

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 February 2017

Public Authority: Central Bedfordshire Council

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

Decision (including any steps ordered)

1. The complainant has requested information relating to a Gas Maintenance and Service Contract. Central Bedfordshire Council withheld the information under the exemptions for information provided in confidence (section 41) and prejudice to commercial interests (section 43(2)).
2. The Commissioner's decision is that Central Bedfordshire Council has failed to demonstrate that section 41 and section 43(2) are engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant.
4. 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

5. On 10 March 2016, the complainant wrote to Central Bedfordshire Council (the "council") and requested information in the following terms:

"In relation to the Gas Maintenance and Service Contract advertised on 26/10/15.

Contract Number: CBC-0559-T-CE

(1) For each of the successful Pre-Qualification Questionnaires received could you please supply copies of the responses received in respect of Question 6: Technical and Professional Ability, and their allocated scores?

Could you please issue this information as one document per PQQ containing all 3 examples.

(2) As per your evaluation methodology a maximum of 10 marks could be achieved for each Contract Example, therefore can you please let me have a breakdown of the criteria and associated scores to explain how these 10 marks were apportioned to each Example?

I do not need to know who submitted these responses and do not require any responses to any other questions asked within the PQQ."

6. The council responded on 6 April 2016. It stated that it was withholding the information under the FOIA exemptions for information provided in confidence (section 41) and prejudice to commercial interests (section 43(2)).
7. Following an internal review the council wrote to the complainant on 2 November 2016. It stated that it was maintaining its position.

Scope of the case

8. On 3 November 2016, following the internal review, the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly applied exemptions to withhold the requested information.

Reasons for decision

Section 43(2) – commercial interests

10. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.
11. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43. This comments 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."*¹
12. The information in this case relates to a tender exercise for a Gas Maintenance and Service Contract. The Commissioner is satisfied that the information relates to a commercial interest. However, it will only fall within the scope of the exemption if its disclosure would, or would be likely to prejudice a commercial interest. The Commissioner has gone on to consider the nature of the prejudice which the council has argued that disclosure would create.

The Nature of the Prejudice

13. In investigating complaints which involve a consideration of prejudice arguments, the Commissioner considers that the relevant test is not a weak test, and a public authority must be able to point to prejudice which is "real, actual or of substance" and to show some causal link between the potential disclosure and the prejudice. As long as the prejudice is real and not trivial, its severity is not relevant to engaging the exemption – this will be factored in at the public interest test stage.
14. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of

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http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.

15. In this case the council has argued that the companies who submitted the successful tender would be disadvantaged by disclosure. The council has not specified which limb clarifying the probability of prejudice occurring it is relying on so the Commissioner has defaulted to the higher threshold of "would prejudice", as she routinely does in such cases.
16. As regards the nature of the prejudice which would be caused by disclosure the council has stated:

*"Companies who submitted the successful tender would be disadvantaged as it would make aware their work practices thus divulging their technical and professional ability and give Oakray an unfair advantage in any future tender process."*²
17. The Commissioner notes that the council's submission makes no reference to any specific elements of the withheld information, nor does it clearly define what form the "disadvantage" would take and explain how disclosure would produce such disadvantages. The Commissioner considers that the council's submission lacks detail, is generic in nature and suggests that it either does not understand the evidential burden that must be met to engage the exemption or that it has not taken the matter sufficiently seriously.
18. Part IV of the code of practice issued under section 45 of the FOIA (the "code") recommends that, where requests for information potentially relate to the interests of third parties, authorities should consider consulting with such parties and seeking their views as to the disclosure of the information³.
19. Ultimately, the decision whether to disclosure requested information rests with the public authority to which a request is made, however, the Commissioner considers that it is in keeping with the best practice identified in the code to ensure arguments about prejudice to a party or

² The complainant submitted the request on behalf of Oakray Limited.

³ The code is published online here:

<http://webarchive.nationalarchives.gov.uk/20150730125042/http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

parties' interests reflect the views of those to which the prejudice relates.

20. In this case the council confirmed that it did not consult with any of the potentially affected parties. This, in addition to the already scant and speculative nature of the council's submissions leads the Commissioner to conclude that the council's arguments do not necessarily reflect the concerns (if any) of the identified affected parties.
21. In cases where a public authority has failed to provide adequate arguments and has otherwise not demonstrated that an exemption is engaged, the Commissioner does not consider it to be her responsibility to generate arguments on its behalf.
22. In this case, the arguments provided by the council are so lacking in detail that the Commissioner considers that they would even fail to meet the weaker limb of the probability of the prejudice arising, which requires it to be shown that *"...prejudice should be real and significant, and certainly more than hypothetical or remote."*
23. Having considered the submissions the Commissioner has concluded that the council has failed to clearly define the actual prejudice and to make concrete the causal link between the information being disclosed and the prejudicial effects occurring. In light of this, she has concluded that the council has not shown that disclosure of the information would result in prejudice to the commercial interests of the parties identified.
24. As she has found that the exemption is not engaged the Commissioner has not gone on to consider the public interest test.

Section 41 – information provided in confidence

25. The council has applied section 41 to withhold the information identified in both parts of the request.
26. Section 41(1) of the FOIA states that information is exempt from disclosure if:
 - "(a) it was obtained by the public authority from any other person (including another public authority), and*
 - (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*

Was the information obtained by the council from any other person?

27. The council did not explicitly address this criterion for engaging the exemption. However, in view of the nature of the information requested in part 1 of the request, which consists of information submitted by companies applying for the tender, the Commissioner accepts that it is self-evident that this was provided to the council by other persons. However, part 2 of the request relates to the council's own evaluation process so it is not apparent that this falls within the scope of this element of the exemption.
28. As it is not self-evident that part 2 of the request identifies information obtained by the council from a third party and, as the council has not provided any submissions which provide clarification, the council considers that part 2 of the request is not covered by the exception. The Commissioner has, therefore, gone on to consider whether the information in part 1 of the request satisfies the other criteria for engaging the exemption.

Does the information have the necessary quality of confidence?

29. For the information to have the necessary quality of confidence it must not be trivial and otherwise available to the public. Information which is of a trivial nature or already available to the public cannot be regarded as having the necessary quality of confidence.
30. Having viewed the withheld information the Commissioner notes that it contains details of tender applicants' technical and professional ability and working practices. The Commissioner is satisfied that the information is not trivial, however, the council has not clarified whether the information is otherwise publicly accessible. The Commissioner is struck by the council's lack of attention to detail in its submissions but has set aside the question of the accessibility of the information for now and considered whether disclosure of the information would in fact result in any detriment to the parties to whom the duty of confidence is owed.

Would an unauthorised use of the withheld information cause detriment to the confider and result in an actionable breach of confidence?

31. In order for the exemption to be engaged it is necessary to demonstrate that disclosure of information would cause detriment to the confider and result in an actionable breach of confidence.
32. In relation to the putative detriment to the third parties submitting information as part of the tender process, the council has argued that it *"...has an obligation of confidence in that divulging information to third parties on the contents of contract tender in relation to technical and*

professional ability would provide information on business practices that would give other potential contractors an unfair advantage."

33. The Commissioner notes that the council's submission in relation to potential detriment, again, lacks detail and is wholly generic in nature. As she has found in her analysis of the council's application of section 43(2), above, the council has not shown that the disclosure of the information would result in prejudice to the parties concerned. In the absence of any additional detail provided in support of the ascribed detriment in the context of section 41, the Commissioner considers that it has not been shown that disclosure would result in detriment to the confider.
34. The Commissioner makes it clear in her correspondence with public authorities that she will give them one chance to set out their final position as regards the handling of a request for information and specifies the level of detail that is required in order to demonstrate the engagement of exemptions.
35. Where an authority fails to provide sufficient evidence in its submissions or does not otherwise explain why information should be withheld, the Commissioner does not consider it is her role to generate arguments on its behalf.
36. In this case, the Commissioner has concluded that, in relation to part 2 of the request, the council has failed to show that the information was obtained from any other person so it does not fall within the scope of the exemption.
37. In relation to part 1 of the request, the Commissioner considers that the council has failed to explain whether the information is otherwise publically available and failed to show that the detriment limb of the confidence test has been proved. She finds that the council has failed to show that there would be an actionable claim for breach of confidence and the exemption at section 41 does not apply.

Other matters

38. Although they do not form part of this decision notice the Commissioner would like to note the following matters of concern.

Internal Review

39. The code of practice issued under section 45 of the FOIA (the "code") recommends that public authorities should provide a procedure for dealing with complaints about the handling of requests (commonly known as "internal review")⁴. The code recommends that internal reviews should encourage a prompt determination in relation to any complaint.
40. The Commissioner echoes the recommendations of the code and considers that a "prompt determination" in relation to the timeframe for conducting internal reviews should, in normal cases, equate to 20 working days. In exceptional cases this might be extended to 40 working days and the Commissioner does not consider it reasonable for internal reviews to extend beyond these timeframes.
41. In this case the complainant submitted their request for internal review on 8 April 2016 and the council issued its review response, after being prompted by the Commissioner, on 2 November 2016.
42. The Commissioner expects that, in its future handling of internal reviews, the council will have regard for the recommendations of the code and the Commissioner's own guidelines.

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<http://webarchive.nationalarchives.gov.uk/20150730125042/http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

Right of appeal

43. 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

44. 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.
45. 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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SK9 5AF