

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 November 2015

Public Authority: Brighton and Hove City Council

Address: Kings House
Grand Avenue
Hove
BN3 2LS

Decision (including any steps ordered)

1. The complainant requested information from Brighton and Hove City Council ("the council") relating to its contract for bus shelter advertising. The council supplied some information but refused other information using the exemption under section 43(2) of the Freedom of Information Act 2000 ("the FOIA"). This exemption concerns commercial interests. During the Commissioner's investigation, the council said that it wished to change its position. It said that in relation to one of the requests it could neither confirm nor deny whether the information was held in accordance with section 43(3) because to do so would be likely to cause prejudice to commercial interests. In relation to the remaining information, the council wished to rely on the additional exemptions under section 41(1) and 44(1) as well as section 43(2). These exemptions concern confidential information and circumstances where the disclosure is prohibited under law. The Commissioner's decision is that the council incorrectly claimed that it cannot confirm or deny whether the information was held relating to one of the requests. The Commissioner was not persuaded that any of the exemptions relied upon were engaged in the circumstances of this case. He has ordered the council to confirm or deny whether the information was held in relation to one of the requests, and to disclose it if it was. He has also ordered the disclosure of the other information held. This decision notice includes a confidential annex.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

- In relation to the requests, "*What are the financial benefits to the Council annually and over the life of the contract*" and "*Are these payments made on a regular basis and if so when*", the council should disclose the information it held to the complainant.
 - In relation to the request, "*Does the council receive any discounts on advertising it purchases and if so what percentage*", the council should confirm or deny whether the information was held and if it was held, it should disclose it to the complainant
3. 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

4. The complainant requested information from the council on 22 May 2015 in the following terms:
- "*What is the nature and length of any contract between the council with a named supplier of Bus Shelters carrying advertising*
 - "*What number of these shelters are owned by the advertising supplier and what number owned by the Council*
 - "*What are the financial benefits to the Council annually and over the life of the contract*
 - "*Are these payments made on a regular basis and if so when*
 - "*Does the council receive any discounts on advertising it purchases and if so what percentage*"
5. The council responded on 10 June 2015. It responded to the first two bullet points. In relation to the remaining points, the council said that this information was exempt under section 43(2) of the FOIA. This exemption relates to commercial interests.
6. The complainant requested an internal review on 11 June 2015.
7. The council completed its internal review on 9 July 2015. The council accepted that it had not provided an adequate refusal notice but it stated that it wished to maintain that the information was exempt under section 43(2) and the public interest favoured maintaining the exemption.

Scope of the case

8. The complainant contacted the Commissioner on 10 July 2015 to complain about the way his request for information had been handled. The complainant asked the Commissioner to consider whether the council had correctly withheld the information using the exemption under section 43(2).
9. As additional reasons for withholding the information were provided during the course of the Commissioner's investigation, the Commissioner also considered the additional arguments including the use of the exemptions under section 43(3), 41(1) and 44(1) of the FOIA.

Reasons for decision

Section 43(2) – Commercial interests

10. The council relied on this exemption in relation to the following two requests:
 - *What are the financial benefits to the Council annually and over the life of the contract*
 - *Are these payments made on a regular basis and if so when*
11. The exemption under section 43(2) is engaged if disclosure of the information would or would be likely to prejudice the commercial interests of any person, including the public authority. The Commissioner's published guidance is available on the website here:
<https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/>
12. The Commissioner's guidance explains that a commercial interest relates to a person's ability to participate competitively in a commercial activity i.e. the purchase and sale of goods or services. In this case, the information relates to a contract for providing a service (the provision of bus shelters carrying advertising). The parties do not dispute that the information is commercial in nature and the Commissioner accepts that this is the case.
13. The council told the Commissioner that it wished to argue that disclosure of the information would be likely to prejudice its own commercial interests initially and then subsequently expanded this to include prejudice to the commercial interests of its contractor, Clear Channel

UK. For clarity, "Would be likely to" has been interpreted by the Information Tribunal to mean that there must be a real and significant risk of prejudice that is substantially more than remote, although it need not be more probable than not.

14. The council explained that it was concerned that the disclosure would be likely to prejudice its ability to achieve "best value" because disclosure would be likely to influence bids in a future tender process. At the time of the request, the tendering process was due to begin in August 2015. As the initial tender provided an unsatisfactory outcome, at the time of writing this decision notice, the Commissioner understands that the council is redrafting the specification before beginning the tender process again. It does not expect to know the outcome until December 2015.
15. Following consultation with its contractor, Clear Channel, the council received some representations, which the council said it was prepared to adopt in full. The representations indicated that Clear Channel considered that disclosure would be likely to cause prejudice to its own commercial interests as well as those of the council. Clear Channel argued that the outdoor advertising market is highly competitive and any advantage gained by one of its competitors would be likely to put Clear Channel at a significant disadvantage and would be likely to distort the market in an unfair way. Clear Channel also argued that the disclosure would allow potential clients of Clear Channel to amend their offers in any subsequent tenders to its disadvantage.
16. Clear Channel also expanded on the argument relating to prejudice to the council's commercial interests. It said that disclosure of the information would make any procurement process unfair which could lead to challenges to the award of a new contract from any bidder who is not privy to this information.
17. The Commissioner's published guidance explains that in general, commercial sensitivity is likely to diminish over time. In this case, the council's current contract has been in existence since 1999. The Commissioner's view is that the market conditions, as well as the council's expectations, are likely to have changed considerably since then. The Commissioner explained to the council that it was difficult to see precisely how information that is of such a significant age would be likely to influence bids of contractors bidding for a contract in 2015 to any significant extent. The Commissioner also said that his assumption was that there would be a healthy amount of competition for the contract (an assumption which Clear Channel subsequently confirmed) and this would be likely to encourage the best value. In view of the level of competition, it seems unlikely to the Commissioner that contractors would be unduly influenced by information dating back nearly 17 years

and that any future tender processes would be unfair as a result. Clear Channel asserted that the information was "current" but presented no justification or evidence to support that statement, and the council declined to engage with the Commissioner's comments about the age of the information.

18. On the subject of prejudice to Clear Channel's own commercial interests, the Commissioner did not consider that he was provided with sufficient evidence or argument to justify the statement that disclosure would be likely to cause prejudice. As noted above, Clear Channel did not engage with the Commissioner's assessment that the information appeared to be too out of date to be of real use to a competitor bidding for contracts in the present day. In relation to the concern about "potential clients" of Clear Channel amending their offers in future tender processes, again, without evidence or justification for the statement that 17 year old information is still "current" and relevant to any future tender processes, the Commissioner was unable to accept the argument. The council declined to offer any further supporting evidence or argument in support of Clear Channel's comments. Without further engagement, the Commissioner was not prepared to accept that the exemption had been correctly engaged.
19. The council's and the contractor's argument above seemed focused on the disclosure of the precise financial value of the contract. There were no specific comments made in relation to why the parties were not willing to respond to the request to confirm if payments are made on a regular basis and if so when. It was not apparent to the Commissioner that there was any basis for arguing that this information was exempt under section 43(2).
20. Furthermore, although the Commissioner does not need to consider the public interest if he is not satisfied that the exemption is engaged, the Commissioner would like to comment in any event that it appears to him that the public interest in disclosure of this information is particularly strong. In general, it is important that public authorities are as transparent and accountable as possible with the public about financial contracts they have entered into with third parties, particularly in the current economic climate where local authority budgets are under pressure. The wide variety of benefits that it is possible to gain from these contracts (as evidenced by the complainant's responses from a large number of other authorities) suggests that there would be a weighty public interest in allowing the public and other authorities to understand and compare the financial benefits which have been negotiated by the public authorities concerned. This would help to assess the performance of authorities in achieving best value and help to encourage competition from other suppliers. Transparency is even more important where the contract which was entered into by the public

authority was for such a lengthy term (in this case 15 years), and the Office of Fair Trading has previously expressed concern about the competitiveness of long term contracts in this area, in a marketplace dominated by three main companies, including Clear Channel UK:

<https://www.gov.uk/cma-cases/street-furniture-outdoor-advertising-contracts-between-media-owners-and-local-authorities>

Section 43(3) – Duty to confirm or deny does not arise in the case of prejudice to commercial interests

21. The council relied on this exemption in relation to the following request:

“Does the council receive any discounts on advertising it purchases and if so what percentage”

22. Section 1(1)(a) of the FOIA creates a general duty upon public authorities to confirm or deny whether information is held when a request is received. In this case, the council initially confirmed that the information was held and cited the exemption under section 43(2). It subsequently explained to the Commissioner that it wished to amend its position to rely on section 43(3) instead, which is that it cannot confirm or deny whether the information was held as to do so would be likely to prejudice its commercial interests.

23. It has been necessary to consider the nature of the council’s argument in a confidential annex, shared only with the council. The Commissioner’s decision was that section 43(3) did not apply.

Section 41(1) – Information provided in confidence

24. This exemption was raised by Clear Channel in the first instance. The council said that it was prepared to adopt the argument. The exemption under section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and if the disclosure of the information to the public otherwise than under the FOIA would constitute a breach of confidence actionable by that or any other person. The Commissioner’s published guidance is available on the website.

25. As discussed in the Commissioner’s guidance, the contents of a contract between a public authority and a third party generally will not be information obtained by an authority from another person. This is because the terms of the contract will have been mutually agreed by the respective parties, rather than provided by one party to another. In *Department of Health v ICO* (EA/2008/0018, 18 November 2008), the Information Tribunal commented as follows:

"If the contract signifies one party stating: 'these are the terms upon which we are prepared to enter into a contract with you' by the acceptance of that contract the other party is simultaneously stating 'and these are the terms upon which we are prepared to enter into a contract with you'. Consequently the contract terms were mutually agreed and therefore not obtained by either party." (Para. 34)

26. Furthermore, in the context of commercial information, the Commissioner would expect to be satisfied that the disclosure of the information would be detrimental to the confider, in other words, that it would or would be likely to cause commercial prejudice. As already explained above, the Commissioner was not persuaded that this was the case and he does not therefore consider that this exemption was engaged.

Section 44(1)(a) and (b) – Disclosure is prohibited under an enactment or is incompatible with any Community obligation

27. This exemption provides that information is exempt if its disclosure otherwise than under the FOIA is prohibited by or under any enactment, is incompatible with any community obligation or would constitute or be punishable as a contempt of court. The Commissioner's published guidance is available on the website.
28. This exemption was also raised by Clear Channel in the first instance and the council subsequently confirmed that it wished to adopt the argument. Clear Channel asserted that the information was exempt because the disclosure of financial information is prohibited under EU and UK competition law. Clear Channel referred specifically to Article 101 of the Treaty on the Functioning of the European Union and section 2 of the Competition Act 1998, but only cited section 44(1)(b) specifically.
29. Article 101 of the Treaty referred to reads as follows:

"The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary conditions which, by their nature or according to commercial usage, have no connection with the subject of such contracts”.

30. Section 2 of the Competition Act 1998 reads as follows:

“Agreements etc. preventing, restricting or distorting competition.

(1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which –

(a) may affect trade within the United Kingdom, and

(b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,

are prohibited unless they are exempt in accordance with the provisions of this part.

(2) Subsection (1) applies, in particular, to agreements, decisions or practices which –

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development or investment;

(c) Share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts

31. As discussed in the Commissioner’s guidance, section 44(1)(b) provides for the exemption of information where its disclosure is incompatible with any European Community obligation. Where these obligations are

incorporated into UK law such as by an Act of Parliament or Regulations, they will be covered by section 44(1)(a). Section 2 of the Competition Act appears to incorporate into UK law article 101 of the Treaty.

32. The Commissioner expressed concern that the council had not sought and was not willing to seek its own legal advice, contrary to the Commissioner's guidance. The council was willing to adopt Clear Channel's argument, but the Commissioner was not satisfied that the council had properly considered or understood the nature of that argument. The Commissioner explained to the council that it would need to justify its position in more detail, explaining more precisely why it considered that disclosure of the information in this case would be prohibited by the Competition Act 1998. On the face of the limited argument presented (which essentially amounted to a statement that the information was exempt under section 44), the legislation referred to above, and the facts of this case, it was not apparent to the Commissioner why disclosure of the specific information would be prohibited. Without further engagement from the council, the Commissioner was not prepared to support its position.

Right of appeal

33. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

34. 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.
35. 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

Andrew White
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