

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 August 2019

Public Authority: Halton Borough Council

Address: Municipal Buildings
Kingsway
Widnes
WA8 7QF

Decision (including any steps ordered)

1. The complainant has requested information regarding a kennelling contract and related payments.
2. The Commissioner's decision is that Halton Borough Council incorrectly relied upon the exemptions at section 41(1) – information provided in confidence sections and section 43(2) – commercial interests to withhold the information. The council also breached section 16 - duty to provide advice and assistance.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information with names, contact details, and signatures of individuals redacted on the basis of section 40(2).
4. The public authority 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 Act and may be dealt with as a contempt of court.

Request and response

5. On 11 August 2018, the complainant wrote to Halton Borough Council ('the council') and requested information in the following terms:

"In 2016 Halton Council paid Animal Wardens Ltd £14,115.60 for the dog warden service. In 2017 Halton Council paid Animal Wardens Ltd £7,271.61 for the dog warden service.

Animal Wardens Ltd have a contract with Halton Council, together with Sefton, Liverpool and Knowsley Councils, to provide a service for the collection and kennelling of stray dogs.

Please can you provide a breakdown of which services the above payments were for. Please provide specifically a breakdown as to which of those payments related to the kennelling contract and which related to the collection contract."

6. The council responded on 16 August 2018. It provided the suppliers invoice amounts for 2016/17 and 2017/18 for the combined kennelling and collection contract but stated that the costs could not be de-aggregated.

7. The complainant raised a further request on the 16 August 2018:

"Would you please be able to provide me with a copy of the contract ['the Kennelling Contract'], or a redacted version if it contains commercially sensitive information or personal data?"

8. On 16 August 2018 the council responded and denied holding the Kennelling Contract. It advised the complainant to contact Liverpool City Council ('the Lead Authority') directly, being the party that had issued the contract.

9. A number of emails were exchanged between the complainant and the council regarding the breakdown of services that relate to the payments. As a result, on 21 September 2018 the complainant provided a clarification of the original request and requested copies of the invoices raised relating to the payments. The council confirmed that it receives a schedule of itemized charges associated with each dog seized.

10. On 25 September 2018 the council refused the clarified request for the schedules of itemized charges. It stated this was on the grounds of cost

to extract and collate the information exceeding 18 hours, and personal information. It did not cite specific FOIA exemptions.

11. On 25 September 2018 the complainant reduced the scope of the request to be the schedules dated October, November and December 2016. This was in order to stay within the recommended cost limits.
12. On 27 September 2018 the council refused the narrowed request regarding the schedules on the basis of section 43 –commercial interests.
13. On 7 October 2018 the complainant requested an internal review of the council’s responses in regard to his requests for:
 - [1] the kennelling and collection contract; and
 - [2] the October, November, December 2016 schedules.
14. Following an internal review the council wrote to the complainant on 1 November 2018. In response to each item it:
 - [1] stated that it had obtained a copy of the requested information, but refused to disclose it, citing the exemption section 41(1) – information provided in confidence;
 - [2] upheld its position to withhold the information on the basis of the exemption at section 43(2) – commercial interest.
15. During the course of the Commissioner’s investigation the council advised that, subsequent to its response to [1], it was aware that the Lead Authority had provided the complainant with a redacted version of the Kennelling Contract. It therefore considered that some information in the contract was in the public domain and as such no longer exempt under section 41(1).
16. In light of the Lead Authority’s provision of the redacted contract, on 17 May 2019 the council provided the complainant with a redacted version of the contract [1]. It confirmed that the redacted information remained withheld on the basis of section 41(1).

Scope of the case

17. The complainant initially contacted the Commissioner on 17 November 2018 to complain about the way the request for information had been handled. Subsequent to the disclosure of the redacted contract on 17 May 2019, the complainant confirmed further his grounds for the complaint. That being whether the council is entitled to withhold the

information on the basis of the exemptions cited, and whether it had handled the request in accordance with the provisions in the FOIA.

18. In light of the investigation, the Commissioner considers the scope of this case is to establish whether the council has correctly engaged the exemptions at sections 41(1) and 43(2). If it has, then she will consider where the balance of public interest lies. Furthermore she will consider whether the council incurred any procedural breaches of the FOIA.

Reasons for decision

Section 41 – information provided in confidence

19. Section 41(1) of the FOIA states that:

“Information is exempt information if –

- a) it was obtained by the public authority from any other person (including another public authority); and
 - b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”
20. In order for Section 41(1) to be engaged, the following criteria must be fulfilled:
 - the authority must have obtained the information from another person,
 - its disclosure must constitute a breach of confidence,
 - a legal person must be able to bring an action for the breach of confidence to court, and
 - that court action must be likely to succeed.

Was the information obtained from another person?

21. In this context the term ‘person’ means a ‘legal person’. This could be an individual, a company, another public authority or any other type of legal entity.
22. The council advises that the Lead Authority, being the owner of the document and the lead on the procurement exercise, had provided a copy of the contract in confidence. It stated that the Lead Authority

were responsible for a joint procurement exercise for a number of local authorities, including the council, within the region.

23. The Commissioner notes that the title page of the contract states "A *JOINT PROCUREMENT BY LIVERPOOL CITY COUNCIL AND THE BOROUGH COUNCILS OF HALTON, KNOWSLEY AND SEFTON TO PROVIDE A DAY TIME AND OUT OF HOURS KENNELLING SERVICE, AND AN OUT OF HOURS COLLECTION SERVICE FOR STRAY DOGS*"
24. The Commissioner's guidance on section 41(1)¹ states that the contents of a contract between a public authority and a third party generally won't be information obtained by an authority from another person. This is because the terms of the contract will have been mutually agreed by the respective parties, rather than provided by one party to another.
25. The council are not a third party in the context of supplying services to the Lead Authority. They are, however, a named party, being one of four councils procuring kennelling services. The contract outlines the terms including the responsibilities of the named councils in the contract, and those of the service provider.
26. In light of this, the Commissioner concludes that the Kennelling Contract is not information provided by another person.
27. As the Commissioner has not been able to find that the Kennelling Contract represents information 'obtained' from another person, she does not need to proceed to consider whether disclosure would constitute a breach of confidence. As such, she finds that the exemption at section 41(1) is not engaged.
28. The council have provided the Commissioner with an extract of the covering letter, sent by Liverpool City Council, with the redacted contract, in response to the request directed to that public authority for the same information. The Commissioner notes that Liverpool City Council applied two exemptions, being section 40(2) – personal data and section 43(2) – commercial interests. As the council has not cited section 43(2) in response to this part of the request, the Commissioner has not considered the exemption.

¹ <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

29. Nonetheless personal information should not be disclosed as part of an FOIA request. The Commissioner therefore requires the council to disclose the withheld information with the names, contact details, and signatures of individuals redacted on the basis of section 40(2).

Section 43 (2) – commercial interests

30. Section 43(2) of the FOIA 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).”

31. Section 43 is a prejudice-based exemption. In order to be engaged, the following criteria must be met:

- 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;
- 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
- 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.

32. In her guidance on section 43² the Commissioner explains that “would...prejudice” means that prejudice is more probable than not, ie that there is a more than 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so. “Would be likely to prejudice” is a lower threshold. It means that there must be more than a hypothetical or remote possibility of prejudice occurring; there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%.

² <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

33. As section 43(2) is a qualified exemption, it is subject to public interest considerations.

34. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner has considered what this means in her guidance:

"...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."

35. 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). This is a qualified exemption and is, therefore, subject to the public interest test.

36. The information in scope of [2], withheld under section 43(2), comprises three monthly schedules of work between Animal Wardens ('the Supplier') and the council. The schedules contain details of and outcomes for lost and found dogs, and the related charge per incident.

37. The relevant applicable interest cited in this exemption is the prejudice to commercial interests. The Commissioner accepts that the arguments made by the council set out below address the prejudice at section 43(2).

38. When considering the second point, the Commissioner must be satisfied that the nature of the prejudice is "real, actual or of substance" and not trivial or insignificant. She must also be satisfied that some causal relationship exists between the potential disclosure and the stated prejudice.

39. The council explained that disclosure in this case would provide details of costs relating to the specific activities of the contractor and reveal information concerning the contractors pricing methodology and business model and would therefore be of use to competitors at the time of contract renewal.

40. Furthermore the council states that the existing contract for the services expires in May 2019 and *"unless it is subject to a further extension that has yet to be determined by the lead authority Liverpool City Council, the council considers that the release of such information would distort and be likely to prejudice the open competitive tendering process which would follow a failure to renew the current arrangement."*

41. In considering the use of section 43(2) the Commissioner requires clarity in terms of the party or parties whose commercial interests

would, or would be likely to be prejudiced if the withheld information was disclosed. The Commissioner does not consider that the council, in its submissions for this investigation, has been particularly clear on this point therefore she has considered both the interests of the council and the Supplier.

42. In terms of the prejudicing the commercial interests of third parties, such as the Supplier in this case, in line with the Information Tribunal decision in the case *Derry Council v Information Commissioner* (EA/2006/0014), the Commissioner does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties.
43. This means that when a public authority wants to withhold information on the basis that to disclose the information would or would be likely to prejudice the commercial interests of a third party, it must have evidence that this does in fact represent the concerns of that third party. It is not sufficient for the public authority to speculate on the prejudice which may be caused to the third party by the disclosure.
44. Whilst it may not be necessary to explicitly consult the relevant third party, arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns. The Commissioner requested clarification on what basis the council had established that prejudice of a third party's interests may occur, with any relevant copies of correspondence the council had with third parties in this respect. In its response, however, the council has only provided the arguments already discussed above.
45. The Commissioner therefore finds that the council have provided insufficient arguments to support the case that the commercial interests of the Supplier would be prejudiced by the disclosure of the withheld information.
46. The Commissioner has also considered the commercial interests of the council. The council states that the release of the information would distort and be likely to prejudice the open competitive tendering process, which would be required, should the existing contract fail to be renewed.
47. The council's arguments appear to infer that knowledge of the incumbent suppliers' charges could suppress the competitiveness of future bids for the contract. However, conversely the Commissioner considers that such knowledge *could* also give rise to more competitive bids, but without a more substantive case being made by the council, the Commissioner finds it difficult to give weight to either side of the point. The Commissioner concludes that there is a lack of applicable

arguments presenting a causal relationship between disclosure and the stated prejudice.

48. Taking all of the above into account, the Commissioner considers that the council has failed to demonstrate that disclosure of the requested information would be likely to prejudice its own commercial interests or those of the service provider.
49. The Commissioner therefore considers that the section 43(2) exemption is not engaged. As the exemption is not engaged there is no requirement to consider the balance of the public interest in disclosure.
50. Given that the Commissioner does not consider that the section 43(2) exemption is engaged, her decision is for the council to disclose the withheld information [2] to the complainant.

Section 16 – duty to provide advice and assistance

51. The Commissioner has considered section 16 in regard to request item [2].

52. Section 16 states:

“(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it;

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.”

53. The Commissioner’s view is that, where a public authority refuses a requests under section 12(1) of FOIA, section 16(1) creates an obligation to provide advice and assistance on how the scope of the request could be refined or reduced to avoid exceeding the appropriate limit.
54. On 21 September 2018 the complainant provided a clarification of the original request and requested copies of the invoices raised relating to the payments to the contractor. The council confirmed that it receives a schedule of itemized charges associated with each dog seized. On 25 September 2018 the council refused the clarified request for the schedules of itemized charges. It stated this was on the grounds of cost to extract and collate the information exceeding 18 hours, and personal information. The complainant subsequently reduced his request to three

months, in order to stay within the cost limit. However in response the council refused the information citing section 43(2).

55. In this case it is clear that the advice and assistance provided by the council was misleading and inadequate as ultimately it refused the request on the basis of another exemption.
56. The Commissioner considers that the council did not give a reasonable provision of advice and assistance to the complainant. She therefore finds that the council has breached section 16.
57. As the request was subsequently refused under a different exemption the Commissioner does not require the council to take any steps in this regard.

Right of appeal

58. 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

59. 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.
60. 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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