

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 27 October 2020

**Public Authority:** Inspiring Futures through Learning  
**Address:** Fairfields Primary School  
Apollo Avenue  
Fairfields  
Milton Keynes  
MK11 4BA

#### Decision (including any steps ordered)

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1. The complainant requested from Inspiring Futures through Learning ("IFtL") information relating to the application which IFtL made to run the Glebe Farm School, Milton Keynes. IFtL withheld information under section 43(2) (commercial interests) of the FOIA to some parts of the request.
2. The Commissioner's decision is that IFtL correctly applied section 43(2) of the FOIA. Therefore, the Commissioner does not require IFtL to take any steps as a result of this decision.

#### Background

3. IFtL explained to the Commissioner that it applied for the new, all-through school in Milton Keynes in line with the Free School Presumption Competition (FSPC). IFtL was recently awarded the right to run Glebe Farm School, and it is due to open in 2022. The award was made subsequent to the FSPC run by Milton Keynes Council (MKC) with their recommendation of the award approved through the Regional Schools Commissioner's office for its region.

#### Request and response

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4. On 16 April 2020 the complainant requested information under the FOIA of the following description:

*"I should be grateful if you would forward the following information relating to Inspiring Futures Through Learning's application to run the Glebe Farm School, Milton Keynes.*

- (i) Copy of the completed application Form submitted to the LA*
  - (ii) Any documentation submitted in support of the application, e.g. Pre-opening skills and experience table, financial plan, CV of headteacher designate*
  - (iii) All correspondence relating to the application between IFtL and third parties, e.g. LA, Regional Schools Commissioner's office, other schools/Trusts*
  - (iv) Presentation given to selection panel and any handouts provided*
  - (v) Minutes from Trustee meetings at which this application was discussed".*
5. On the same day IFtL responded and stated that it had no record of the request for information.
  6. On 19 May 2020 IFtL received the original request.
  7. On 29 May 2020 IFtL provided its response to the request. IFtL withheld some of the information and applied the commercial interests exemption section 43(2) of the FOIA to parts 1, 2 and 4 of the request.
  8. With regards to part 3, IFtL considered the correspondence and disclosed some information which is not commercially sensitive. IFtL confirmed that no information was held relating to the application process between IFtL and the Regional Schools Commissioner's Office. IFtL applied section 43(2) to information which consisted of discussions about the application. Regarding part 5 of the request, IFtL provided information to this which was the relevant minutes.
  9. On the same day the complainant asked IFtL for an internal review on its decision not to provide all the information requested.
  10. On 15 July 2020 IFtL provided its internal review response. IFtL maintained its original position to withhold information to some parts of the request and it explained its reasons for doing so.

## **Scope of the case**

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11. The complainant contacted the Commissioner on 16 July 2020 to complain about the way her request for information had been handled.

Specifically, the complainant argued that the information withheld was considered commercially sensitive.

12. The following analysis focuses on whether the exemption at section 43(2) of the FOIA was cited correctly.

## Reasons for decision

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### Section 43(2) – prejudice to commercial interests

13. Section 43(2) of the FOIA states that information is exempt if its disclosure 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.
14. The exemption can be engaged on the basis that disclosing the information either “*would*” prejudice commercial interests, or the lower threshold that disclosure “*would be likely*” to prejudice those interests. The term “*likely*” is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice would be more probable than not.
15. For the Commissioner to accept that prejudice *would* result, she must be satisfied that this outcome would be more likely than not. The Council considered that disclosure of the requested information “*would be likely*” to prejudice its own commercial interests.
16. The withheld information relates wholly to a competitive Free School bid. It includes IFtL’s interview presentation and its application form. There are elements of the information that reveals how IFtL runs its organisation, its school improvement strategies, and its commercial approach.
17. IFtL stated its position that the information sought is its commercial bid, made under a confidential competitive process. It said that it would cause prejudice to the interest of IFtL if the information were disclosed. IFtL provided the Commissioner with the information which it considered commercially sensitive.
18. IFtL said “*We would respectfully suggest that in the business world a company bidding for a contract would not be expected to disclose its bid to a competitor in the same process, nor a competitor in the same area that will be in direct competition in future.*”

19. The Commissioner accepts on the basis of this reasoning that the information is commercial in nature. The next step is for the Commissioner to consider the prejudice which disclosure would or would be likely to cause and the relevant party or parties that would be affected.
20. For Section 43(2) to be engaged 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 commercial interests;
  - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the withheld information and the prejudice to those commercial interests; and
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, meaning whether there is at least a real and significant risk of the prejudice occurring.
21. With regards to the first criterion, the Commissioner accepts that the prejudice envisaged would likely be to the commercial interests of IFtL. Therefore, the Commissioner is satisfied that the first criterion is met. This is not to say that she agrees it will happen; simply that the criterion is met.
22. IFtL explained that the application which it submitted to the FSPC was made as part of a process to present its vision, values, ways of operating, school improvement model etc. Also, to engage in a free and frank exchange of views regarding the potential of the suitability of IFtL to be able to run a new all-through school in Milton Keynes.
23. IFtL stated that a commercial interest relates to its ability to participate competitively in a commercial activity. It said that the information – the bid which it submitted, was part of a commercial, competitive tender. IFtL reported that the information is being sought by its competitor that had also submitted a bid to the FSPC.
24. IFtL said that it considered whether it would be likely to compete in the future in a tender against the complainant. It argued that as the complainant is a competitor providing the same services as IFtL and in the same geographical area, it is more than probable and likely that IFtL and the complainant will tender against each other in the immediate future.

25. IFtL explained that it is a Multi-Academy Trust and it is in a growth phase, and may be likely to make further applications for Free School bids in Milton Keynes, Northamptonshire and neighbouring areas in futures years. Therefore, IFtL considers that its commercial interests in future bids would be prejudiced if some of the information requested were available to the public and its potential future commercial competitors.
26. Having considered the arguments, together with the withheld information, the Commissioner is satisfied that IFtL demonstrated that a causal relationship exists between the potential disclosure of the information being withheld, and the prejudice to its commercial interests. Therefore, the Commissioner considers that the second criterion has also been met.
27. Turning to the third criterion, IFtL considers that there is a real and significant risk of the prejudice occurring. It stated that the prejudice is that disclosure of the requested information would reveal the structure of its bids, pricing structure, method of delivery and implementation. All of which the IFtL believes it to be unique to them. It also believes that if disclosed, the information could be used as the basis of the complainant's next bid when they both next tender.
28. IFtL explained to the Commissioner that although it is a public body it is also "*a private company that relies on private income to be sustainable.*" IFtL said that it submits bids to public authorities under different regimes – 'Wave' and 'Free School Presumption Competitive' basis, and that it is similar to any other commercial business "*but straddle the two communities.*" IFtL argued that "*to allow disclosure of a bid made under a private, competitive process to a competitor, would set a precedent that would allow close competitors access to sensitive commercial information.*"
29. The Commissioner has considered these details and she believes that IFtL has clearly demonstrated that the disclosure of the information, would be likely to have a detrimental impact on its commercial activities; specifically, upon IFtL's ability to effectively bid for future tenders.
30. In light of IFtL's submissions, it is clear that disclosing the withheld information could result in competitors having access to sensitive commercial information. This could be used for a bid in the next tender for the same project. The Commissioner is of the view that it would not be fair to disclose information that would disadvantage the company in future tender processes.

31. The Commissioner notes that IFtL disclosed to the complainant some information which fulfilled elements of the request. The information included details of correspondence between IFtL and third parties, and also relevant minutes from meetings. However, IFtL withheld information to the remaining parts of the request on the basis it retains its commercial sensitivity.
32. Having viewed the withheld information and considered the arguments made, the Commissioner accepts that prejudice to the commercial interests of IFtL would be more likely than not to result through disclosure of the information in question. She therefore finds that disclosure would result in prejudice to the commercial interests of IFtL and, on this basis, section 43(2) of the FOIA is engaged.

### **Public interest test**

33. Having found that the exemption is engaged, the Commissioner has gone on to consider the public interest factors in favour of disclosing the withheld information and of maintaining the exemption. Although the Commissioner has found the section 43(2) exemption is engaged, the information may still be released if the public interest in disclosing it outweighs the public interest in maintaining the exemption.

#### *Public interest arguments in favour of disclosing the withheld information*

34. IFtL accepts that it is in the public interest for it to be open and transparent about its decision-making powers. IFtL said that it is a basic principle of democracy that processes and procedures are transparent. It also said that the wider public may be legitimately interested in any allegation of any wrongdoing.
35. It believes that the public interest in activities of IFtL is well served by publicly available information regarding the achievements and progress of the schools within, and that there is no additional information in IFtL's application documents for Glebe Farm that would not be considered commercially sensitive.
36. The complainant argued that the Department for Education (DfE) publishes all successful applications to open Free Schools through the 'Wave' programme on its website. Therefore, the complainant considers that *"the public interest in this information is already established and the commercial interest argument undermined."* She further argued that local authority competitions should be no different, and that the withheld information concerning IFtL's application to the Free School bid should be disclosed.

*Public interest arguments in favour of maintaining the exemption*

37. IFtL argued that in this case the transparency concerns the tender and how the local authority conducted this in respect of its processes and procedures. IFtL submitted that the disclosure of its bid does not impinge on transparency of local authority decision-making.
38. IFtL said that whilst a public interest in its application to the Free School bid may be present, it believes that the risk to its ability to engage fully in future processes and ensure that the public are served by a strong applicant, is greater than the risk of no public scrutiny.
39. IFtL recognises that some of the information contained in its application is in the public domain, i.e. results of existing IFtL schools, leadership profiles etc. which are available from publicly accessible sources. IFtL referred to this information in its response to the complainant.
40. With regards to any wrongdoing, IFtL accepts that there is a legitimate interest by the wider public in this. IFtL said that as far as it is aware, there has not been any allegation of wrongdoing made against IFtL. It may be, IFtL stated, that the complainant believes that there is some wrongdoing by the local authority in the way that it has conducted the tender process and the decision that they came to.
41. IFtL acknowledges the complainant's concerns about the tender process and her need to ensure that there is no suspicion of illegality. However, IFtL said that this is a matter for the local authority to respond to as it relates to process, procedure and various factors during the tendering process. The local authority will be able to set out their tender process and how they assessed bids. IFtL said that it does not believe *"that the disclosure of its individual, commercially sensitive bid made during a closed, competitive process should be disclosed as the essence of any alleged wrongdoing would be linked to local authority process, not the substantive content of our bid."*
42. IFtL referred to the complainant's dissatisfaction within its original response and that she had cited that 'Wave' applications are published as part of the DfE process. IFtL confirmed to the complainant that its application was not made through the 'Wave' application process, but that it was made through the FSPC process run by Milton Keynes Council. IFtL said that there is no provision in the FSPC process for *"the unmitigated publishing of applications made and as such, FOI requests are eligible to be refused under the FOIA."*

43. IFtL acknowledged that the DfE's 'Wave' process is different from the local authority's competition process, it explained that applications submitted under the 'Wave' process are disclosed, those under the local authority competition process are not. IFtL said it was unable to comment on why there is this distinction in the processes. It added that the DfE and the local authority could respond to this question as they develop and administer the processes, where as IFtL only apply using the stipulated process.
44. IFtL explained that there is an alternative route for the complainant to express her concerns about an investigation into any wrongdoing by the local authority, i.e. the local authority's internal complaints procedure and the Local Authority Ombudsman.
45. IFtL argued that disclosure of any further information would be detrimental to its commercial interests. It said that this would impact upon its ability to effectively bid for future tenders.
46. IFtL reiterated that *"the FSPC process makes no provision for publishing the bids in full as standard (unlike the Wave application process) and as such, is a process within which free and frank discussion about specific commercial interests of bidders should be expected and encouraged to determine the best decision-making information is available."* IFtL said that where it had entered into this process, it had done so with the above understanding.

#### *Balance of the public interest*

47. The Commissioner accepts that there is a strong and legitimate public interest in the openness and transparency of public authorities with regard to their decision-making processes. This is because it promotes the aims of transparency and accountability, which in turn furthers greater public engagement and understanding of the decisions taken by public authorities.
48. In this case, the information relates to IFtL's competitive Free School bid. Details of the bid and the associated documentation was made in a confidential, competitive process in which the complainant (also a competitor) was involved in. The Commissioner recognises that the complainant has concerns regarding the tender process and how the decision was made. With regards to any wrongdoing, there is no evidence of this that the Commissioner is aware of, and which would add weight to the arguments for disclosure. The only public interest arguments for disclosure are seemingly those of accountability and transparency.



49. The Commissioner accepts that disclosure of the withheld information would provide an insight into how IFtL operates its organisation, details of its strategies and its commercial approach. It would also reveal discussions regarding the potential of IFtL's suitability to run a new all-through school.
50. The Commissioner also accepts that disclosing the information would allow competitors to take advantage of this knowledge and use it for the next bid for future tenders. She is aware that competitors are likely to have significant interest in obtaining confidential information that can be used to their own advantage. The Commissioner notes that opponents and competitors could seek to undermine IFtL's commercial services.
51. The Commissioner considers that there is a strong and inherent public interest in ensuring fairness of competition, and in her view it would be firmly against the public interest if the commercial interests are harmed. She also considers that protecting IFtL's ability to operate effectively within a competitive market, by not disclosing information that competitors could use to its commercial disadvantage, outweighs the public interest arguments for the information's disclosure. IFtL was awarded the contract on the basis that it submitted the best tender, and the Commissioner is of the view that it would not be fair to disclose information that would disadvantage the company in future tender processes. The Commissioner considers this to have significant weight in balancing the public interest.
52. The Commissioner has considered whether disclosure of the information would add significantly to the public and understanding of the decision made. She has also considered the harm that would be likely to occur to IFtL should its tender documents be released into the public domain.
53. Given the level of likelihood that commercial harm would occur should the information be disclosed, the Commissioner has decided that the balance of public interests currently favours maintaining the exemption.

## **Conclusion**

54. The Commissioner's conclusion is that the public interest in disclosure of the withheld information is outweighed by the public interest in maintaining the section 43(2) exemption. Therefore, IFtL was not obliged to disclose the requested information.

## Right of appeal

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55. 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@justice.gov.uk](mailto:grc@justice.gov.uk).

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

56. 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.
57. 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 .....**

**Phillip Angell**  
**Group Manager**  
**Information Commissioner's Office**  
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