

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 December 2013

Public Authority: The London Borough of Southwark
Address: PO Box 64529
London
SE1P 5LX

Decision (including any steps ordered)

1. The complainant submitted a request to the London Borough of Southwark (the Council) for the cost of repainting double yellow lines on a particular street. The Council withheld this information under section 43(2) of FOIA on the basis that disclosure would prejudice both its interests and those of its contractor who carried out the work. The Commissioner is satisfied that disclosure of the withheld information would result in prejudice to the contractor's commercial interests and furthermore would be likely to prejudice the Council's commercial interests. The information is therefore exempt from disclosure on the basis of section 43(2) of FOIA. The Commissioner has also concluded that the public interest favours withholding the information.

Request and response

2. The complainant submitted the following request to the Council on 28 May 2013:

'1. The last time Southwark Council repainted the double yellow lines on Hampton Street SE1 6SN and the cost of repainting them.

2. How many PCN's were issued for contraventions on parking on the double yellow lines on Hampton Street, how many of the PCN's have been appealed successfully and how much money the Council was paid by these non-compliant drivers for these contraventions since the Council last repainted the double yellow lines on Hampton Street.'

3. In an undated response the Council provided all of the information sought by request 2. In relation to request 1, it explained that it only held records dating back to August 2005 but provided the dates and details of the three lining jobs completed since then. The Council argued that the costs of these works were exempt from disclosure on the basis of section 43(2) of FOIA.
4. The complainant contacted the Council on 28 June 2013 in order to complain about the decision to apply section 43(2) and asked for an internal review to be conducted.
5. The Council informed him of the outcome of the internal review on 5 August 2013. The review upheld the application of section 43(2).

Scope of the case

6. The complainant contacted the Commissioner on 5 August 2013 in order to complain about the Council's application of section 43(2). He indicated that he intended to use the information in relation to a parking appeal submitted to Parking and Traffic Appeals Service and thus it would be used as written evidence seen by the adjudicator of the appeal rather than being disclosed to the general public.

Reasons for decision

Section 43 – commercial interests

7. 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).'

8. 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.
9. 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

10. The Council argued that disclosure of the withheld information would - as opposed to simply being likely to - prejudice its commercial interests and those of its contractor, Conway AECOM, which was paid to carry out the line painting work in question. The Council explained that if the Commissioner did not accept that this higher threshold of likelihood was met then in the alternative it would argue that disclosure would be likely to prejudice the commercial interests of both parties.
11. With regard to its own commercial interests, the Council argued that its ability to achieve the best price for the goods and services it commissions may be prejudiced if information about the rates it has previously agreed for goods and services is disclosed. The risk is that price submissions in future tendering processes will be pitched at a level reflecting what contractors believe the Council will be willing to pay and not at a level at which contractors believe they can deliver goods and services at the best possible price.
12. The Council explained that the works in question were carried out under the terms of a maintenance contract which had recently been re-tendered and a new contract commenced on 1 April 2013. This contract runs for six years, with a possible two year extension.
13. Furthermore, the Council suggested that contractors may be less willing to participate in a tendering process with the Council if it cannot be

certain that information about prices will not be kept confidential. This may reduce the number of bidders, lessen competition and reduce the Council's options. This may in turn result in the Council having to pay more for goods and services than it might otherwise have done had there been more competition.

14. With regard to the contractor who carried out the line painting works, the Council argued that it was in Conway AECOM's commercial interest that it was able to operate fairly and 'on a level playing field' with its competitors. Competitive tendering processes seek to enable this in part by ensuring that information passed to contracting organisations should not be disclosed in the event that another organisation should obtain a competitive advantage if it came into possession of the information.
15. The Council explained that although tendering process with regard to the current contract had been completed, there was still a real risk of Conway AECOM's commercial interests being prejudiced. This was because its current rates for such work were based on the rates detailed in the requested information. Furthermore, the Council explained it believed that the likelihood of this prejudice occurring was one that met the higher threshold given the nature of the work covered by the contract, the number of local highway authorities who will be seeking to tender for this work, and the regularity of such tendering opportunities.
16. In order to evidence Conway AECOM's position, the Commissioner was provided with an exchange of emails between the Council and contractor outlining why it believed that disclosure of the withheld information would harm its commercial interests.

The Commissioner's position

17. With regard to the three limb test for engaging a prejudice based exemption set out at paragraph 8, 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 both the Council and the contractor, clearly relates to the interests which section 43(2) is designed to protect.
18. 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 to both the Council's and Conway AECOM's commercial interests. This is because it is broadly accepted that a situation of information asymmetry - where one party to a commercial transaction has more (or better) information than the other - is highly likely to distort the competitive buying process to the extent that the party in a position of having less (or worse) information is commercially disadvantaged. Consequently it is reasonable to argue that disclosure of

the information could prejudice both the Council's commercial interests when it seeks to retender for similar works in the future and Conway AECOM's commercial interests when it tenders for similar contracts in the future with other local authorities. Moreover, the Commissioner is satisfied that the resulting prejudice for both parties can be correctly described as ones of substance given the value of such contracts.

19. In reaching this view, the Commissioner recognises that the Council will not seek to retender for this contract for another six, or potentially eight, years and as a consequence it is possible that the sensitivity of the pricing information which has been withheld may reduce over such a lengthy period of time. However, based upon the content of the submissions provided to him by the Council the Commissioner is persuaded that given the particular nature of the market for these services, it is still plausible to argue that the disclosure of these prices could undermine the Council's negotiating position in six or eight years time.
20. However, the Commissioner is not prepared to accept that there is a causal link between disclosure of the withheld information and contractors being less willing to participate in future tendering processes undertaken by the Council. In the Commissioner's opinion this is a generic argument, unsubstantiated by any particular evidence, eg submissions which demonstrate that the market in question is one where there are a very limited number of suppliers.
21. With regard to the third limb of the prejudice test the Commissioner notes that the Council has argued that the exemption is engaged at the higher threshold, ie that disclosure would occur if the withheld information was disclosed. In relation to the contractor's commercial interests, the Commissioner is satisfied that this higher threshold is met. This because he accepts that the circumstances under which the contractor's commercial interests could be prejudiced are ones that are likely to occur frequently given the number of highway authorities who will be seeking to tender for such work and the regularity of the tendering opportunities.
22. However, in respect of the Council's own commercial interests, the Commissioner is not persuaded that the higher threshold is met, albeit that the lower threshold of would be likely is. The Commissioner has reached this conclusion on the basis that the Council will not seek to retender for this contract for another six, possibly eight, years. Although for the reasons discussed above, the Commissioner does not believe that this passage of time undermines the causal link between disclosure of the information and harm to the Council's commercial interests, the Commissioner is of the view that the passage of time makes it difficult

to convincingly argue that prejudice would occur, as opposed to simply being likely to.

23. In reaching this conclusion, the Commissioner notes the complainant's suggestion that if the withheld information had been provided to him then he would have simply used it as part of an appeal to Parking and Traffic Appeals Service rather than placing the information in the public domain. However, disclosure of any information under FOIA is taken to be disclosure to the world at large, regardless as to how a particular requester intends to use the information. Consequently, the Commissioner does not believe that complainant's suggestion affects his finding that section 43(2) is engaged.

Public interest test

24. 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

25. The Council acknowledged that there was a public interest in disclosure of information in order to ensure that it was transparent about how public money had been spent and to reassure the public that it has been used effectively to secure best value.
26. As noted above, in submitting his request the complainant indicated that he needed the withheld information for an appeal to the Parking and Traffic Appeals Service.

Public interest arguments in favour of maintaining the exemption

27. The Council argued that there is a strong public interest in it achieving the best price that it can when purchasing goods and services so as to protect public funds and achieve value for money, particularly in the current funding climate that local authorities have to operate in.
28. Furthermore, it argued that there is a public interest in ensuring that companies are able to compete fairly. There was also a public interest in ensuring that there is competition for public sector contracts.

Balance of the public interest arguments

29. The Commissioner agrees that there is a clear public interest in public authorities being open and transparent about the way in which public

money is spent. However, in the particular circumstances of this case given the very specific nature of the requested information, it would only provide the public with a very limited insight into how the Council had spent these funds. Furthermore, the Commissioner considers the complainant's desire to use the information as part of an appeal against a parking ticket to represent a purely personal and private interest and consequently this line of argument does not add any weight in favour of disclosing the withheld information.

30. With regard to the arguments in favour of maintaining the exemption, the Commissioner agrees that it is very strongly in the public interest that the Council is able to achieve value for money when it purchases goods and services. Furthermore, the Commissioner believes 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

31. 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: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

32. 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.
33. 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
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