

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 August 2018

Public Authority: Ryedale District Council
Address: Ryedale House
Old Malton Road
Malton
North Yorkshire
YO17 7HH

Decision (including any steps ordered)

1. The complainant has requested information relating to the procurement process for a leisure management contract. Ryedale District Council ("the Council") refused to comply with the request on the grounds that it would impose a grossly oppressive burden under section 14(1) of the Freedom of Information Act ("the FOIA").
2. The Commissioner's decision is that the Council has correctly applied section 14(1).
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 27 October 2017, the complainant wrote to the Council and requested the following information:
 - *The tender specification for the currently outsourced leisure services contract. (The 'Everyone Active contract')*
 - *The responses received for the tender*
 - *The marking strategy (normally part of the tender spec)*
 - *The marking matrix (or whatever methodology was used to ensure Best Value)*
 - *The final contract awarded to the current provider (Everyone Active)*
5. The Council responded on 17 November 2017. It disclosed some held information (namely the tender specification), and withheld the remainder under the exemption provided by section 43(2).
6. The complainant asked for an internal review on 27 November 2017.
7. The Council contacted the complainant on 27 November 2017 to clarify whether the request could be narrowed to specific matters, so that the Council could focus the internal review on select information, such as clauses within the contract. The complainant confirmed on the same date that he wished the Council to consider all of the withheld information.
8. Following an internal review the Council wrote to the complainant on 7 December 2017. It stated that, having reconsidered the request, it was refusing to comply with it under section 14(1).

Scope of the case

9. The complainant contacted the Commissioner on 8 December 2017 to complain about the way his request for information had been handled.
10. The Commissioner considers the scope of the case to be the determination of whether the Council has correctly applied section 14(1).

Reasons for decision

Section 14(1) – Vexatious requests

11. Section 14(1) of the FOIA states that:

Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

12. The Commissioner has published guidance on vexatious requests¹. As discussed in the Commissioner's guidance, the relevant consideration is whether the request itself is vexatious, rather than the individual submitting it. Sometimes, it will be obvious when requests are vexatious, but sometimes it may not. In such cases, it should be considered whether the request would be likely to cause a disproportionate or unjustified level of disruption, irritation or distress to the public authority. This negative impact must then be considered against the purpose and public value of the request. A public authority can also consider the context of the request and the history of its relationship with the requestor when this is relevant.
13. In the circumstances of this case the Council applied section 14(1) on the basis of the grossly oppressive burden that it considers the request would impose upon it.
14. Ordinarily, where the concern of a public authority is about the burden of a request, the relevant provision of the FOIA would be section 12(1). This section provides that a public authority is not obliged to comply with a request where the cost of doing so would exceed a limit. However, a public authority cannot claim section 12(1) for the cost and effort associated with considering exemptions or redacting exempt information, which was the concern of the Council in this case.
15. A public authority may apply section 14(1) where it can make a case that the amount of time required to review and prepare the information for disclosure would impose a grossly oppressive burden upon it. This can include time spent on considering exemptions and making redactions.

¹ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

16. However, the Commissioner considers there to be a high threshold for refusing a request on such grounds. This means that a public authority is most likely to have a viable case where:
- The requestor has asked for a substantial volume of information **and**
 - The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the ICO **and**
 - Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.
17. The Commissioner has considered the representations received from both the complainant and the Council.

The complainant's position

18. The complainant represents a local swimming club which provides swimming lessons at two leisure facilities owned by the Council. In 2014 the Council entered an outsourcing contract for the management of these facilities, and the club has since been served notice by the contractor to cease providing swimming lessons. This action has since been referred to the Council for a determination of whether it is valid.
19. The complainant argues that the original tender specification required the continued use of the leisure facilities by the club, and that if the contractor submitted a tender which was at odds with this, then the procurement process may have been flawed. The implication of this is that the scoring used by the Council may be incorrect, and that the contract may have been awarded to the wrong bidder. The complainant has explained that this is the reason why the request seeks all relevant information about the procurement process.

The Council's position

20. The Council has explained that the request seeks a substantial volume of information relating to the procurement process for the management of two leisure facilities owned by the Council. This information spans the submitted tenders and the subsequent contract that was awarded, and comprises approximately 7800 separate pages (some of which are complex spreadsheets which have only been counted as 1 page). The Council has noted that the contract in itself is over 500 pages. The Council estimates that, even allowing for 1 minute per page for reading and redaction, it would require approximately 130 hours to review the

information for disclosure. This work would need to be undertaken by a legal professional with familiarity of such matters.

21. The Council has further explained that it has real concerns about potentially exempt information. Due to the subject matter, part of the information is likely to represent personal information, information provided in confidence, and information that may prejudice the commercial interests of a person. As such, the Council considers it likely that such information may be subject to the exemptions provided by sections 40(2), 41(1), and 43(2).
22. In respect of section 43(2), the Council has explained that leisure management is a highly competitive area of procurement, and submitted tenders contain detailed financial, technical and operational information about the bidder's proposed management of leisure facilities. As such, these tenders are not shared with other bidders or to third parties, as to do so may be prejudicial to the commercial interests of the bidder. The contract likewise contains similar information, and disclosure may be detrimental to the contractor, which as a national operator may be managing leisure facilities, or bidding for such contracts, with other Councils and service providers.
23. In respect of section 41(1), the Council has explained that the contract contains confidentiality clauses in relation to commercially sensitive information, and the Council would be required to consider section 41(1) in conjunction with section 43(2). The Council has consulted with the contractor, who maintains that the contract contains confidential information.
24. In respect of section 40(2), the Council has explained that the documents are likely to contain some personal information, which the Council would need to consider under data protection law.
25. The Council has lastly explained that the potentially exempt information cannot easily be isolated. A legal professional would need to review the information, including each clause of the contract, to determine the application of exemptions.
26. The Council asks the Commissioner to note that it has invited the complainant to narrow the scope of the request, but that this has been declined, and the Council has therefore treated the request as seeking all relevant held information.
27. The Council has also noted that the issue of local swimming clubs using the leisure facilities has since been resolved in a decision by the Council; the outcome of which is that the clubs can continue to use the leisure facilities as previously done.

The Commissioner's view

28. The Council has applied section 14(1) on the basis that compliance with the request would impose a grossly oppressive burden.
29. The Commissioner has considered the Council's position, and recognises that the request seeks a substantial volume of information of approximately 7800 pages.
30. The Commissioner further recognises that, due to the nature of the information and the circumstances in which it is held, the Council has real concerns about potentially exempt information which cannot be easily isolated. The information would therefore need to be manually reviewed in order to identify the potentially exempt information. The Council would then need to undertake the necessary actions to decide whether the cited exemptions are engaged.
31. The Commissioner's guidance for section 43² explains that information held in respect of procurement, including submitted tenders and the awarded contract, is likely to require consideration of whether it may prejudice a person's commercial interests if disclosed. The Commissioner expects a public authority to consult with the involved parties and establish the likelihood of prejudice arising, before then proceeding to a public interest test. The guidance further advises, that in respect of an awarded contract, the Council may need to consider the individual clauses within a contract to decide the application of the exemption. In addition to section 43(2), the Commissioner recognises that it may also be necessary to consider section 41(1) in the context of outsourcing³, particularly where a contract contains a confidentiality clause. As explained in the Commissioner's guidance for section 41⁴, the consideration of this exemption requires a public authority to establish whether disclosure would represent an actionable breach of confidence in law.

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

³ <https://ico.org.uk/media/for-organisations/documents/1043530/outsourcing-and-freedom-of-information.pdf>

⁴ <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

32. Whilst the Commissioner has noted the arguments put forward by the complainant, it is reasonable for the Commissioner to consider that concerns about the contractor's management of the leisure facilities should be referred to the Council. This appears to have been done, and it is noted that following the request being made, the Council has made a decision favouring the swimming club. Whilst it is recognised that the complainant also holds concerns about the validity of the procurement process, it is reasonable for the Commissioner to consider that any such concerns should be submitted to the Council through its formal complaints process, or otherwise referred to the relevant body with authority to consider such matters.

The Commissioner's conclusion

33. In conclusion, all information requests impose some burden and public authorities have to accept that in order to comply with their FOIA obligations. However, in some cases the burden imposed by a request will be disproportionate to its value.
34. In this case, the Commissioner recognises that the request seeks a significant volume of recorded information, being 7800 separate pages. The Council has substantiated its position that this information contains potentially exempt information, and the Commissioner recognises that compliance with the request would require the Council to review the information prior to any disclosure. This action, applied to approximately 7800 separate pages, and allowing for a minimum of 1 minute per page, would take at least 130 hours of officer time.
35. The FOIA does not contain a limit at which a request is considered to impose a grossly oppressive burden, and any such request is considered by the Commissioner based on the individual circumstances of a case. In this case, the Commissioner is mindful that the calculated time is far in excess of the appropriate limit of 18 hours (or £450 at a flat rate of £25 per person, per hour) that Parliament set for section 12(1) in *The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004*. It is also relevant for the Commissioner to note that, using the flat rate of £25, the calculated time in this case would equate to a cost of £3250. It is reasonable for the Commissioner to consider that compliance with the request would therefore represent a substantial diversion of the Council's resources, and limited public interest has been evidenced that would justify this.
36. The Commissioner has therefore concluded that the request would impose a grossly oppressive burden, and that the Council has correctly applied section 14(1).

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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.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.

Signed

Andrew White
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