

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 April 2020

Public Authority: Wakefield Council
Address: County Hall
Bond Street
Wakefield
West Yorkshire
WF1 2QW

Decision (including any steps ordered)

1. The complainant has requested information with regards to a public service contract. Wakefield Council (the council) refused the request relying on section 43(2) of the FOIA – commercial interests - and section 36 of the FOIA - Prejudice to effective conduct of public affairs.
2. During the Commissioner's investigations the council provided a redacted version of the information.
3. The Commissioner's decision is that section 43(2) of the FOIA is engaged to the redacted information. As section 43(2) of the FOIA is engaged, the Commissioner has not gone on to consider section 36 of the FOIA.
4. The Commissioner does not require the council to take any steps.

Request and response

5. On 26 September 2018, the complainant wrote to the council and requested information in the following terms:

"Please could you provide me with all written correspondence made between Wakefield Council officers and ENGIE between 1st April 2018 and 31st August 2018?"

6. The council responded on the same day asking for clarification explaining that the large volumes of information that this request could cover would invoke section 12 of the FOIA – Appropriate limit. The council asked the complainant to clarify the nature of the meetings and communications required.

7. The complainant clarified on the same day:

"To be specific, please could I have correspondence that relates to breaches of the public service contract that exists between ENGIE and Wakefield Council and was signed in 2016. If it would help, I am happy to narrow the timeframe for correspondence I've originally requested?"

8. On 27 September 2018 the council acknowledged receipt of the clarification. It then responded to the request on the 23 November 2018. It advised that the information sought is being withheld under section 36 of the FOIA – Prejudice to effective conduct of public affairs.
9. It also advised that parts of the requested information are also being withheld under section 43(2) of the FOIA – commercial interests.
10. The complainant requested an internal review on the 18 December 2018. He stated that he would accept that commercially sensitive information would be redacted but considers that the discussions between Engie and the council are a matter of considerable public interest.
11. The council provided its internal review response on the 18 January 2019 upholding its position.

Scope of the case

12. The complainant contacted the Commissioner on the 27 February 2019 to appeal against the council's refusal of the information being withheld under section 36 of the FOIA.
13. During the Commissioner's initial investigations it was established that the council was now relying on section 43(2) of the FOIA to all of the information, not just some of it.
14. On relaying this to the complainant, the complainant changed his position. He now disputes the council's reliance of both section 43(2) and 36 of the FOIA to withhold all of the information.
15. After further discussions with the Commissioner, the council later provided a heavily redacted version of the information to the complainant on 30 January 2020. It is information it considers can be released now that the issue is no longer 'live'.
16. The Commissioner therefore considers the scope of the request is to determine whether the remaining redacted information can be withheld. The Commissioner's considerations has to be made based on the situation at the time the request was made, which is when the issue was considered to be 'live'.
17. She will firstly consider the council's application of section 43(2) of the FOIA and will only go on to consider section 36 of the FOIA if she finds any or all of the information is not exempt under section 43(2) of the FOIA.

Reasons for decision

Background

18. From the Commissioner's understanding, the council entered into a Strategic Partnership Contract with Engie in October 2016. The contract was initially for a seven year period with the option available to extend the contract for three more years.
19. A number of contract breaches and failures took place that led to a commercial settlement and agreement that bound Engie to compensate and rectify the situation. This work to rectify the contract started in May 2018 and concluded in December 2018.

The withheld information

20. The council has told the Commissioner that the information being withheld is Engie's final offer and settlement to the matter which have been notified. The settlement goes into greater detail and identifies a number of noncompliance issues and a ratification plan has been produced.
21. The settlement agreement is the final legally sealed contractual version and applied appendices to the Heads of Commercial Terms for Settlement Agreement (HOCT settlement).
22. This information contains details of financial penalties imposed by the council upon Engie and in-depth information detailing the specific areas of noncompliance and a rectification plan.

Section 43(2) of the FOIA – Commercial interests

23. Section 43(2) of the FOIA states that information is exempt information 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.
24. The exemption can be engaged on the basis that disclosing the information wither "would" prejudice commercial interests, or, the lower threshold, that disclosure "would be likely" to prejudice those interests.
25. 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 is more probable than not. For the Commissioner to accept that prejudice "would" result, she must be satisfied that this outcome is more likely than not.
26. The Commissioner's guidance¹ for section 43(2) of the FOIA at paragraph 13 states:

¹ <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

"There are many circumstances in which a public authority might hold information with the potential to prejudice commercial interests. The range of activities below indicates where this is most likely, although there may be other situations where commercial information is held.

- **Procurement** – *many public authorities will be involved in the purchase of goods and services and will hold a wide range of information relating to this procurement process. This can include: information provided during a tendering process about both successful and unsuccessful tenders; details of a contract with a successful company; future procurement plans; and performance about a contractor.*
27. The council has explained to the Commissioner that it has a commercial contract with Engie in relation to delivering a range of Property and Facilities Services to the council. A number of contract breaches and failures took place that led to a commercial settlement and agreement that bound Engie to compensate and rectify the situation.
 28. During this period, the council has advised the Commissioner that Wakefield Council Audit Committee asked for two updates, the most recent being 8 April 2019². At these meetings, matters and issues were made public, however the full details of the failures and breaches, as well as the overall value of the settlement and its contents, have not been made public as it was a commercial and legally bound settlement.
 29. The Commissioner is satisfied that this information is commercial in nature as it relates to the performance of a commercial contract and the rectification of failings.
 30. Having determined that the information is commercial in nature, the Commissioner has gone on to consider the prejudice which disclosure would or would be likely to cause and the relevant party or parties that would be affected.
 31. For section 43(2) of the FOIA to be engaged, three criteria must be met:
 - Firstly, the actual harm which the council alleges would be likely to occur if the withheld information was disclosed has to relate to commercial interests;

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<http://mg.wakefield.gov.uk/ieListDocuments.aspx?CIId=700&MIId=13971&Ver=4>

- Secondly, the council must be able to demonstrate that some casual relationship exists between the potential disclosure of the information being withheld 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, i.e. whether there is a real and significant risk of the prejudice occurring.
32. With regards to the first criterion, the council states that the information is commercially sensitive and confidential to both Engie and the council. At the time of the request, the internal review and the Commissioner's initial enquiries, the council was still in negotiations with Engie with regards to the breaches of contract and future arrangements.
33. The council has explained to the Commissioner that Engie deliver services such as cleaning and maintenance on behalf of the council. The council states that disclosure of the information could undermine these subcontracting arrangements and pose a risk to the council achieving best value for the public purse
34. The Commissioner accepts that the prejudice envisaged would be to the council. 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.
35. With regards to the second criterion, the council explained that the settlement agreement was not intended to be representative of, or constructed as, an admission of liability or wrongdoing, in relation to alleged service delivery issues, or any other matters.
36. The council submits that disclosure of this information would reveal sensitive information that could adversely affect Engie's potential bids to other future clients. The council also states the information would reveal its own strategies in managing significant contracts, potentially undermining its own commercial interests.
37. The Commissioner accepts the concerns to prejudice commercial interests, resulting from disclosure of the information.
38. Turning to the third criterion, when claiming that disclosure would prejudice the commercial interests of a third party, the Commissioner expects a public authority to obtain arguments from the third parties themselves.

39. The council confirmed to the Commissioner that it had consulted with Engie during the stage from when the Commissioner started her investigation.
40. The council has told the Commissioner that Engie asserts that disclosure of the information would adversely and unfairly prejudice Engie's commercial interests and may cause significant and unjustified damage to its reputation. The settlement agreement also contains detailed information regarding payments and remedies between the parties.
41. With regards to this the council has told the Commissioner that Engie asserts that this commercial information is current and the disclosure of this quantitative information into the public domain will prejudice Engie's commercial interests, where Engie is invited to pursue alternative commercial opportunities and will impact on its ability to make a profit and then have a detrimental impact on Engie's 800 staff members.
42. The council also states that the contract and partnership it has with Engie is now being delivered effectively and they are about to go out to the wider market to promote and win business from other schools and local authorities across the Yorkshire and Humber region. It considers that if this information were in the public domain, it could harm the progression of that opportunity.
43. The council has advised the Commissioner that Engie is continuing to bid for business outside of the region and again, the release of this information could harm Engie's opportunity to win that business. Should Engie's competitive position be eroded in this manner, the whole market would become less competitive to the detriment to the wider public.
44. The council has told the Commissioner that Engie are explicit that should the withheld information be released, they will bring legal action against the council for releasing information which has been agreed on the basis of a commercial and legal settlement.
45. This information clearly relates to the performance of Engie with regards to a commercial contract. In releasing this information the Commissioner accepts that Engie's reputation may be affected and may have an adverse impact on future commercial contracts it may pursue.
46. Having viewed the withheld information and considered the arguments made, the Commissioner accepts that prejudice to the commercial interests of Engie would be more likely than not to result through disclosure of the information in question. She therefore finds that section 43(2) of the FOIA is engaged.

Public interest test

47. 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.

Public interest arguments in favour of disclosing the information

48. The council has told the Commissioner that it recognises the importance of openness and transparency and be able to demonstrate an efficient service to the public.
49. The council also is aware that the public must have confidence in its decision making processes, such as being able to obtain the best value for money from a contract.
50. The Complainant argues there is significant public interest given that £200 million of taxpayers money is involved and the significant problems the deal has encountered.

Public interest arguments in favour of maintaining the exemption

51. The council has told the commission that the issue was very much live at the time of the request.
52. The council states that the information already available in the public domain (documented discussions within the Audit Committee) allows transparency at a level which meets the public interest in confirming the council are actively rectifying performance issues within contractual agreements.
53. The Commissioner notes that this public information came after the request and rectification period. It was not available at the time of the request and refusal. Thus, there would have been less transparency in the public domain at the time of the request than there is now.
54. The council also state that disclosure would adversely affect its ability to source suppliers in a competitive environment. Publicising the details of Engie's alleged non-compliance would prevent potential bids for new contracts due to fear of disclosure of operating data and this would in turn result in the council being unable to find the best use of public funds.
55. The council argues that releasing the withheld documents will not materially add any benefit to the public interest in terms of the use of public funds.

56. Lastly, the council has said that disclosure would cause disruption to the provision of services and impact staff as Engie has indicated to the council that it would take action to terminate the contract and this would in turn incur costs to the council to procure replacement services.

Commissioner's conclusions

57. The Commissioner is of the view that this is a large contract dealing with significant monetary figures and therefore there would be public interest in the way public funds are being used. Especially in a situation that involves rectifying failings within a contract.
58. However, at the time the request was made, the council and Engie were in the rectification period that ran between May and December 2018. The Commissioner considers that during this period there would be a greater weight that Engie and the council are able to focus on rectifying any failings within the contract without having to divulge their negotiations and the details. As these negotiations were very much live at the time of the request, the commissioner considers this adds significant weight to withholding the information at that time.
59. Based on the above, and considering the time of the request, the Commissioner has determined that the public interest in withholding the information outweighs the public interest in disclosure.
60. The Commissioner therefore upholds the application of section 43(2) of the FOIA in this case. As she has found this exemption to be engaged to the withheld information, she has not gone on to consider section 36 of the FOIA.

Right of appeal

61. 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

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

62. 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.
63. 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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