

Freedom of Information Act 2000 (Section 50)

Decision Notice

20 June 2011

Public Authority: Oldham Borough Council
Address: West Street
Oldham
OL1 1UG

Summary

The complainant requested the Council to release a copy of its recent contract with KPMG. The Council responded disclosing a redacted version of the contract to the complainant. It informed the complainant that the redacted information comprised of KPMG's day rates and the resources required under the contract and that this information had been withheld under section 43(2) of the Act. As the complainant remained dissatisfied, he approached the Commissioner. The Commissioner has considered the complaint and he has concluded that the remaining information is exempt from disclosure under section 43(2) of the Act. He therefore requires no further steps to be taken.

The Commissioner's Role

1. The Commissioner's 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 "Act"). This Notice sets out his decision.

Background

2. The Office of Government Commerce (OGC) and its trading arm, Buying Solutions, offer the Buying Solutions Framework ('the framework') for IT goods and associated services via a selection of registered suppliers to the public sector. Buying Solutions is the national procurement partner for all UK public services and it offers a range of products such as ICT, energy, travel, office solutions, property solutions and professional services. There are over 1500 registered

suppliers; KPMG is one of them. The Commissioner understands that each supplier provides Buying Solutions its terms of business and its rates (referred to by the Council and KPMG as its 'Catalyst day rates'), which are then put into a general catalogue for customers to view and choose who they want to supply the services.

The Request

3. The complainant contacted the Council on 29 October 2008 to request the following information:

"Would it be possible to request, under Freedom of Information Act 2000, a copy of the recent contract or contracts (if it has changed over the course of time/or been subjected to any form of negotiation(s)) between KPMG and Oldham Metropolitan Borough Council."
4. The Council responded on 19 February 2009 releasing a redacted version of the contract to the complainant. The Council confirmed that the information that had been redacted was being withheld under section 43(2) of the Act.
5. The complainant contacted the Council on 19 February 2009 to request an internal review.
6. The Council responded on 30 September 2009. It advised the complainant that it remained of the view that the redacted information was exempt from disclosure under section 43(2) of the Act. It, however, informed the complainant that it would undertake a further review in 3 to 4 months time to see whether this exemption still applied.
7. The complainant contacted the Council on 13 January 2010 to request that it undertake a further review.
8. The Council responded on 10 August 2010. It advised the complainant that it still remained of the view that the redacted information was exempt from disclosure under section 43(2) of the Act. The Council advised the complainant to refer the matter to the Commissioner if he remained dissatisfied.

The Investigation

Scope of the case

9. On 10 August 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

The complainant specifically asked the Commissioner to consider whether the Council had acted appropriately by withholding the remaining information under section 43(2) of the Act.

10. During the Commissioner's investigation it was established that the withheld information consists of the following:
 - The total number of days input required under the contract and a breakdown of this total for 7 key areas.
 - The breakdown of resources, input and fees. This section includes the Catalyst day rate for 7 key personnel, the total amount of days each is required and the overall cost for each key personnel under the contract.

Chronology

11. The Commissioner wrote to the Council on 17 September 2010 to inform it that he had received a complaint from the complainant. He requested the Council to provide a copy of key correspondence with the complainant and a copy of the remaining withheld information.
12. The Council responded on 30 September 2010 providing the information requested.
13. The Commissioner wrote to the Council on 30 November 2010 to request that it explain in more detail why it considered the remaining information was exempt from disclosure under section 43(2) of the Act.
14. The Council responded on 22 December 2010.
15. The Commissioner wrote to the Council on 5 January 2011 to request some further information.
16. The Council replied on 19 January 2011 providing the necessary information.
17. The Commissioner wrote to the Council again on 2 February 2011 to seek further clarification on the application of section 43(2) of the Act.
18. The Council responded in full on 15 February 2011.

Analysis

Exemptions

Section 43(2) – commercial interests

19. For the Commissioner to agree that section 43(2) of the Act is engaged, the Council must first demonstrate that prejudice would or would be likely to occur to the commercial interests of the Council and/or KPMG. In the Information Tribunal hearing of *Hogan v The Information Commissioner and Oxford City Council (EA/2005/0030)* ('Hogan') the Tribunal stated that:

"The application of the 'prejudice test' should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption... Second, the nature of 'prejudice' being claimed must be considered... A third step for the decision-maker concerns the likelihood of occurrence of prejudice."
20. When considering the nature of the prejudice, the Tribunal stated in the hearing of Hogan that:

"An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thoroton has stated "real, actual or of substance" (Hansard HL (VOL. 162, April 20, 2000, col.827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected."
21. As stated above in paragraph 19 the third step of the prejudice test is to consider the likelihood of occurrence of the prejudice claimed. The Commissioner notes that there are two limbs to this test; "would be likely to prejudice" and "would prejudice". The first limb of the test places a lesser evidential burden on the public authority to discharge. "Would be likely to prejudice" was considered in the Information Tribunal hearing of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*. The Tribunal stated that:

"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk".
22. The second limb of the test "would prejudice" places a much stronger evidential burden on the public authority to discharge. Whilst it would not be possible to prove that prejudice would occur beyond any doubt

whatsoever, it is the Commissioner's view that prejudice must be at least more probable than not.

23. Once the Council has applied the prejudice test it must then go on to consider the public interest test, as section 43(2) of the Act is a qualified exemption.
24. The Commissioner notes that the Council has not explicitly stated which limb of the prejudice test is being claimed in this case. He will therefore go on to consider the lesser threshold of "would be likely to". It follows that if this threshold is not met, the higher threshold of "would" is not met also.
25. The Council provided the Commissioner with copies of its correspondence with KPMG relating to this request, which detail KPMG's objections to disclosure and presented the following arguments in support of the engagement of section 43(2) of the Act.
26. The Council confirmed that the total cost of the contract has already been released into the public domain. It argued that if the total number of days input was disclosed as well, it would then be possible for KPMG's competitors to work out KPMG's daily rate under this contract. The Council stated that the withheld information also contained a more detailed breakdown of this total input over 7 key areas in the contract. It argued that disclosure of this information would enable a competitor to work out KPMG's pricing structure over these 7 key areas, which would then provide a competitor with a more detailed overview of the rates charged for certain activities under the contract. The Council stated that this information would be very useful to KPMG's competitors, as it would reveal the detailed pricing structure agreed for this contract which could then be used in the future to outbid KPMG in future tenders.
27. The withheld information also contained the Catalyst day rate agreed for 7 key personnel, the number of days they are required and the total cost of supplying each employee over the course of the contract. The Council confirmed that KPMG regarded this information to be commercially sensitive. It stated that if this information was to be released in whole or in part it would enable more detailed data to be gleaned relating to KPMG's pricing structure. It confirmed that each element is commercially sensitive in its own right, as it would be possible to calculate any redacted data from the data that is provided. For example, if the Catalyst day rate was redacted, it would still be possible for a competitor to work this out from the remaining information i.e. the total cost and the days required for each employee.

28. The Council advised that KPMG regard the pricing structure under this contract to be very much 'live' and would be likely to prejudice it in the market place if it were to be disclosed. KPMG explained that its Catalyst day rates are used for nearly all government contracting. It argued that it carefully negotiated these rates with the Council and contracts secured under the Buying Solutions framework represent a significant element of KPMG's overall business. Disclosure of this information would be likely to prejudice KPMG in the market place and potentially release to clients in the private sector rates they may not enjoy which could then hinder KPMG from securing future business with its private sector customers.
29. In its submissions both the Council and KPMG referred the Commissioner to the OGC Guidance on the disclosure of contractual information and stated that it had released a redacted version of the contract to the complainant in accordance with the recommendations detailed in this guidance. Both the Council and KPMG referred to the OGC's view on the disclosure of pricing structures, detailed costs models and day rates and confirmed that the OGC considers this type of information is commercially sensitive and should be withheld.
30. The Council confirmed that KPMG also regarded its Catalyst day rates as commercially sensitive because of the changing circumstances and downturn in the economic market which has resulted in many of its existing customers receiving reduced or frozen rates. KPMG considers disclosure could have a detrimental impact on its reputation and damage its profile, which would then result in financial loss. KPMG is of the view that disclosure could therefore undermine the company's position in the market place and enable competitors to undercut it. It stated that its Catalyst day rates are one of its most important negotiating tools.
31. The Council argued that KPMG stated the consultancy market is the most competitive part of public sector work in the UK. Local authority work is also more intense than any other public sector work. It confirmed that KPMG has made significant investment in attaining and retaining the leadership for providing such services. Disclosure of such commercially sensitive information would be likely to be detrimental to KPMG as a business and result in it suffering significant financial loss.
32. During the Commissioner's investigation it was brought to his attention that KPMG had agreed to the release of similar information under a contract with another public authority. KPMG advised that it was reluctant to disclose this information, which did contain information relating to its Catalyst day rates. However, it did not regard this information to be "sufficiently" within the public domain to jeopardise its assertion in this case that the Catalyst day rates under this contract

are commercially sensitive. It also argued that the contracts themselves and the services offered are very different and diverse and that it felt each case should be judged on its own merits.

33. It also argued that the Catalyst day rates agreed under the framework, operated by the OGC, are not necessarily the figures ultimately agreed with a public authority. It stated that there is still some room for further negotiation and although the agreed figures will be close to the Catalyst day rates agreed under the framework, they are not automatically the same and may represent a further discount depending on the individual circumstances.
34. The Commissioner has carefully considered the arguments presented by the Council and KPMG. He is satisfied that the requested information would be likely to prejudice the commercial interests of KPMG if it were to be disclosed and he will now explain why.
35. As stated in paragraph 29 above, the Council considered the OGC guidance in great detail when considering what information should and should not be released to the complainant. It considers the decision not to disclose the remaining information is in line with this guidance and other decisions reached by the Commissioner and the Information Tribunal.
36. In the Information Tribunal hearing of the *Department of Health v Information Commissioner EA/2008/0018* the Tribunal referred to the OGC guidance and stated that it is:

"a useful approach to dealing with an information request".

And that it would expect:

"...the DOH in any future case to consider the information request by direct reference to these guidelines and in the event that the guidance was not followed in any respect, be able to provide the Commissioner with a clear explanation of why it was departing from the general principles set out".

The Tribunal therefore indicated that it considered this guidance is a useful starting point for all public authorities considering the disclosure of contractual information.

37. At paragraph 90 of its decision, the Tribunal provided a table of the information it considered was exempt from disclosure. It considered similar information to that being considered here and reached the decision that "pricing figures and structure" should be withheld as it could be indexed and provide competitors with information to undercut price and undermine the contractor's approach.

38. While the Commissioner agrees with this approach and considers the OGC guidance is a useful starting point for public authorities when considering disclosure of contractual information, each case should still be considered on a case by case basis. He will therefore now go on to consider the detailed arguments presented by the Council in support of its application of this exemption.
39. The Commissioner acknowledges that the remaining withheld information contains the Catalyst day rates KPMG agreed with the Council under this contract and a selection of other information from which these rates could be determined if it were disclosed. He accepts that such information would be of interest to a competitor, particularly other suppliers registered with Buying Solutions. It would provide detailed information on how KPMG secured this contract, what rates were agreed and possibly reveal a good indication of KPMG's profit or return from this business. Such information would enable a competitor to work out fairly accurately the rates KPMG is likely to quote in any re-tender process or future business, which could then be used to undercut KPMG. The Commissioner accepts that such implications would be unfair and would be likely to place KPMG at a disadvantage in the market place and hinder its ability to compete competitively in the future. The Commissioner accepts that public sector procurement is a lucrative business for many private sector firms and that disclosure of this information would be likely to create an uneven playing field and distort true competition in the future.
40. The Commissioner also notes KPMG's concerns that disclosure would be likely to release rates agreed with the Council, which other customers do not benefit from, particularly its customers in the private sector. He accepts that disclosure in this case would be likely to strain, if not damage, KPMG's relationships with such customers. If these customers were to identify that KPMG had offered more favourable rates to its public sector customers this could lead to a breakdown in these relationships and lead to a potential loss of revenue for KPMG when further business opportunities arise. Disclosure could hinder KPMG's ability to secure further business with its existing customer base.
41. The Commissioner is aware that KPMG agreed to the disclosure of another contract secured under this framework with another public authority and that this information contained the rates it agreed. However, he notes that this was with some reluctance and possibly agreed to by KPMG without a true understanding of what disclosure under the Act effectively means i.e. disclosure under the Act is disclosure to the world at large, meaning that the information must be released to any other applicant that may submit an information request for the same information. It also remains the Commissioner's view that

each case should be considered on its own merits and notes that he was not involved in this decision.

42. In other cases he has considered the Commissioner has generally ruled that day rates should not be disclosed, for example, case reference FS50309543 against the Department of Communities and Local Government. As stated in paragraph 37 above, the Information Tribunal also decided that very similar information was exempt from disclosure by virtue of section 43(2) of the Act in the hearing of *Department of Health v Information Commissioner EA/2008/0018*.
43. The Commissioner also considers that, as he was not party to the decision to release this information for another contract secured under this framework with another public authority, he must consider the issue of prejudice afresh based on the arguments he has received. As he has already explained in paragraphs 39 and 40 above, he considers there is sufficient evidence available to suggest that disclosure, in this case, would be likely to prejudice the commercial interests of KPMG. He notes that the two contracts were different and the engagements differed significantly by the set of service areas involved. He also notes that there is room for further negotiation on exact rates when a supplier is chosen and therefore the actual rates agreed may differ between contracts and may not necessarily be the same as the Catalyst day rates submitted to the OGC under the Buying Solutions framework.
44. As the Commissioner is satisfied that section 43(2) of the Act is engaged it is now necessary for him to go on to consider the public interest test.

Public interest arguments in favour of disclosing the requested information

45. The Council stated that it accepted there is a public interest in gaining access to contractual information which enables the public to understand more clearly why a particular supplier was selected and what the requirements of the contract were. It also agreed that there was a public interest in knowing how public funds are spent to further public debate and to assure the public that value for money is being achieved.
46. It also acknowledged that there is a public interest in the overall transparency and accountability of public authorities.

Public interest arguments in favour of maintaining the exemption

47. However, it considered the public interest had already been met by the information which has already been released. It confirmed that the total value of the contract, the selected supplier (i.e. KPMG) and all

sections of the contract with the exception of the remaining information had been disclosed. The Council is of the view that the level of information already in the public domain is sufficient to enable the public to understand the arrangements in place and to scrutinise its spending of public funds if they so require.

48. The Council also argued that it considers there are overriding public interest factors in maintaining this exemption. It stated that it does not consider the public interest is served by disadvantaging private sector firms in the market place. Disclosure would remove all control that KPMG has over the use of this information. It considers KPMG's day rates are one of the few areas where they can negotiate and such information is a critical part of any tender. Disclosure of this information could lead KPMG to fail in securing future contracts which would then result in it suffering financial loss as a direct consequence. The Council and KPMG asserted that it did not consider the public interest in disclosure was proportionate to the damage that could be caused.
49. The Council confirmed that Catalyst rates are used in nearly all government contracting and public sector procurement is a significant element of KPMG's overall business. The rates agreed in this case were carefully negotiated by KPMG and disclosure would be likely to enable other suppliers registered with the framework to undercut KPMG in future business opportunities.
50. The Council referred to the Buying Solutions Framework itself and advised that the OGC do not make the Catalyst day rates submitted by each supplier public, therefore recognising itself that the information is commercially sensitive. It confirmed that this information is only shared in a controlled way with public authorities seeking a supplier for particular services.

Balance of the public interest arguments

51. The Commissioner accepts that there is a public interest in releasing contractual information relating to agreements between public authorities and third parties into the public domain. In this case, the Council awarded the contract to KPMG to provide the services it required. The Commissioner agrees that information relating to these arrangements, for example, why the contract was awarded to KPMG, what specific services were required and how these are to be met by the selected supplier should be disclosed to enable the public to scrutinise such decisions and to ensure that procurement processes are being conducted in an open and honest way. He also acknowledges that there is a public interest in knowing how public funds are spent and gaining access to information which enables the public to consider

whether value for money is being achieved. However, in this case, the Commissioner considers these public interest factors have already been met by the information which has already been released to the complainant. He notes that a redacted version of the contract has been released, which appears to be in line with the suggestions made in the OGC guidance.

52. The Commissioner considers that it can be argued that there is some public interest in private sector firms' pricing structures and day rates being disclosed, as this would enable competitors to undercut a previously selected supplier in an effort to win future contracts, which could then possibly lead to more effective arrangements being achieved and drive down price. However, he notes that this would be at considerable prejudice, in this case, to KPMG and it is not necessarily in the public interest to disadvantage contractors in this way. The Commissioner accepts that disclosure of this information would be likely to prejudice the commercial interests of KPMG for the reasons he has already explained. He therefore also accepts that disclosure could distort competition in future business opportunities. The Commissioner considers there is considerable public interest in maintaining fair competition in public sector contract procurement. This too increases innovation, more effective services and value for money.
53. The Commissioner also considers, in this case, that disclosure could lead to a possible reduction in the number and quality of companies being willing in future to share such information with public authorities and to tender for public sector work. If information which the Commissioner agrees is commercially sensitive were to be disclosed this may discourage private sector firms from bidding for future contractual opportunities. It may lead to such companies in this same market to rethink their future strategy and to weigh up the benefits of disclosing this sort of information to public authorities in the future against the likely return particularly in the current economic climate where frozen and reduced rates are required.
54. For the reasons explained above, the Commissioner has decided in this case that the public interest in favour of disclosure is outweighed by the public interest in maintaining this exemption.

Procedural Requirements

55. The Commissioner notes that the Council failed to issue a refusal notice to the complainant within 20 working days of his information request. The Commissioner therefore finds the Council in breach of section 17(1) of the Act in this case.

The Decision

56. The Commissioner's decision is that the Council dealt with the following aspect of the request for information in accordance with the Act:
- it acted appropriately by withholding the remaining withheld information under section 43(2) of the Act.
57. The Commissioner's decision is that the Council did not deal with the following aspects of the request for information in accordance with the Act:
- it breached section 17(1) of the Act by failing to issue a refusal notice to the complainant within 20 working days of his request.

Steps Required

58. The Commissioner requires no steps to be taken.

Other matters

59. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. Concerning the complainant's request for an internal review, the Commissioner notes that the Council took several months to respond. The complainant's request was made on 19 February 2009. However, the Council did not respond until 30 September 2009; over 7 months later.
60. There is no timescale laid down in the Act for a public authority to complete an internal review but the Commissioner has since issued guidance which recommends 20 working days from the date of request as a reasonable time for completing an internal review and (in exceptional circumstances) no later than 40 working days. Also, Part VI of the Code of Practice issued under section 45 of the Act states in this regard:

"41. In all cases, complaints should be acknowledged promptly and the complainant should be informed of an authority's target date for determining the complaint. Where it is apparent that determination of the complaint will take longer than the target time (for example because of the complexity of the particular case), the authority should inform the complainant and explain the reason for the delay."

61. The Commissioner notes that, in failing to advise the complainant of the estimated date for completion of the internal review and in failing to complete the internal review within a reasonable timescale the Council failed to conform to Part VI of the section 45 Code of Practice.

Right of Appeal

62. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 20th day of June 2011

Signed

**Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1)

Provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Section 17(1)

Provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies."

Section 43(2)

Provides 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)."