

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 March 2019

Public Authority: North East Lincolnshire Council
Address: Town Hall Square
Grimsby
North East Lincolnshire
DN31 1HU

Decision (including any steps ordered)

1. The complainant requested from North East Lincolnshire Council (the Council) information regarding the budget details for the proposed expansion of Bradley Football Development Centre. The Council refused the request under section 43(2) (commercial interests) of the FOIA.
2. The Commissioner's decision is that the Council correctly cited section 43(2) of the FOIA. Therefore, the Commissioner does not require the Council to take any steps as a result of this decision.

Background

3. The Council proposed to expand an existing football facility at Bradley. In Cabinet minutes the Council proposed a maximum budget for the project with funds expected from an FA grant and borrowing. The complainant said that the scale of the intended development would appear likely to exceed the estimated cost and he therefore requested the quotations received by the Council for the construction work.

Request and response

4. On 8 June 2018 the complainant wrote to the Council and requested information in the following terms:

"The minutes of NELC Cabinet Meeting revealed that NELC were to receive a grant of £500,000 from the FA. This would be matched by an identical amount from NELC which would be borrowed.

Would you kindly provide the budget details for this project including quotations received to undertake the work. As other locations have been dismissed on the grounds of excessive cost presumably the proposed work has been exactly priced including contingency for cost overrun.

This request is made under the Freedom of Information Act.

Also, should the expansion proceed, can I be assured that all recommendations and conditions are complied with in full unlike previously when they were not fulfilled on account of the budget being exceeded."

5. On 4 July 2018 the Council responded and refused the request under section 43(2) (commercial interests) of the FOIA.
6. On 16 July 2018 the complainant asked for an internal review. He stated that he did not require the names of the companies concerned but that he wanted the quotation figures - the quotations received by the Council for the construction work.
7. On 9 August 2018 the Council provided its internal review response and maintained its position that section 43(2) applied.

Scope of the case

8. The complainant contacted the Commissioner on 1 September 2018 to complain about the way his request for information had been handled. In his complaint, he specified that he wanted to challenge the Council's decision not to release this information.
9. The withheld information concerns the method of finance for a project - the proposed expansion of Bradley Football Development Centre (FDC) - which is set out in reports. It is a combination of a grant from the Football Foundation and money from the Council's capital.
10. The withheld information consists of budget details for the project and includes various costs, quotation figures which relate to this project and has the quotations received by the Council for the construction work. As the complainant specified at the internal review stage that he did not require the names of the parties that had given the quotations, that information is excluded from the following analysis.

11. The following analysis focuses on whether the exemption at section 43(2) of the FOIA was cited correctly.

Reasons for decision

Section 43(2) – prejudice to commercial interests

12. The Council applied section 43(2) to the withheld information. Section 43(2) of the 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. This is a qualified exemption and is, therefore, subject to the public interest test.

13. The Commissioner states in her Section 43 – Commercial Interests Guidance¹:

"A commercial interest relates to a person's ability to participate competitively in a commercial activity. The underlying aim may be to make a profit however it could also be to cover costs or to simply remain solvent."

14. The Council stated that the withheld information is commercially sensitive, particularly where this relates to individual costs concerning an overall project. The Council confirmed that its refusal under section 43 was based on the commercial prejudice to the Council only. It did not believe it was necessary or appropriate to consult with the five organisations who returned tenders. Nor did the Council feel it necessary to consult with the Football Foundation in order to establish the effect of disclosure on their commercial interests or obtain their position on disclosure.
15. The Council considers that to release this information concerning the quotation figures, would prejudice the Council being able to be commercially competitive in the future. It added that at this point in time, the financial information cannot be released.
16. The Commissioner considers the withheld information is commercial in nature as it relates to budget details concerning a proposed expansion of a football centre. It is regarding the potential to convert existing grass pitches to artificial surfaces.

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

17. Having determined that the information is commercial in nature, the Commissioner has gone on to 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

18. The Council said that five artificial pitch tenderers (for the Bradley Playing Pitch Development) returned their competitive quotes and to date, a contract has not been awarded for the build element of the development. In order to put forward a new planning application, the Council stated it would have to develop the proposal. This is likely to include the need to retender (due to previous out of date quotes) for the works required to develop an artificial grass pitch. Once the Council has planning permission and received revised quotes, it said that it will be able to award a contract to build the new artificial grass pitches. The details of the successful bid, the Council confirmed, will be made public by the Council at that time.
19. The Council explained that releasing the withheld information regarding the proposed expansion of the FDC, would prejudice the commercial interest of the Council. The Council said that revealing details as part of the commercial tendering process, could provide an advantage to any competitor organisation. It considers that by disclosing the information, there could be reputable damage to the Council.

Commercial interests of the Council

20. The Council said there is a need for confidence in any tendering process and sharing such details may limit the ability of the Council fulfilling any future projects of this type. The Council reiterated that the commercial interests of the Council would be prejudiced if the withheld information concerning the FDC was disclosed.
21. The complainant argued that as the Council is a public authority, it has a responsibility for financial transparency. He said that the Council had already set a maximum budget for the project and therefore, the complainant disputes that the information is possibly commercially sensitive to the Council.
22. The Commissioner acknowledges that the Council's arguments are that disclosing the information could cause commercial damage against the Council. Disclosure of the information, the Commissioner believes, would reveal the position and commercial advantage of each tenderer. She understands that this would prevent other organisations tendering for the works and could result in the withdrawal of one or more of the original tenderers. It could also lead to changes in future bids submitted.

23. The Commissioner accepts that the commercial prejudice caused to the Council would be that it would be unable to demonstrate 'Value for Money' in the Council's use of public funds and grants awarded from the Football Foundation. Also, she accepts that work could be reduced due to tenderers changing their quotes and potentially not be able to secure a willing supplier. The Commissioner considers any disclosure will have a prejudicial impact on the Council in effectively selecting a provider for the works.
24. The Commissioner has viewed the information, which consists of details concerning the proposed expansion of the FDC. The information includes quotation figures and costs relating to the project. The Commissioner acknowledges that this information is at the time of this decision notice, still in the tendering process.
25. The Commissioner notes that the information shows the Council's position with third parties in relation to the project and that the prejudice would be likely to occur to the Council. The Commissioner accepts that the prejudice identified, would be likely to occur due to the fact that the impacts would be direct in terms of the ability of the Council to secure a commercially competitive tender.
26. In order to accept the exemption is engaged, the Commissioner usually requires evidence of a causal link between the information in question and the alleged prejudice argued. This is easier to argue where an issue is ongoing, such as retendering or negotiating a new commercial contract or deal. Whilst the Council has not specifically provided evidence of this, the Commissioner considers it is reasonable to accept that, given the work of the Council, there is a need to engage with private organisations. The Council will need to undertake further negotiations with third parties to award a contract for the build element of the development.
27. Therefore, it can be argued that disclosing the quotations received by the Council for the construction work and the budget details for this project, will impede the Council from undertaking effective negotiations. This could subsequently increase the Council's costs and would be likely to have a negative impact on future business decisions.
28. The Commissioner accepts that the information would show the Council's financial position and would have an effect on the Council's position within the commercial market. This would be likely to prejudice the effectiveness of the Council to secure a commercially competitive tender.

29. The Commissioner is satisfied that the nature and likelihood of the prejudice envisaged to the commercial interests of the Council fall within the scope of the exemption provided by section 43(2).
30. Given the above considerations, the Commissioner finds that the likelihood of the prejudice reaches the threshold of real and significant, and so she concludes that disclosure of the withheld information would be likely to result in prejudice to the commercial interests of the Council. The Commissioner therefore finds that the exemption provided by section 43(2) is engaged.

Public interest test

31. Having found that the exemption is engaged, the Commissioner has gone on to consider the public interest factors in favour of disclosing the withheld information and of maintaining the exemption.

Public interest arguments in favour of disclosing the withheld information

32. The Council said it had taken into account an increased understanding of council tax payers and other council activities. In particular, with regards to the procurement of services, informing its decision making, and allowing it to challenge the decisions and actions of the Council and to participate in debate. The Council added that it ensures it is able to be held accountable for its decisions. Also, to ensure that it is able to effectively provide services and deliver outcomes for the community.
33. The Council considered the effect disclosure would have on the commercial interest of the third parties in a competitive environment and also to ensure that the Council provides value for money services.
34. The Commissioner recognises that there is a significant public interest in disclosure of information about what the Council's plans are for the FDC and how this will impact on the area. Also, in terms of how the Council is spending public money.

Public interest arguments in favour of maintaining the exemption

35. The Council considered these arguments and stated that to ensure a competitive environment for the supply of services to the Council and to others, was a reason for maintaining the exemption. Also, to ensure that the Council achieve value for money in the commissioning of services. The Council added that its ability to effectively provide services and deliver outcomes for the community through effective procurement and tendering activities were reasons for maintaining the exemption.

36. The Council reported that when the contract is awarded, information in regard to this will become publically available. This, the Council said, would be through established contract award procedures, publication as part of the Transparency Agenda, and Council communication and press releases.
37. The Council reported the need for confidence in any tendering process and said that sharing such details may limit the ability of the Council to fulfil any future projects of this type.
38. The Commissioner recognises that there is a public interest in preventing prejudice to the commercial interests of the Council. As the Council is publicly funded, disclosure in this case would be likely to prejudice the commercial interests of the Council and subsequently, would be likely to prejudice public funds. The validity of this factor is further highlighted by the well documented financial pressures in the local government sector. This is a valid public interest of significant weight in favour of maintaining the exemption.

Balance of the public interest arguments

39. The Commissioner recognises that there is a strong and legitimate public interest in the openness and transparency of public authorities with regard to their decision-making processes. In particular, there will be a public interest in knowing more about plans to transform the FDC, its capital budget to fund the redevelopment and the effect on its local community. It is in the public interest to ensure that the Council is able to negotiate with private organisations effectively and the Commissioner has determined that the balance of public interests favours maintaining the exemption.
40. On balance and in particular because the withheld information relates to a process that is ongoing, the Commissioner considers that the public interest in disclosure of the withheld information is outweighed by the public interest in maintaining the section 43(2) exemption. Therefore, the Council was not obliged to disclose the requested information.

Right of appeal

41. 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

42. 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.
43. 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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