

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 October 2012

Public Authority: Northumberland County Council
Address: County Hall
Morpeth
Northumberland
NE61 2EF

Decision (including any steps ordered)

1. The complainant requested information from Northumberland County Council (the Council) about a particular contract for which it invited tenders. In response to this request the Council disclosed various pieces of information including the original invitation to tender, the evaluation scores of both the tenders it had received and the price of the winning tender. However, it withheld two documents on the basis of section 43 of the Freedom of Information Act on the basis that their disclosure would be likely to breach the commercial interests of the company which won the contract. The Commissioner is satisfied that both documents are exempt from disclosure on the basis of this exemption and, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Request and response

2. On 26 March 2012 the complainant submitted the following request to Northumberland County Council (the Council):

'1) A list of any and all bidders competing for the Provision of an Incubator Management Service at Berwick Workspace issued in April 2011, and the price offered by each bidder
2) A copy of the original Invitation to Tender specification

3) A copy of the winning tender return (including all indexes, appendices and supplements)

4) A copy of the evaluation assessment, reasoning and scores for the evaluation criteria set out in the invitation to tender.¹

3. The Council responded on 18 April 2012 and provided the complainant with information requested at points 1, 2 and 4. However, it withheld the information falling within the scope of point 3 on the basis of section 43(2) of the Freedom of Information Act (FOIA).
4. The complainant contacted the Council on the same day and asked for an internal review of this decision to be undertaken.
5. The Council informed him of the outcome of the review on 3 May 2012; the review upheld the application of section 43(2).

Scope of the case

6. The complainant contacted the Commissioner to complain about the Council's decision to withhold the copy of the winning tender, i.e. the information contained at point 3 of his request. The complainant argued that disclosure of this information was in the public interest.
7. During the course of his investigation the Commissioner established that the winning tender submission, i.e. point 3 of the request, actually consisted of five separate documents. Three of these documents were disclosed to the complainant during the course of the Commissioner's investigation. These documents consist of the completed pricing schedule; a signed certificate of 'Non Collusion and Non Canvassing'; and a 'form of tender' document. The two documents which continue to be withheld consist of the winning company's response to the questions raised in the invitation to tender and the company's completed business questionnaire. In light of the subsequent disclosures to the complainant, the Commissioner has simply considered whether the section 43(2) provides a basis to withhold these two remaining documents (from here on referred to as the 'withheld information').

¹ The tender in question sought the provision of management services for the Berwick Workspace business enterprise centre for a 12 month period starting around June 2011. The purpose of the centre is to provide easy in/easy out accommodation, mentoring and advice services for business start-up and growth businesses in the local area.

Reasons for decision

8. Section 43(2) 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).'

9. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner believes that three criteria must be met:

- Firstly, 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; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner believes 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.

10. In relation to the commercial interests of third parties, 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. Whilst it may not be necessary to explicitly consult the relevant third party, the Commissioner expects that arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns.

The Council's position

11. The Council's position is that disclosure of the withheld information would be likely to prejudice the commercial interests of the company which submitted the winning tender, Northumberland Business Services Ltd (NBSL). In order to support its position, the Council provided the

Commissioner with the submission it had itself received from NBSL in which NBSL explained why it believed that disclosure of the withheld information could prejudice its commercial interests. The Commissioner has summarised the points made by NBSL below.

12. NBSL explained that the withheld information sets out in detail its particular approach to delivering contracts of this nature. It includes the details of NBSL's strengths, background, track records, how it delivered previous contracts, details of its management systems and controls, how it manages its suppliers, its quality management systems, its experience and its technical capability. In effect, the withheld information is a potted history of who NBSL are and how it manages its operations.
13. NBSL argued strongly that disclosure of this information could give a potential competitor a significant unfair competitive advantage either for this particular service, or for any other applicable tender. With regard to its competitors who, like NBSL, were relatively small organisations they could, as a minimum, use the information to incorporate the details of NBSL's successful approach as contained in the withheld information into any future tenders they may submit. With regard to its larger competitors, NBSL explained that such organisations had the resources to 'trawl' for all details of all tenders simply in order to build a portfolio of their competition. (NBSL provided examples of such larger competitors.) NBSL emphasised that disclosure of the information would place it in this disadvantageous position at a time when there were fewer opportunities available of this nature.

The Commissioner's position

14. With regard to the three limb test for engaging a prejudice based exemption set out at paragraph 9, the Commissioner is satisfied that the first limb is clearly met because the nature of the harm envisaged, namely prejudice to the commercial interests of NBSL, clearly relates to the interests which section 43(2) is designed to protect.
15. With regard to the second limb, the Commissioner is also satisfied that there is a causal link between disclosure of the withheld information and the prejudice which would allegedly occur. This because he accepts that it is logical to argue that disclosure of documentation which sets out in detail how NBSL would undertake this particular contract could be advantageous to NBSL's competitors. Furthermore, the Commissioner is satisfied that the resulting prejudice to NBSL's interests would clearly be one that was of substance as such contracts are clearly of some value.
16. With regard to the third limb, the Commissioner notes that the Council has argued that the exemption is engaged at the lower threshold, i.e. that prejudice would be likely to occur if the withheld information was

disclosed. Having reviewed the withheld information and having taken into account the submissions NBSL made to the Council, the Commissioner is satisfied that disclosure of the withheld information would indeed be likely to prejudice NBSL's commercial interests. The Commissioner has reached this decision for a number of reasons.

17. Firstly, the significant level of detail contained in the withheld information about exactly how NBSL would undertake the tender in question provides notable support for the view that disclosure could be prejudicial to NBSL's interests in the manner it suggests. Secondly, NBSL has identified two different ways in which different types of competitor may use the information. Therefore, the opportunity for prejudice is not limited to one particular competitor using the information. Thirdly, and linked to this, is the fact that disclosure could provide an advantage to NBSL's competitors in any number of similar tenders in the future, not just one specific tender. In relation to this point, the Commissioner understands that at the time of this request the Council was not intending to re-tender for this contract. However, given that NBSL is arguing that disclosure could be prejudicial to any number of similar contracts in the future, not just in relation to the Berwick Workspace, the Commissioner does not believe that this undermines his conclusions. Fourthly, the Commissioner accepts that the increasing lack of tenders such as this would mean that any prejudice to NBSL's interests could well be amplified. For these reasons, the Commissioner is satisfied that the likelihood of prejudice occurring is one that represents a real and significant risk and is clearly one that is more than a hypothetical possibility.
18. The Commissioner is therefore satisfied that the Council can rely on section 43(2) of FOIA as a basis not to disclose the withheld information.

Public interest test

19. Section 43(2) is a qualified exemption and therefore the Commissioner must consider the public interest test contained at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the withheld information

20. The complainant argued that the public have clear interest in knowing the terms of contracts awarded by public authorities given that such contracts involve the spending of public money. The complainant noted that many public authorities release contracts with private vendors under FOIA.

Public interest arguments in favour of maintaining the exemption

21. In its correspondence with the complainant, the Council did not identify any specific public interest arguments which set out why it believed that the exemption should be maintained. However, in correspondence provided to the Commissioner, the Council suggested that it would not be in the public interest if private companies with whom it entered into contracts found their commercial interests prejudiced simply because of the obligations placed upon the Council by FOIA.

Balance of the public interest arguments

22. The Commissioner would agree with the complainant's line of argument that there is clear public interest in public authorities being open and transparent about the way in which public money is spent. Given the detailed nature of the withheld information, its disclosure would provide the public with an insight into NBSL's approach of managing the Berwick Workspace. The Commissioner acknowledges that this may be of particular interest to users of the centre.
23. However, in the Commissioner's opinion, the information which the Council has disclosed in relation to this request already provides the public with a sound understanding of the terms of the NBSL contract with the Council in respect of this project. That is to say, the original Invitation to Tender specification sets out in detail the services that NBSL (or indeed any other company who may have won the tender) had to provide to the Council. Furthermore, NBSL's final price for the contract has already been disclosed, in addition to the Council's evaluation of the NBSL's tender scored against the other unsuccessful bidder. In this context, the Commissioner believes that the public interest in disclosure of the withheld information is arguably reduced because the information already disclosed serves, to a notable extent, the public interest in the Council being transparent in respect of this particular tender. In other words, the public are already aware of the services that NBSL has provided to the Council and at what price; disclosure of the withheld information would simply provide the public with some insight as to NBSL's particular approach in delivering these services rather than revealing previously unknown details as to what services are actually being delivered.
24. Furthermore, the Commissioner agrees with the Council that it is not in the public interest that third parties have their commercial interests prejudiced simply because they have entered into contracts with the Council. In the Commissioner's opinion, for the public interest to favour disclosure of information in such a scenario would require a particularly compelling set of circumstances which the Commissioner does not believe exist here. The Commissioner has therefore concluded that the

public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

Right of appeal

25. 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: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

26. 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.
27. 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

Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF