

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 May 2014

Public Authority: Cambridgeshire County Council

Address: Shire Hall
Castle Hill
Cambridge
CB3 0AP

Decision (including any steps ordered)

1. The complainant requested information from Cambridgeshire County Council (the Council) about the contract for an overpayments recovery service and any relevant invoices. The Council confirmed it held some information within the scope of the request. It provided some of that information, but refused to provide the remainder citing the exemptions in sections 43(1) and (2) (commercial interests) and 31(1)(a) of FOIA (law enforcement).
2. The Commissioner's decision is that the Council was entitled to apply section 31. However he finds that section 43 was incorrectly applied to some of the information withheld by virtue of that exemption.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - disclose the information incorrectly withheld by virtue of 43(1) and 43(2) as indicated in the confidential annex to this decision notice.
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.

Background

5. The request in this case relates to a contract between the Council/LGSS and the Audit Partnership Ltd (APL). The complainant was an unsuccessful competitor in the procurement process.
6. According to its website¹, LGSS is one of the largest public sector shared services ventures of its kind in the UK, wholly owned by Cambridgeshire and Northamptonshire county councils.

Request and response

7. On 14 August 2013 the complainant wrote to the Council and requested information relating to a contract with APL.

"Please could you send me a copy of the signed contract between CCC/LGSS and the Audit Partnership Ltd in April 2013 for the latter's overpayment recovery service. I would also like to see copies of any invoices this company has submitted to CCC/LGSS to date".

8. The Council wrote to the complainant on 12 September 2013 explaining that the contract included information *"that may prejudice the commercial or financial interests of the company concerned"*. It advised that it was extending the time for responding in order to consider the public interest test.
9. The complainant wrote to the Council on 12 September 2013, expressing dissatisfaction with the Council's claim that it needed additional time to determine where the balance of the public interest lies. In his correspondence, he also explained why he does not consider that the section 43 exemption (commercial interests) applies.
10. The Council provided its substantive response to the request for information on 24 September 2013. It denied holding some of the requested information, namely invoices submitted to either CCC or LGSS. With respect to the requested contract information it provided

¹ <http://www.lgss.co.uk/Pages/Home.aspx>

some information within the scope of that part of the request but refused to provide the remainder. Where information was withheld the Council cited the following exemptions of the FOIA as its basis for doing so:

- section 43(1) and (2) (commercial interests); and
- section 31(1)(a) (law enforcement).

11. The Council told the complainant:

"APP3 contains Part 2 of the Invitation to Tender, including method statements provided by APL in answer to the Invitation. Information has been provided where available; however some information has been redacted. Redacted information includes method statements which detail how APL will meet the criteria required; information about how APL secure their information and systems; and information relating to the breakdown of cost".

12. Also on 24 September 2013 the Council responded to the complainant's correspondence of 12 September 2013 in which he expressed dissatisfaction with its handling of his request for information. The Council concluded by saying that its review was complete and advising that the complainant may apply to the ICO for a decision if he remained dissatisfied.

Scope of the case

13. The complainant contacted the Commissioner on 3 October 2013 to complain about the way his request for information had been handled.

14. He told the Commissioner:

"CCC eventually provided me with three documents, but the one that would have produced the useful information I was looking for was so heavily redacted that it was reminiscent of a set of MP's expenses. The parts not redacted provided very little useful information, and no information at all about the successful bidder's fee ...".

15. The complainant provided the Commissioner with a copy of the redacted information that he had received from the Council. The Commissioner understands it to be the information referred to by the Council as 'APP3'.

16. The complainant also told the Commissioner:

"The service provided by APL is the result of a competitive tender. Even before the recent consultation exercise the transparency code recommended that local authorities release copies of contracts and tenders to businesses (paragraph 12). I therefore don't understand why the public interest in disclosure in this instance should be trumped by APL's supposed commercial interests and the other, to me, implausible excuses CCC has employed to justify keeping this information secret".

17. The Commissioner notes the complainant's comments in respect of a code of recommended practice. However, his duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the FOIA).
18. In light of the above, the Commissioner considers the scope of his investigation to be the Council's application of sections 43 and 31 to the withheld 'APP3' information.

Reasons for decision

Section 43 commercial interests

19. Section 43(1) of FOIA sets out an exemption from the right to know if the information requested is a trade secret. Section 43(2) sets out an exemption from the right to know if release of the information is likely to prejudice the commercial interests of any person, including those of the public authority holding the information.
20. In this case, the Council has applied section 43(1) to some of the information withheld by virtue of the commercial interests exemption. It considers that section 43(2) applies to the remainder of the information withheld by virtue of section 43.
21. The Commissioner has first considered the Council's application of section 43(1).

Is the information a trade secret?

22. The trade secret exemption within section 43 is a class exemption. That means that if information is a trade secret it is exempt - whether or not harm results from its disclosure.
23. The Commissioner invited the Council to provide evidence in support of its position that the information withheld by virtue of section 43(1)

constitutes a trade secret. For example, he asked the Council to advise what steps are taken to keep the information secret.

24. Summarising its response, the Council told the Commissioner:

"The Council believes that disclosure of the information subject to this exemption would undermine the commercial interests of both APL and their clients".

25. The Council provided the Commissioner with further explanation in support of its view that section 43(1) applies in this case. For example it explained why APL considers that the information at issue constitutes part of its USP (unique selling point).

26. The Commissioner recognises that the term 'trade secret' is not defined in the FOIA. The Commissioner also accepts that the term can have a fairly wide meaning. In his view, it covers not only secret formulae or recipes, but can also extend to such matters as names of customers and the goods they buy, or a company's pricing structure, if these are not generally known and are the source of a trading advantage.

27. In deciding whether the information in this case is in fact a trade secret, the Commissioner, in line with his guidance on the commercial interests exemption², has found it helpful to ask the following questions.

- Is the information used for the purpose of trade?
- Is it obvious from the nature of the information or, if not, has the owner made it clear, that he or she considers releasing the information would cause them harm or be advantageous to their rivals?
- Is the information already known?
- How easy would it be for competitors to discover or reproduce the information for themselves?

28. In the Commissioner's view, generally the less skill, effort, or innovation that was required to generate the information in the first place, the less likely the information is to constitute a trade secret. Similarly, he

2

http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.ashx

considers that the easier it would be for a competitor to recreate or discover that information through his own efforts, the less likely it is to be a trade secret.

29. The Commissioner is mindful that he is restricted in what he is able to say about the nature of the withheld information without disclosing the very information itself. However, having considered the arguments put forward by the Council in this case, and viewed the information withheld by virtue of section 43(1), the Commissioner is not satisfied that the Council has demonstrated that that information constitutes a trade secret. He therefore does not find the section 43(1) exemption engaged in respect of that information.

Section 43(2)

30. The Commissioner has next considered the Council's application of section 43(2) to the information withheld by virtue of that exemption. With respect to whose commercial interests would be harmed by disclosure, the Council is not claiming that disclosure would, or would be likely to, prejudice its own commercial interests.
31. During the course of the Commissioner's investigation the Council confirmed that the section 43(2) exemption was applied because it would be prejudicial to the commercial interests of APL and their clients.
32. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers that three criteria must be met.
- First, 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.
 - 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.

Applicable interests

33. When identifying the applicable interests, the Commissioner must consider whether the prejudice claimed is to the interest stated.
34. In the Commissioner's view, a commercial interest relates to a person's ability to participate competitively in a commercial activity, ie the purchase and sale of goods or services.
35. The Commissioner is satisfied that, in the context of the request in this case, the information relates to a commercial interest. He is also satisfied that the commercial activity involved – a recovery service – is conducted in a competitive environment.

Nature of the prejudice

36. The Commissioner's view is that the use of the term 'prejudice' is important to consider in the context of the exemption at section 43. It implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way.
37. Secondly, there must be what the *Hogan* Tribunal³ called a 'causal link' between the disclosure and the prejudice claimed. The authority must be able to show how the disclosure of the specific information requested would, or would be likely to, lead to the prejudice.
38. With respect to the nature of the prejudice to APL and its clients, respectively, the Council told the Commissioner:

"Disclosure of this information would allow competitors to use the expertise that APL has developed, for free and this would undermine APL's commercial interest in this regard"

and

"Disclosure of this information would breach the confidentiality of information these companies passed to APL. Such disclosure would undermine their trust in APL's ability to maintain their confidence and would impact APL's reputation and therefore their commercial interests as organisations would be less likely to engage them in future".

³ *Hogan v the ICO and Oxford City Council* (EA/2005/0026, EA/2005/0030)

Likelihood of prejudice

39. The Council told the Commissioner that it considers that the circumstances of this case support the higher threshold of 'would prejudice' as opposed to 'would be likely to prejudice' the commercial interests of the third parties.

Is the exemption engaged?

40. The Commissioner considers that the prejudice test is not a weak test, and a public authority must be able to point to prejudice which is 'real, actual or of substance' and to show some causal link between the potential disclosure of specific withheld information and the prejudice.
41. The Commissioner considers it important that, in claiming the exemption on the basis of prejudice to the commercial interests of a third party, the public authority must have evidence that this does in fact represent or reflect the view of the third party.
42. During the course of his investigation the Council confirmed that the Commissioner has been provided with all the correspondence between APL and the Council in relation to this request, including in relation to its clients.
43. In determining whether or not the effect of disclosure in this case would be detrimental or damaging in some way to the commercial interests of APL and its clients, the Commissioner has considered the nature and likelihood of harm that would be caused.

The commercial interests of APL's clients

44. The Council applied section 43(2) to some of the withheld information on the basis that that disclosure would be prejudicial to APL's clients. In correspondence about some of the proposed redactions, APL told the Council:

"This is to protect our clients".

45. It is not clear whether APL's clients were notified of this request for information. However, the Commissioner was not provided with any submissions from those clients about prejudice to themselves. In other words, he is not satisfied that the Council has evidenced that the arguments put forward in respect of APL's clients represent or reflect the views of those parties.
46. Having considered the withheld information in conjunction with the arguments put forward by the Council, the Commissioner is not satisfied that it has demonstrated that disclosure would prejudice APL's clients. It

follows that he does not find the exemption engaged in respect of that information.

APL's own commercial interests

47. The Commissioner considers it relevant in this case to take into account that the information at issue relates to a competitive bid. In the Commissioner's view, the level of competition within an industry can affect whether the release of information will harm someone's commercial interests. However, it should also be remembered that information that was commercially sensitive during the tendering process may no longer be sensitive once contracts have been signed.
48. The Commissioner is satisfied that the Council consulted APL at the time of the request. Having had the opportunity to consider the representations APL made to the Council on the subject of disclosure he is satisfied that the Council, in claiming the exemption, is reflecting their views.
49. Specifically with respect to its pricing schedule, APL told the Council:

"As you are probably aware cost recovery is very competitive market [sic] and we believe that our fee rate is unique and confidential to each individual client. This could potentially be damaging to our other client contracts and relationships. This information is also commercially sensitive and making this information public could result in some providers issuing unrealistic fee rates that are not sustainable, which could potentially damage the entire market due to the nature of the contingency based charging mechanism".
50. The Commissioner recognises that there may be circumstances where the release of information held by a public authority could damage a company's reputation or the confidence that customers, suppliers or investors may have in a company. For example, it may be that releasing such information has a significant impact on revenue or threatens its ability to obtain supplies or secure finance.
51. With respect to prejudice to the commercial interests of APL, the Commissioner finds the exemption engaged with respect to some of the withheld information. However, given the nature of the information at issue in this case, and having considered the arguments advanced by the Council, the Commissioner does not find the exemption at section 43(2) engaged with respect to the remainder of the withheld information.

The public interest test

52. Having established that the section 43 exemption is engaged in respect of some of the withheld information, the Commissioner must go on to consider the public interest test as set out in section 2(2)(b) of FOIA.
53. In the Commissioner's guidance on the commercial interests exemption, he explains that section 43 is a qualified exemption. That is, it is subject to the public interest test which is set out in section 2 of the FOIA. Where a public authority is satisfied that the release of the information requested would prejudice someone's commercial interests, it can only refuse to provide the information if it is satisfied that the public interest in withholding the information outweighs the public interest in disclosing it. The bias is in favour of disclosure and there will be occasions where information is released even though it is likely to prejudice someone's commercial interest.
54. The public interest test involves identifying the appropriate public interests and assessing the extent to which they are served by disclosure or by maintaining an exemption. In the Commissioner's view, the arguments put forward by the Council in its correspondence with the complainant – particularly those in favour of maintaining the exemption – fell short of what he would expect to see.

Public interest arguments in favour of disclosing the information

55. The Council told the complainant:

"the public interest arguments in favour of release that were considered included whether release of the information would inform public debate of the day; whether release could promote transparency and accountability for the spending of public funds, whether release would enable understanding of, and provide an opportunity to challenge a decision by the Council".

Public interest arguments in favour of maintaining the exemption

56. With respect to its pricing schedule – the aspect of the requested information the Commissioner understands the complainant is particularly interested in – the complainant told the Council:

"redacting the pricing schedule information, which is the only reference to the cost of this contract, cannot be justified by reference to exemptions under any of the FOIA sections you have mentioned, least of all seven months after the tender's closing date. Without that information it is impossible to judge how well CCC is spending public funds, which is one of the things the FOIA was supposed to facilitate".

57. In the Commissioner's view, the Council's arguments in favour of maintaining the exemption amounted more to reasons for engaging the exemption, rather than public interest arguments. For example the Council told the complainant:

"We have considered the detriment likely to be suffered by APL should detailed information about how they conduct their business be released into the public domain".

The balance of the public interest

58. The Commissioner considers that there is a public interest in openness and transparency, and in accountability in relation to the carrying out of a tendering process to ensure it is undertaken fairly and that the Council is obtaining value for money.
59. The Commissioner considers that, in the case of section 43, there is an inherent public interest in ensuring that companies are able to compete fairly and it is not in the public interest to prejudice a company's commercial interests.
60. In this instance, the Commissioner is not aware of any broader public interest which would be served by the disclosure of the information. On balance, therefore, and in respect of the information he considers engages the exemption, the Commissioner considers that the public interest arguments in favour of disclosing the information are outweighed by the public interest arguments in favour of maintaining the exemption.

Conclusion

61. The Commissioner has concluded that section 43(1) and (2) was applied incorrectly by the Council to some of the withheld information that falls within the scope of the request. The Council is therefore required to disclose that information. The Commissioner has specified the information that has been incorrectly withheld in a confidential annex to this decision notice. A copy of the confidential annex will be provided to the Council only.

Section 31 law enforcement

62. The Commissioner has next considered the information withheld by virtue of section 31.
63. Section 31 provides a prejudice based exemption which protects a variety of law enforcement interests. In this case the Council considers that section 31(1)(a) applies. That section states:

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

(a) the prevention or detection of crime".

The applicable interests

64. The Council must show that the prejudice it is envisaging affects the particular interest that the exemption is designed to protect.
65. The Commissioner accepts that the Council's arguments relate to the law enforcement activity that the exemption is designed to protect – the prevention or detection of crime.

The nature of the prejudice

66. In applying this exemption, the Council told the complainant:

"We have also looked at how the release of details about the security measures that are in place to protect the systems and information of APL would have an adverse effect on the efficiency of those measures and increase the threat of unauthorised access to their systems".

The likelihood of the prejudice occurring

67. In correspondence with the Commissioner, albeit with respect to the public interest arguments, the Council said:

"Releasing information into the public domain relating to the security measures put in place by APL would make them vulnerable to crime.....disclosure of this information would make APL a target for crime".

Is the exemption engaged? Would disclosure prejudice law enforcement?

68. The Commissioner recognises that section 31(1)(a) will cover all aspects of the prevention and detection of crime.
69. In the circumstances of this case, having considered the information at issue he is satisfied that the exemption is engaged.

The public interest test

70. Section 31 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining each exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

71. The Council acknowledged that disclosure would inform public debate. It also recognised the public interest in accountability and transparency. It told the Commissioner:

"Important that authority is accountable for the decisions it has made and the public can confirm that the correct processes have been followed to protect the public.

Would provide information about how funds are being spent and whether the service bought was value for money".

Public interest arguments in favour of maintaining the exemption

72. In favour of maintaining the exemption, the Council told the Commissioner that it was not in the public interest to release information that could make APL a target for crime.

Balance of the public interest arguments

73. In this case, the Commissioner considers that the public interest arguments for disclosure are based on the general principles of accountability and transparency. In contrast, in the Commissioner's view, there will always be strong grounds for protecting information that may result in the prevention and detection of crime.
74. Having given due consideration to the opposing public interest factors in this case, the Commissioner's decision is that the public interest in avoiding prejudice to the prevention and detection of crime outweighs the public interest in disclosure in all the circumstances of this case.

Other matters

75. The Commissioner understands that, following a competitive bidding process, the Council provides feedback to those companies whose bids are unsuccessful. The Council confirmed that further feedback is provided to unsuccessful companies upon request. The Commissioner notes that this approach goes some way to providing transparency in the Council's decision making processes.

Right of appeal

76. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

77. 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.
78. 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

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