment arrangements, including the agreed percentage PwC have/will receive from savings made by the council on the basis of PwC advice, the length of time PwC have/will receive this percentage, and any bonuses”.
4. The Council responded on 23 May 2016 and provided information relating to parts 1 and 2 of the request but withheld information relating to part 3 of the request under section 43 of the FOIA.
 5. On 24 May 2016, the complainant requested an internal review of the Council's application of section 43. He said that he considered there was a significant public interest in the subject matter of the request and he therefore disputed that the information requested was exempt under section 43 of the FOIA.
 6. The Council provided the outcome of its internal review on 15 July 2016. The Council upheld its position that section 43 applied to the withheld information and it also stated that it considered the information to also be exempt under section 41 of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 19 July 2016 to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation the Council withdrew its reliance on section 41 of the FOIA but maintained that the information requested was exempt under section 43 of the FOIA. In addition, the Council provided the complainant with a redacted copy of the contract, the publicly available framework agreement and the later variation to the contract. The Council advised the complainant that the information in question had been released in relation to other FOIA requests it had received and may be of interest to him.
9. The Commissioner considers that the scope of this complaint is to consider whether the Council has correctly applied section 43(2) of the FOIA to the withheld information.

Reasons for decision

Background information

10. The withheld information in this case is contained within schedule 3 of the Council's Corporate Efficiency Partner contract with PwC to deliver performance and efficiency savings. The Commissioner understands that the duration of the contract is from 9 January 2015 to 30 June 2016. The procurement for the contract was undertaken through an 'All Wales' framework consisting of a number of local authorities and tenderers.
11. The original framework was advertised in the OJEU and tendered using the open tender procedure. The Council was seeking a partner to assist it with identifying savings within the Council on a 'risk and reward basis, which essentially means that PwC's remuneration is linked to any savings identified by them. The Council utilised a mini tender within the framework in order to procure its contract and the Council resolved to award PwC the contact at a cabinet meeting on 14 July 2015.

Section 43 – commercial interests

12. 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).
13. Broadly speaking, section 43(2) protects the ability of a party to participate competitively in a commercial activity, for example the purchase and sale of goods or services. The successful application of section 43(2) is dependent on a public authority being able to demonstrate that the following conditions are satisfied –
 - Disclosure of the requested information would, or would be likely to, prejudice the commercial interests of any party (including the public authority holding it).
 - In all the circumstances, the weight of the public interest in maintaining the exemption outweighs the public interest in disclosure.
14. Schedule 3 of the contract consists of information which relates to specific fees and percentage fees payable under the contract, and when and how they are payable. The Council is of the view that the information relates to PwC's commercial interests and that disclosing details of PwC's pricing model, percentages etc would give its

competitors a commercial advantage over PwC when next competing against them for a contract of this nature. This is because PwC's competitors would be able to adjust their pricing structure accordingly, and seek to undercut those prices/percentages by the narrowest possible margins rather than offering the best price possible. In addition, the Council consider that "other public authority clients of PwC's who have not had as favourable terms as the Council will become aware of the same which would damage their relationship with PwC and may make those clients look less favourably on PwC when next seeking a service provider". The Council contends that both of these outcomes would affect PwC's ability to participate competitively in the market and thus their commercial interests would be prejudiced through disclosure of the requested information.

15. The Council explained that PwC does not have a monopoly in the professional services industry in which they operate, which is a very competitive environment. As such any advantage that a competitor in the industry gains over another is very important. The Council pointed out that in the current climate of austerity public authorities are increasingly seeing unprecedented budget cuts. It is well documented that public authorities are looking to firms like PwC to assist them in identifying savings and efficiencies. As such, the Council's contract with PwC is not unique and other authorities across the UK are still in the process of procuring similar services now, and in the future. In light of this, the Council considers that "there is a high risk of competitors using the information to gain an advantage over PwC in current and future contracts with the prejudice caused being realised". In support of this position, the Council provided the Commissioner with evidence of a similar contract awarded (to PwC) by Wrexham County Borough Council in 2014, and a public contract notice for a similar contract issued by Pembrokeshire County Council in 2015. The Council also provided a more recent public contract notice dated 17 September 2016 from the Secretary of State for Defence, which relates to procurement of a consultancy service to deliver efficiencies.
16. The Council confirmed it had consulted with PwC in relation to disclosure of information about the contract in respect of a number of separate FOIA requests about the subject matter. The Council provided the Commissioner with copies of correspondence it had received from PwC as a result of this consultation. The Council also confirmed that PwC's position regarding disclosure of the information was discussed in a Programme Board meeting on 30 June 2016. During this meeting, the harm identified within paragraph 17 of this notice was verbally raised by PwC.
17. 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.
18. The Commissioner is satisfied that the first limb is clearly met given that the nature of prejudice envisaged to PwC’s interests are ones that fall within the scope of the exemption provided by section 43(2).
19. With regard to the second limb, the Commissioner accepts that there is some causal link between disclosure of the withheld information and harm occurring to PwC’s commercial interests. The Commissioner agrees that it is logical to argue that disclosure of PwC’s detailed fees and pricing structures would provide its potential competitors with a commercial advantage and thus prejudice its ability to compete for other similar contracts in the future.
20. With regard to the third limb, the Commissioner is satisfied that the likelihood of prejudice occurring to PwC’s commercial interests is clearly more than a hypothetical possibility; rather there is a real and significant risk of this happening. The withheld information is contained within a contract which was live at the time of the request. The Commissioner has taken into account the fact that, in the current climate, there is a significant drive on organisations to identify savings and efficiencies. She notes the evidence that the Council has provided in terms of similar procurement exercises/contracts. If PwC were to submit bids in relation to these similar procurements it is likely that they would be based upon similar commercial terms. The Commissioner is satisfied that the level of detail within the withheld information would be a commercial advantage to potential competitors within any upcoming procurement exercises. The Commissioner is therefore satisfied that

disclosure of the withheld information would be likely to prejudice PwC's commercial interests, and section 43(2) is engaged in relation to the withheld information

Public interest test

21. The exemption under section 43(2) of the FOIA is qualified which means that the information in question should only be withheld where the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

22. The Council acknowledges the general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process.

23. The Council also accepts that there is a public interest in the subject matter associated with the request, that being the payment of public money to a private firm to identify savings for the Council and its services at a time of austerity.

24. The complainant submitted the following arguments in favour of disclosure:

- (i) The Council's contract with PwC is of huge significance to its residents. A previous FOI request revealed that the Council had paid almost £1m to PwC as part of the contract. He referred to a media article dated 29 January 2016, a link to which is below:

<http://www.cambrian-news.co.uk/article.cfm?id=101890&headline=Council%20has%20paid%20almost%20%C2%A31%20million%20to%20private%20consultants§ionIs=news&searchyear=2016>

- (ii) The Parliamentary Public Accounts Committee has previously found PwC guilty of "promoting tax avoidance on an industrial scale". There is a strong public interest in revealing how much public money has been paid to a company accused of such practices. The complainant referred to a media article about this, a link to which is below:

<http://www.cambrian-news.co.uk/article.cfm?id=104762&headline=Calls%20for%20Council%20to%20end%20relationship%20with%20consultants%20over%20%E2%80%99tax%20avoidance%E2%80%99%20schemes§ionIs=news&searchyear=2016>

- (iii) Councillors are paid around £14,000 per annum and cabinet members around £14,000. If councillors are being paid to make difficult decisions, it is a waste of taxpayers' money, and a duplication of service, to bypass councillors and pay a private company to find ways and suggestions to make savings and efficiencies.
25. The Council addressed the complainant's points in correspondence to the Commissioner. In terms of point (i) the Council acknowledged the public interest in disclosure of information relating to the contract in question and public spending. It pointed out that, through previous FOIA requests, it has disclosed the full figures of the amounts paid to PwC each year and a redacted copy of the contract and the letter of contract variation. The Council confirmed that it is only the further breakdown of fees, calculations and payment arrangements that it has withheld under section 43. In light of the information it has disclosed to date, the Council does not agree that release of the withheld information would further public debate or understanding of the subject matter.
26. In relation to point (ii), the Council notes that PwC has been under public scrutiny on the topic of tax avoidance. However, the Council pointed out that PwC is a large company who advise on a range of different subjects. PwC were employed by the Council on a very different subject matter to that of tax advisors and as such, the Council does not consider that this argument holds much weight when looking at the section 43 exemption and the expenditure of public money.
27. In respect of point (iii) the Council contends that councillors have not been bypassed in contracting with PwC as all suggestions brought forward by PwC are fully scrutinised by elected members through the relevant scrutiny committees and cabinet before decisions as to the cost saving proposals are put forward. In addition, the decision to approve the contract with PwC was taken by the Council's full cabinet and was not called in by any individual member or party within the Council. In addition the Council set up cross party governance arrangements whereby elected members from all the political parties were represented on the Cross Party Transformation and Efficiency Consultative Group. The Council again does not consider this argument holds much weight in terms of the public interest arguments under section 43(2).

Public interest arguments in favour of maintaining the exemption

28. The Council argues that there is a public interest in ensuring that companies such as PwC can compete fairly and that there is competition for public sector contracts to achieve best value for money.

29. The Council is of the view that the public has been provided with the total amounts paid to PwC under the contract each year which enables debate on the subject. However, disclosure of the entire details of the payment arrangements will enable competitors to tailor bids for similar public sector contracts. This could in turn result in the cost of procuring similar services in the future increasing rather than being competitive, and thus the public purse would ultimately be paying more.

The balance of the public interest test

30. The Commissioner considers that there is a public interest in openness and transparency, and in accountability for the efficient use of public funds. However she accepts that in this case a large part of the contract has been disclosed along with the annual total amounts paid to PwC which goes some way to meeting this public interest argument.
31. The Commissioner does not accept the Council's position that disclosure of the further breakdown of the fees, calculations and payment arrangements would not further the public debate or understanding of the subject. In addition, given that the Council has not claimed that disclosure would prejudice its own commercial interests, the Commissioner has not considered the Council's public interest argument that disclosure would have an adverse effect on the public purse (paragraph 29).
32. The Commissioner understands that, to compete in a commercial market, it is necessary to be able to provide something which a competitor cannot. If details of the supplier's methodology, pricing, skills and qualifications were to be disclosed to a competitor, this would provide the competitor with an unfair market advantage. Having inspected the withheld information, the Commissioner accepts that its disclosure would be likely to provide competitors with an insight into PwC's way of working and pricing structures which could be used by its competitors, to the commercial detriment of PwC.
33. The Commissioner considers that there is a strong public interest in not disclosing information which would be likely to commercially disadvantage private companies in the bidding process relating to contracts with public authorities, such as in this case. Based on the evidence provided, the Commissioner also accepts that it is likely that PwC will be competing for similar contracts in the future.
34. Having taken into account all of the public interest arguments for and against disclosure of the withheld information, the Commissioner has concluded that the public interest in maintaining the exemption, and therefore protecting the commercial interests of PwC and preserving its

ability to compete fairly in a commercial market, outweighs the public interest in disclosure in all the circumstances of this case.

Right of appeal

35. 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

36. 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.
37. 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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