

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 September 2013

Public Authority: Central Bedfordshire Council

Address: Priory House
Monks Walk
Chicksands
Shefford
Bedfordshire
SG17 5TQ

Decision (including any steps ordered)

The complainant has requested the winning tender amounts per route per day relating to a home to school transport tender carried out by the council. The council claimed that the information was exempt under section 43(2) (commercial interests). During the course of the Commissioner's investigation it also applied section 41 (information in confidence).

The Commissioner's decision is that Central Bedfordshire Council was not correct to apply section 43(2) to the information.

The Commissioner has also decided that the council was not correct to apply section 41 to the information. Although the information is held under a duty of confidence, the Commissioner considers that the public interest in the information being disclosed would prevent a breach of that duty being actionable.

The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

- To disclose the information to the complainant.

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

1. On 27 September 2012 the complainant wrote to Central Bedfordshire Council and requested information in the following terms:

"The winning tender amounts per route per day relating to the recent Home to School Transport tender for all the C, F, J & M routes. Where the winning bid was a combination price then the price per day and details of which routes this included."

2. The council responded on 3 October 2012. It stated that the information was exempt under section 43 of the Act.
3. Following an internal review the council wrote to the complainant on 19 December 2012. It stated upheld its decision for the same reasons.
4. During the Commissioner's investigation the council also claimed that section 41 is also applicable.

Scope of the case

5. The complainant contacted the Commissioner 14 January 2013 to complain about the way his request for information had been handled.
6. The Commissioner considers that the complaint to be that he considered the information should have been disclosed to him and that the exemption claimed does not apply.

Reasons for decision

Section 43(2)

7. Section 43(2) of the Act 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)."

8. The council therefore needs to demonstrate that a disclosure of the information would prejudice the commercial interests of any party.
9. Some arguments it has submitted cannot be considered within this decision notice without disclosing withheld information. The Commissioner has however taken this into account in his final decision.

The council also provided the Commissioner with other arguments for the exemption applying which are considered below.

10. It stated the transport contracts were awarded following a quotation exercise conducted through a framework agreement in accordance with the Public Contracts Regulations 2006. The use of a framework agreement allows the Council to set terms and conditions for all contracts awarded through it and it is also used to specify the quality standards that apply to those contracts.
11. The quotation exercise contains all the information about distance, pickup points/times, set down points/times, vehicle standards and sizes, requirements for passenger assistant, the number of days service is required and contract duration. Operators therefore perform the services to these pre-determined standards and many have similar vehicles and overheads. They are also likely to be aware of the fares charged by competitors for the routes they operate or have an interest in. Therefore knowing the rate charged for a certain route would enable an operator to accurately determine the business model of their competitors.
12. The council argued that with this information larger competitors could underbid for routes in the future, thereby ensuring that smaller competitors could not compete for the routes. This would cause some operators to go out of business. In particular it stated that those businesses operating more specialist vehicles may not be able to adapt and therefore go out of business. In this way competition for routes would be likely to be reduced.
13. The council said that EU Regulations governing framework agreements do not allow the addition of further operators during the life of the framework agreement. These typically last for 4 years. It states that for this agreement the council has authorised a specific number of potential operators, most of which are local companies who are not large and do not operate with large financial capital behind them. A disclosure of this information may therefore mean that many of these are significantly prejudiced if details of their successful bids are disclosed to their larger commercial competitors.
14. The council also noted that for certain routes competition is generally small in any event. It argues that disclosing the successful bids for those routes would lead to future tenders levelling around those bid prices rather than any significant reduction on tender bids from other competitors.
15. The council stated that it had recently carried out a poll of some transport operators for their views regarding the disclosure of prices and that the response was overwhelmingly against such a move. The operators considered the information to be commercially sensitive. It

argues that this fully supports the council's arguments that a disclosure of this information would be likely to prejudice the commercial interests of the operators.

16. The council has outlined above that if this information is disclosed it would lead to less competition, may undermine some service operators to the point where they go out of business, and ultimately end up either costing the public more for the same services or lead to less services being provided on some of the less profitable routes.
17. The Commissioner accepts that these arguments are valid and that the exemption is therefore engaged.
18. The Commissioner has therefore carried out a public interest test as required by section 2 of the Act. The test is whether the public interest in maintaining the exemption outweighs the public interest in the information being disclosed.

The public interest test

The public interest in the information being disclosed

19. FOI guidance produced by The Office of Government Commerce ('FOI (Civil Procurement) Policy and Guidance Version 2.0') states at paragraph 4.2:

"Transparency in the use of public funds

The public can only be reassured that authorities are spending taxpayers' money wisely if they have visibility of:

- *how much money is being spent;*
- *with whom that money is being spent;*
- *exactly what services, goods or works that money is buying;*
- *what redress is available if those services, goods or works are below an agreed standard."*

20. The OGC guidance suggests as a starting point that the overall cost of a contract should be disclosed once the contracts have been awarded.
21. The balance of the public interest test in this case is a relatively straightforward balancing of facts: which is more beneficial to the public, the disclosure of the current costs to the council for the services provided, balanced against any damage that would occur to the market in the area, to the transport companies and to the community as a whole.

22. The council has submitted arguments that a disclosure of the information would be likely to damage the market and the smaller companies. However the Commissioner would generally find that that information, at the least, should be provided to the public as a means of ensuring that the council is acting transparently and allowing the public to understand how its taxes are being spent. The central arguments in favour of the information being disclosed therefore surround creating greater transparency and allowing greater scrutiny of the council's financial decisions in terms of the road transport infrastructure; put simply, and in the terms of the above guidance, *'how much money is being spent'*.
23. The sums being paid to operators are public money, and on the face of it there are very strong arguments why the public should be able to know how much the council is paying each operator for the provision of the service.
24. The public will be aware of the service levels which the operators provide. They will also know of any fare increases and the cost of travel on the services; what fares are charged for particular routes and distances. They will also know whether the standard and the quality of services which they receive. They will therefore form their own views on the adequacy of the services being provided. What the public has not been informed of is how much the council is paying for the provision of those services to each individual operator.
25. It is possible that the some members of the public would in some cases question the level and quality of services offered and would be aggrieved if the operators were receiving substantial amounts of public money but failing to provide adequate services in return. The quality and levels of service were however stipulated by the council in the tender and contract to an extent however.

The public interest in the exemption being maintained

26. The Commissioner notes that the framework agreement is normally set for a period of 4 years before being re-tendered. The council argues that if operators go out business during that period they will not be able to replace them until the end of the agreement and therefore competition for routes would be reduced. It says that if competition was to be reduced by too great an extent it may not be able to fulfil its duties and may then need to retender the whole framework agreement.
27. It says that if that occurred in the short term then the successful tender prices would still be very recent and therefore highly sensitive to the operators concerned. Rerunning the framework contract would be a costly exercise on the public purse. The council said that there is already a lack of operators on the list for some areas and this would be likely to

exacerbate this problem and prejudice the council's ability to provide the services. It said that this could lead to the council paying significantly more for the same service, which would not be in the public interest.

28. The council recognised that there is a strong public interest in the disclosure of the figures however it considered that in this case it would not be in the public interest to disclose them on the basis that this would undermine smaller companies in favour of larger ones. It considered that smaller companies would suffer significant financial damage if the large companies were to underbid and win the routes, and it argued that there is little or no public interest in interfering with a company's ability to trade.
29. It further argues that if smaller companies struggled to compensate for the loss of contracts they might therefore be put out of business. This would lessen the competition in the area and would potentially lead to price increases if surviving companies become the sole provider for particular routes. The Commissioner recognises that if this occurred it would also lead to job losses in the community as the council has indicated that most of the contractors are local companies.
30. The Commissioner agrees that it would not be conducive to a competitive market if large companies could undercut smaller ones on profitable routes, whilst leaving unprofitable routes to smaller companies. It may in effect end up with the council being unable to provide services on less profitable routes if smaller companies go out of business through the loss of the more profitable routes to bigger companies. The Commissioner recognises however that this is a relatively normal issue with market forces.
31. Nevertheless the Commissioner accepts that a disclosure of the pricing would allow larger companies to manipulate and dictate the market, and it is not in the public interest to allow bigger companies the ability to undermine smaller companies in this way.

Conclusion

32. The Commissioner has considered the above arguments. Whilst he recognises the difficulty which the council has with this issue he also considers that there are extremely strong reasons why it is in the public interest for the public to be able to access how much the council is paying for the services being provided. Many tendering exercises are not run on price alone. A number of other factors can be stipulated and the council will decide the weight to be placed on each criteria. It's decisions as regards the tenders in this respect provides insight into the heart of its financial decision making in services as important as bus and infrastructure services.

33. His decision is therefore that the public interest rests in the disclosure of the information.

Section 41

34. The council also provided arguments that section 41 was applicable to the information. It provided sections of the framework agreement that demonstrated that details of the bids are to be held in confidence.
35. There are a number of elements to the application of section 41. These are:
- a) That information was received by the council from another person.
 - b) That the information was provided in circumstance which created a duty of confidence.
 - c) That a disclosure of the information would be an actionable breach of that duty of confidence.
36. a) The first question which the Commissioner must therefore consider is whether the information was received from another person. The information requested is the price for the routes for each individual company. This would have been received by the council as part of the tender bid and is therefore received from another person. The Commissioner has therefore considered whether the information was provided in circumstances which created a duty of confidence.
37. The council has provided the Commissioner with details of the contractual stipulations between the parties which on the face of it create a duty of confidence. The Commissioner accepts that these have been agreed between the parties.
38. In *Derry v Information Commissioner (EA/2006/0014)* the Information Tribunal considered that information which had been negotiated between two parties to form a contract could not be considered confidential for the purposes of section 41. This is on the basis that if the contract was negotiated between the parties then information was not 'confided' from one party to the council but developed and agreed between them. The Commissioner considers however that in this case the information was provided – it was the price at which the companies tendered as was not formed as part of a negotiation. He therefore considers that the information was provided by another person.
39. b) The Commissioner accepts that a duty of confidence was created as this was a specific stipulation in the contracts signed between the parties. However the Commissioner is not satisfied that a contractual stipulation of confidentiality should be used to prevent information being accessible under the Act. It is not a way of avoiding the legal responsibilities applied by the Act.

40. However the agreements were reached and signed on the basis that the information would remain confidential. As noted above the information is commercially sensitive and it would be detrimental to some parties if that information were to be disclosed. The information is not therefore trivial and is not otherwise in the public domain.
41. The Commissioner therefore considers that the information falls within the scope of the tests of confidentiality set out in the case of *Coco v AN Clark (Engineers) Ltd* ([1969] RPC 41). A duty of confidence therefore exists between the parties on this information.
42. c) The Commissioner has therefore considered whether a disclosure of the information would be actionable.
43. Where the public interest in the information being disclosed outweighs the public interest in maintaining the duty of confidence this can provide a defence to the breach of confidence; it can prevent action being taken against the breach of the confidence. The Commissioner has therefore considered the public interest arguments further in this case.

The public interest in the exemption being maintained

44. It is a basic principle of English Law that confidences should not be broken lightly. This has been long recognised in case law created by the courts. Whilst the introduction of the FOI Act has served to widen the grounds which would normally be needed to overturn a duty of confidence, in respect of access to public information it is nevertheless agreed by Tribunal that there remains a very strong inherent interest in confidences being maintained.
45. The council has provided strong commercial arguments why the duty of confidence should be maintained which have already been outlined above.
46. The council argues that there are rights under human rights legislation to allow person to 'the peaceful enjoyment of their possessions'. It recognises that this can be overridden by a public interest defence however it argues that there is little or no public interest in harming a company's ability to trade freely. It argues that disclosing this information will lead to smaller companies being disadvantaged.
47. The council has also argued that it would then be detrimental to its own ability to carry out the function of providing public transport. If companies go out of business or the competition is reduced in other ways then the council argues that its current framework agreement might be impaired to the point where it then needs to retender for the contracts.

The public interest in the information being disclosed

48. As noted above the financial figures were provided in confidential tender bids to the council. FOI guidance provided by the Office of Government Commerce states that once final agreements are reached and contracts are signed on tender bids information on the overall price of the agreed contract should generally be disclosed to the public.
49. The Commissioner notes that rather than being an overall price agreed between the parties the information relates to the individual contractors price per day for carrying out the services. A disclosure of the information would not therefore provide interested parties with a picture of the overall costs to the council of providing the services. It would however provide details of the individual companies' agreements with the council. Obviously simple mathematics would allow an interested party to calculate the overall price for all of the services on a rough basis. Additional costs such as the council's administrative costs for managing the service and the payments would not be known but may possibly be available from the council.
50. The Commissioner has considered the public interest in the information being disclosed as part of his considerations on the application of section 43 above. The same considerations apply in this respect.
51. The council's arguments have weight, but are to an extent speculative. There is however an identifiable and foreseeable detriment to the disclosure of the information. Whilst smaller companies have agreed to contract with the council as regards these services they would have done so expecting that the figures agreed would be held in confidence.
52. In general openness in the market is a benefit to the public. Competition serves to keep prices under control and acts as a guard against monopolies being created on the provision of services.
53. The disclosure of some details of the winning tenders will generally lead to better, more informed tenders being submitted in the future.
54. In this case the council is arguing that a disclosure of the information would allow larger companies to outbid and take over smaller companies contracts. This may lead to the public getting a better financial deal in the short term, however, the council is arguing that this would also lead to less competition. It has decided that protecting the smaller companies' interests, and the interests of retaining the current competition levels, overrides the public interest in transparency and allowing scrutiny of its financial decision making in this respect.
55. The Commissioner notes that more than one large company may be involved in the area. If that is the case competition would be likely to remain even if smaller companies were to fail in bids for the contracts concerned. Overall lower bids by the larger companies would generally benefit the public initially. It may only be in a situation where one

company developed a monopoly over the services that issues highlighted by the council would come about.

56. Whilst the council's arguments are reasonable this is nevertheless little different to the market in other areas. Smaller retail businesses struggle against the pricing power of larger retail units. Smaller businesses in general struggle to compete against larger businesses unless they can offer something different or better to their customers. In this contract the ability to do this may have been reduced by the predetermination of the standards of service stipulated by the council within the tendering documents.
57. Nevertheless it is clear that if businesses could not cope with the loss of these contracts they may go out of business altogether, with resulting job losses and a loss of competition in the market.
58. The Commissioner does not consider that the council's arguments have an overwhelming weight. Larger companies which have failed to win the tender bids this time will be likely to reduce or better their bids in any event during the next tender. The council stated that the tendering process pre-determined standards in carrying out the contracts. If all or most of the other aspects of the tender have been pre-determined then it is largely only price which will differ between the tender bids. The bigger companies will therefore look to this aspect automatically in the next tender if they wish to ensure their chances of success for any particular routes.
59. If bigger companies are determined to win the tender they will make the necessary adjustments to their price bids to ensure that they win the tender regardless of whether they have information regarding the bids in this instance. The issues foreseen by the council in this respect are therefore likely to occur whether or not this information is disclosed.

Conclusions

60. The Commissioner notes that, to a degree, the council's argument about the potential for some of the smaller businesses to go out of business and for larger companies to take over the routes is speculation, albeit that it has provided some background information to support these arguments.
61. Additionally when the bigger companies only have price as a means of winning a contract they will obviously need to cut price in their tender bids in the future as this is the only means available to win the contract. Whether or not they have access to the current successful bids of other companies is only relevant in providing some indication of the prices accepted as successful in the last tender and the levels at which the company might need to bid to win the contract in the future.

62. The Commissioner is satisfied that on a basic level, the rights of individuals to know the financial agreements made by the council is essential in creating transparency and trust in the council's financial decision making. Given the weaknesses highlighted in the above arguments he has therefore decided that the public interest rests in the information being disclosed.
63. On balance therefore the Commissioner considers that the public interest in the disclosure of the information would provide a defence to the breach of confidence. The Commissioner therefore considers that the council was not correct to apply section 41 to the information.

Right of appeal

64. 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

65. 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.
66. 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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