

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 March 2018

Public Authority: Redbridge London Borough Council
Address: 128 – 142 High Road
Town Hall
Ilford
Essex
IG1 1DD

Decision (including any steps ordered)

1. The complainant made a freedom of information request to Redbridge London Borough Council (“the Council”) for details of the charges local schools had paid for insurance cover. The Council refused the request under the exemption in section 43(2) (commercial interests) of FOIA.
2. The Commissioner’s decision is that the section 43(2) exemption is not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The Council shall disclose to the complainant the premiums paid to Zurich for “School Buildings” for the years since 2010 up until the date the request was received.
 - The Council shall disclose to the complainant the charges levied on Woodbridge High School and the charges levied on all Redbridge Schools for all years since 2010 for which information is held up until the date the request was received.
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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 10 May 2017 the complainant made a freedom of information request to the Council which read as follows:

"Since the beginning of the initial Zurich insurance contract in 2010, please provide me with a summary of the actual premium charges that were paid to this company on behalf of Woodbridge High School on a year-by-year basis, against charges levied to the school by the local authority each year."

"Since the beginning of the Zurich insurance contract in 2010, please provide me with a summary of the premium charges that were paid to this company on behalf of all Redbridge Schools (bottom line totals will be fine, as I am not seeking individual school information) on a year-by-year basis, against charges levied to the schools by the local authority each year."

6. The Council responded to the request on 6 June 2017 when it explained that the information was being withheld under the exemption in section 43(2) (commercial interests) although it failed to explain why.
7. The complainant subsequently asked the Council to carry out an internal review and it presented its findings on 4 July 2017. The review upheld the decision to refuse the request under section 43(2) and explained that disclosure would, or would be likely to, prejudice the commercial interests of both the Council and Zurich Mutual. The internal review failed to mention the public interest test.

Scope of the case

8. On 10 July 2017 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of her investigation to be to consider whether the Council has correctly withheld the requested information under the section 43(2) exemption.

Reasons for decision

Section 43(2) – Commercial interests

10. The Council has explained that it does not hold all of the information requested by the complainant. Whilst it holds details of the insurance premiums paid to Zurich by the Council on behalf of Schools in the Borough, this is the total figure for all Council services. It does not hold information about the individual costs each School pays to Zurich as the premium is paid to Zurich as a Council wide sum. The premiums it pays do, however, include premiums specifically for school buildings and premiums relating to public liability and employer's liability which are those for the entire authority, including schools. The Commissioner is satisfied that the details of the premiums it pays for school buildings falls within the scope of the request. However, since the premiums for public liability and employers liability are not paid on behalf of schools but are rather, Council wide figures, this information is not caught by the request.
11. The Council also holds details of the charges it made to both Woodbridge High School and other Schools within Redbridge for providing insurance cover. The Council is seeking to withhold all of this information under section 43(2) on the basis that disclosure would prejudice the commercial interests of Zurich. Later, during the Commissioner's investigation it suggested that disclosure would also prejudice its own commercial interests.
12. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers 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.

13. Furthermore, when a public authority is claiming that disclosure of requested information would prejudice the commercial interests of a third party the Commissioner follows the findings of the Information Tribunal decision in the case *Derry Council v Information Commissioner [EA/2006/0014]*. This confirmed that it is not appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Instead, the Commissioner expects that arguments advanced by a public authority should be based on its prior knowledge of the third party's concerns.
14. 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 withheld information relates to the Council's provision of insurance cover from a commercial provider. The information clearly relates to a commercial service and the Commissioner accepts that the prejudice envisaged by the Council falls within the scope of the exemption. The Commissioner is satisfied that this first element of the test is met.
15. As regards the nature of the prejudice the Council first of all said that disclosure would prejudice the commercial interests of Zurich because it would reveal how it calculates its premiums. In particular it said that the information could be used in such a way as to determine the risk rating the company applies to this type of insurance policy.
16. Later on, the Council argued that if the information was disclosed it could also be used by a third party to both Zurich's and the Council's disadvantage in future procurement exercises relating to insurance coverage. It went on to explain that a retendering process for the renewal of the insurance cover for the whole of the Council's insurable interests had commenced and that if disclosed "this sensitive pre tender information" would become available to a potential bidder. It said that the industry expects and is aware that the Council should be starting the tender process. It argued that disclosing the information at this stage could lead to abnormally low tenders because an insurance broker could easily calculate its current insurer's risk ratings from this information and use this to their unfair advantage in the forthcoming insurance tender. It said that it was open to tenderers to ask questions as part of the tender exercise in which case it said that they would receive the appropriate information at the same time as everyone else. However, it

argued that it would be an unfair advantage for bidders to get advance information by using the FOI procedure.

17. The Council went on to say that if it disclosed the information any competitor of Zurich's would be able to disrupt the retendering exercise because they would have "inside information", that is to say a competitor would be able to "match if not undercut" Zurich's tender. The Council also provided the Commissioner with copies of correspondence it received from Zurich to demonstrate that it had sought their opinions on disclosure and that the use of the section 43(2) exemption reflected their concerns. Zurich explained that:

"Certain information included in our tender response is confidential and would, if disclosed under the FOIA prejudice our legitimate commercial interests as it could allow our competitors to obtain commercially sensitive information. Accordingly, we feel that information relating to reserving and pricing which is not already in the public domain is both confidential and commercially sensitive and could be regarded as exempt from disclosure under s41 and/ or s43 of the FOIA."

18. However, Zurich acknowledged that it was ultimately for the Council to decide if the information was exempt and to justify this.
19. During the course of the Commissioner's investigation the Council also said that it was of the view that disclosure would prejudice its own commercial interests as well because it could discourage bidders from coming forward, thereby reducing competition.
20. Dealing first with the Council's argument that disclosure would allow a competitor to calculate Zurich's risk ratings, the Commissioner is not satisfied that section 43(2) is engaged on this basis. She had asked the Council to elaborate on this line of argument and to explain how this might be done given that it had suggested that anyone could "easily calculate" this from the withheld information. In the Commissioner's view the Council has failed to answer this satisfactorily as the only further explanation it was able to offer was "Maybe calculation of risk ratings from this information is a technical matter using algorithms that we do not have access to." This amounts to little more than speculation and so the Commissioner has not taken this into account.
21. As regards the second argument that disclosure would allow a competitor to undercut Zurich in the future tendering exercise, the Commissioner has considered the Council's position against the actual information that has been requested. The Commissioner is aware that the Council is undertaking a retendering exercise for insurance services. However, the Commissioner is also aware that many of the schools

within Redbridge have already secured their own insurance cover, separate from the Council, and therefore will not be included as part of the new retendering process.

22. It is helpful at this point to consider the background to the request which the Commissioner understands followed a number of schools within Redbridge becoming dissatisfied at the cost of their insurance cover which was provided by Zurich via the Council. The complainant explained that in summer 2016, a Schools' procurement Working Party was set up by representative headteachers and school business managers from across Redbridge schools to consider alternative forms of service buy-backs from those which had traditionally been provided by the local authority over many years. The plan was, on completion of the various contractual tendering exercises, to offer to all schools the opportunity to sign up contractually with the alternative chosen providers for the services in question. The first alternative service buy-back considered by the working party was schools' insurance premiums.
23. The working party obtained alternative insurance quotations for local schools with which to compare against the current insurance premiums provided by the Council (schools are insured by Zurich but are invoiced by the Council). As a result the schools were offered like-for-like insurance cover significantly below what was offered by the Council and its provider, Zurich. The Commissioner understands that 28 schools subsequently withdrew from the Council's insurance cover provided by Zurich and bought into an alternative insurance scheme commencing on 1 July 2017 for an initial three year period and with a two year extension option at the end of this period.
24. The complainant also confirmed that following the decision of schools to seek alternative insurance cover the Council offered schools a cheaper deal at what he referred to as the "11th hour" and which in the case of the school he represented, was almost half the cost of the premiums that they had previously been paying.
25. The complainant argued that schools within Redbridge had been charged premiums significantly higher than the market rate and that from what they could gather, a considerable portion of the schools' annual premiums over the years had not actually reached the Council's external insurance company but had instead been retained centrally. The Commissioner understands that a "whistleblow" report has been submitted to the Council to this effect and that the Redbridge Secondary Headteachers' Group and the Redbridge Primary and Special Schools Headteachers' Association have both written to the Council to express their concerns about this.

26. The Commissioner has considered the Council's arguments and the history of the request. As she has mentioned, many of the schools have now obtained alternative insurance cover and therefore will not be covered by the Council's retendering exercise. As such, disclosing details of what these schools had been charged by the Council would not reveal any commercially sensitive information because they would be excluded from the new tender. Furthermore, the Council has confirmed that, as the complainant has suggested, there is a difference between what it charges schools for insurance premiums and what is paid to Zurich. However, it clarified that this is because it has a self-insurance fund and schools contribute both to the premiums paid to Zurich and this self-insurance fund. The amount charged to schools is a composite of both contributions. However, this does mean that the charges levied on the schools do not fully reflect the premiums charged by Zurich. As such the likelihood that disclosure would prejudice the commercial interests of Zurich is reduced.

27. The Commissioner is also mindful that the Council is retendering for insurance cover for all of its services, however, the withheld information only relates to schools which is just one element of this. Therefore in her view disclosure is unlikely to affect how competitors and potential bidders approach the retendering to any significant extent. Moreover, it appears to the Commissioner that both the Council and Zurich's arguments for withholding the information are focussed on the prejudice that would be caused by disclosure of more extensive information than what has actually been requested by the complainant. In particular, in explaining their reasons for applying section 43(2) they have both referenced the Agreed Terms document which includes full details about the cost of the insurance cover, including details of excess, claims handling fees and all the different itemised costs which make up the Council's cover. Obviously this is a much more extensive and revealing document than what the complainant has asked for and therefore the Commissioner considers that some of the Council's arguments overestimate the potential consequences of disclosure.

28. The Commissioner has also considered the fact that many of the schools within Redbridge were able to secure significantly better deals by arranging their own insurance cover and that the Council was itself able to offer schools very much reduced premiums when faced with the prospect of the schools leaving their scheme. The complainant has also suggested that schools have for many years been charged premiums above the market rate. In the Commissioner's view anyone submitting a bid as part of the retendering exercise for Council services is more likely to be guided by what is the market rate for this type of insurance cover rather than what the Council may have paid to Zurich for some of its services or what individual schools were charged by the Council in

previous years. Again, the Commissioner considers that this reduces the likelihood of disclosure prejudicing the retendering exercise.

29. Finally, the Commissioner has taken into account the Local Government Transparency Code, issued by the government and which sets out the minimum data that local authorities should be publishing as a matter of course.¹ In Particular, it recommends that local authorities should publish details of all expenditure over £500 including, for example, "individual invoices" and "payments for goods and services". The code also notes, when considering the impact on commercial confidentiality that:

"The Government has not seen any evidence that publishing details about contracts entered into by local authorities would prejudice procurement exercises or the interests of commercial organisations, or breach commercial confidentiality unless specific confidentiality clauses are included in contracts. Local authorities should expect to publish details of contracts newly entered into – commercial confidentiality should not, in itself, be a reason for local authorities to not follow the provisions of this Code."

30. Having taken all of the above into account, and after considering all the circumstances of the case, the Commissioner has found that disclosure would not prejudice the commercial interests of either Zurich or the Council. Consequently, the Commissioner has decided that the section 43(2) exemption is not engaged.

¹https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408386/150227_PUBLICATION_Final_LGTC_2015.pdf

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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: 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

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