

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 April 2022

Public Authority: North East Procurement Organisation (NEPO)
Address: Northern Design Centre
Abbots Hill
Gateshead
NE8 3DF

Decision (including any steps ordered)

1. The complainant requested a blank copy of the NEPO2 framework agreement from NEPO. NEPO provided some of the information however it withheld sections of the framework on the basis that sections 43(1) (trade secret), 43(2) (commercial interests) and section 40(2) (personal information) applied. During the course of the Commissioner's investigation, NEPO agreed to disclose further information to the complainant, however, by the date of this notice, it had not done so.
2. The Commissioner's decision is that NEPO was not correct to apply section 43(1) to withhold the information. Taking into account NEPO's agreement to disclose further information to the complainant, however, the Commissioner has decided that it was correct to apply section 43(2) to withhold the remaining information. The complainant did not request that the Commissioner consider the council's application of section 40(2) to redact personal data.
3. The Commissioner therefore requires NEPO to take the following steps to ensure compliance with the legislation.
 - Disclose the additional information to the complainant which NEPO indicated to the Commissioner could now be disclosed.

4. NEPO 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 19 November 2020 the complainant wrote to NEPO and requested information in the following terms:
 - Q1. Please supply a copy of the contract[s] between NEPO and Bloom for the services provided?
 - Q2. What information is Bloom required to provide NEPO with for reporting and monitoring purposes?
 - Q3a. What information held by Bloom does NEPO have a right to see?
 - Q3b. What conditions (if any) apply to NEPO access to information held by Bloom?
 - Q4. On termination of the NEPO contract with Bloom does information remain with Bloom, or does it revert to NEPO?
6. NEPO responded on 16 December 2020 seeking clarification of the complainant's request for information. This was provided on the same date. The complainant requested information on NEPRO(2) which ran from 2015 – 2019.
7. NEPO provided its full response on 15 January 2021. It provided a heavily redacted copy of the NEPRO 2 contract between itself and Bloom:
 1. It withheld information under Section 40(2)(personal data of third parties) and Sections 43(1) and 43(2) of the Freedom of Information Act 2000 (trade secrets and commercial interests).
 2. – 4: It provided explanations to the complainant in response to these parts of the request.
8. The complainant requested that the council carry out a review of its decision on 23 January 2021. Specifically, he said that:

“I asked for a blank pro forma of the NEPO2 framework agreement (without any specific client details or commercial information) and the one provided is excessively redacted.

I need to see all of the contents page so that I can see all sections. Where redaction occurs the section heading should remain, and all information should remain except the parts that are truly confidential.

Redaction to the content page stops me seeing what the sections redacted are for. This is absurd.”

9. The Commissioner notes that it was potentially unclear to NEPO that a blank copy of the pro forma was being requested from the wording of the initial request for information. However, this was clarified in the complainant's request for review.
10. NEPO provided the outcome of its internal review on 19 February 2021. It maintained its initial position.

Scope of the case

11. The complainant contacted the Commissioner on 23 February 2021 to complain about the way his request for information had been handled. He considers that NEPO was not correct to apply the exemptions it has to withhold all of the information it has. He said that:

“Given that this is a blank pro forma, an absurd level of redaction was applied (incl to the FOI section) which I believe is incorrect under the FOI Act. I couldn't even see the titles of many sections.

While I might expect the odd specific redaction for (say) penalty clauses, I expected to see the vast majority of this blank pro forma document.

Nor do I think that the public interest test was properly applied.”

12. A small number of names and contact details were redacted under section 40(2) from the framework. The complainant did not complain to the Commissioner about the redaction of personal data under section 40(2), and in his request for review he clarified that he was not seeking specific client details. As such, the Commissioner has not considered the application of section 40(2) further within this decision notice.
13. During the course of the Commissioner's investigation NEPO reconsidered the application of the redactions and decided that a significant amount of further information could be disclosed to the complainant. This included the contents page, which the complainant had highlighted as being of particular concern.

14. As of the date that this DN has been issued, however, NEPO has not confirmed to the Commissioner that this information has been disclosed to the complainant. The Commissioner has therefore included this disclosure as a step within this decision notice. Once NEPO has disclosed this information to the complainant, this step will have been met.
15. The following decision notice therefore analyses whether the council was correct to withhold the remaining information under section 43(1) and 43(2) of FOIA.

Background to the complaint

16. NEPO (North East Procurement Organisation) is a Public Buying Organisation which sells its services across the public sector. Since 1976, NEPO has worked in partnership with contracting authorities on the procurement of goods and services across the public sector.
17. NEPO manages around 70 solutions. One of these solutions is branded NEPRO2. The organisation that was procured to deliver NEPRO2 is Bloom. The NEPRO 2 framework agreement formed the partnership between Bloom and NEPRO from 2015 to 2019. NEPRO 2 was replaced by the NEPRO 3 framework in 2019.
18. The request which is the subject of this decision notice relates to the NEPRO 2 framework agreement.

Reasons for decision

Section 43(1)

19. Section 43(1) of FOIA provides that information is exempt if it constitutes a trade secret. There is no statutory definition of a "trade secret" but the Commissioner will follow the Information Tribunal's preferred view of the meaning of trade secret as outlined in the case of Department of Health v Information Commissioner at paragraph 50. The Tribunal referred to the Lansing Linde V Kerr [1991] WLR 251, Staughton LJ Court of Appeal case.
20. The Commissioner's guidance on section 43(1) also refers to the above case and states that it is generally accepted that, for information to constitute a trade secret it must fulfil the following criteria:

- it must be information used in a trade or business
 - it must be information which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret
 - the owner must limit the dissemination of the information, or at least, not encourage or permit widespread publication.
21. The withheld information is sections of the NEPRO 2 contract which remain withheld following NEPO's decision that further information could be disclosed during the course of the Commissioner's investigation.
22. The Commissioner's view that a trade secret implies that the information is more restricted than information which is commercially sensitive. It involves something technical, unique and achieved with a great deal of difficulty and investment.
23. Although the Commissioner notes NEPO's arguments in this respect, and having viewed the withheld information, the Commissioner has not been persuaded that the withheld information has the level of uniqueness which NEPO argues is the case. Although the package of measures which NEPO employs as a whole may be unique, NEPO has not provided substantive arguments demonstrating significantly unique properties to the framework agreement which might set it apart from others which compete with it.
24. Therefore, the Commissioner is not satisfied that section 43(1) of FOIA would apply to the withheld information.
25. The Commissioner has, however, taken into account the arguments for section 43(1) applying in the following consideration of the application of section 43(2), which relies on similar, or the same arguments from NEPO.

Section 43(2) – prejudice to commercial interests

26. Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

27. In order for a prejudice-based exemption, such as section 43, to be engaged the Commissioner believes 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 considers that the chance of prejudice occurring 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. The anticipated prejudice must be more likely than not.

Does the information relate to a person's commercial interests?

28. The council argues that its own commercial interest would be prejudiced if the requested information were to be disclosed. It also argues that its partner, Bloom's, commercial interests will also be prejudiced.
29. The term 'commercial interests' is not defined in the FOIA; however, the Commissioner has considered her guidance on the application of section 43¹, which clarifies that:

"A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent."
30. The sale and purchasing of goods and services is a commercial activity. The agreement is a product which NEPO sells to other businesses as part of a solution to their procurement needs. The Commissioner therefore accepts that the interests in question are the commercial interests of NEPO and its partners.

¹ <https://ico.org.uk/for-organisations/foi-guidance/section-43-commercial-interests/>

The causal relationship

31. NEPO argues that the framework agreement has sections within it which are exclusive to it and which form part of its success as a procurement organisation. It argues that disclosing these sections would undermine its competitiveness against its rivals and therefore prejudice its commercial interests.
32. It contends that a disclosure of these sections would allow its competitors to identify areas where the NEPO framework betters their own product. This would disadvantage NEPO as it would allow its competitors to incorporate sections or solutions from the agreement to their own products, thereby making NEPO's product less competitive.
33. Having considered NEPO's arguments, the Commissioner is satisfied that a disclosure of its strategy and the format in which it approaches its framework agreement would be likely to cause the prejudice which the exemption is designed to protect. The second test is therefore met.

The likelihood of the prejudice occurring

34. NEPO clarified that it controls any sharing of the framework documentation under a strict non-disclosure agreement process. It argues that it uses document control mechanisms to manage this, and so the information in question is not accessible to the public unless disclosure is authorised under the non-disclosure agreement.
35. It said that it has already encountered and challenged a number of "replica" frameworks which have attempted to copy and adapt the unique NEPRO framework methodology for their own procurement purposes. It argued that it has had to undertake extensive work with external legal teams to manage these conflicts, ensuring that the methodologies contained within NEPRO 2 are protected and preserved.
36. The suggestion that it has already encountered attempts to copy and use these by other providers, despite the steps it takes to protect these, provides substantive evidence that its position within the market would be detrimentally affected if the framework agreement to be disclosed as a result of this request.
37. The Commissioner therefore accepts that NEPO is correct in considering that there is a real likelihood that if the information were to be disclosed, competitors would seek to analyse and incorporate some of its strategies employed within the framework to the detriment of NEPO's commercial interests.

The Commissioner's conclusions

38. The complainant has argued that as he has only requested a blank copy of the framework commercial prejudice would not occur to the level argued by NEPO.
39. The Commissioner understands this argument, however in this situation, the framework itself is both a product, and a selling point of NEPO. The framework model it has designed is the basis of its competitive place within the market because of the results it is able to achieve in terms of customer service and efficiency. It is a package of legal and technical measures designed to allow it to compete successfully against other similar offerings. A disclosure of this 'package' would disclose the individual elements which work together to form its methodology, and which makes the NEPRO2 Framework competitive.
40. The Commissioner has considered the three parts of the test which she outlined above, and had decided that NEPO's arguments meet all three of the required elements.
41. The Commissioner therefore accepts that a disclosure of the withheld information would be likely to prejudice the commercial interests of NEPO and Bloom.

The Public Interest

42. As section 43 is engaged, section 2(2)(b) of FOIA requires that a public interest test is carried out to determine whether the information should be disclosed in spite of the exemption being engaged. The test is whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The public interest in the exemption being maintained

43. The central public interest in the exemption in section 43 being maintained in this case is to protect NEPO and its partner's commercial interests. The exemption has been claimed in order to ensure that it can compete against its competitors on an equal basis, and that the public money it has spent developing its product, and in taking legal action to protect the framework from being copied, is not undermined by disclosure.

44. The Commissioner's view is that there is a valid public interest in ensuring that NEPO's competitiveness is not detrimentally affected by a disclosure of its commercially sensitive information. This would ultimately allow rivals offering the same, or similar services, to copy beneficial sections of its product and approach.
45. In detrimentally affecting NEPO's commercial package, its ability to sell and draw profit from its services would be damaged, and the public purse detrimentally affected as a result.
46. Whilst the Commissioner accepts that it may be able to take legal action for breach of copyright and/or seek to legally protect its intellectual property rights over the information, it would firstly need to identify which competitors might be copying its approach. Even without direct copying, competitors could take steps to identify any areas of NEPO's strategy and change their own products and marketing to undermine NEPO's approach, thereby weakening NEPO's product within the market.
47. As a public authority, NEPO is subject to information access laws which many of its competitors will not be subject to. Disclosing its product, whilst private competitors are not subject to the same level of scrutiny, would put it at a disadvantage against them.
48. There is a strong public interest in protecting balance between all parties, and protecting a 'level playing field' within the market.

The public interest in the information being disclosed

49. The public interest in the information being disclosed rests primarily in creating greater transparency over the way in which the framework runs and is approached. A disclosure of the withheld information would demonstrate the effect which framework agreements of this sort can have in the provision of services to public authorities, and it would also provide details of the remedies which are included if things go wrong.
50. The complainant argues that there is a high public interest in understanding how NEPO and Bloom manage project failures under the NEPRO 2 framework. He gave an example of a local authority merger which was subsequently criticised for costing taxpayers a significant amount of money and argued that this was based upon the advice provided by a service provider who was contracted under the NEPRO 2 agreement.

51. He argues that the framework confers privileges in respect of avoiding competitive tenders in order to obtain contracts, and that "suppliers who have failed their contract should have their place on the NEPRO 2 framework reviewed with a sanction of removal for egregious or repeated failures".
52. He argued that the redactions which NEPO made from the disclosed information leave many questions unanswered:

"For example, the dispute resolution process is redacted and given that these are public contracts with public bodies then how the dispute resolution works is not confidential nor is it a trade secret".

The Commissioner's analysis

53. The Commissioner has considered the arguments submitted by both sides, in conjunction with viewing the withheld parts of the framework agreement.
54. The Commissioner notes that knowing the checks and balances which NEPRO2 has in place will enhance public confidence in its product, and allow interested parties to ensure that where issues arise there is scope within the framework to deal with these effectively. In this way, the public can reassure itself that the companies which supply services through the framework are managed properly, and that issues which arise with suppliers can be dealt with quickly and effectively under the agreement.
55. The Commissioner considers that the complainant is correct in identifying that there is a public interest in disclosing the manner in which a framework system such as this is run. A disclosure would allow interested parties to question and hold NEPO to account where its suppliers do not meet with the requirements for particular tasks.
56. However, there is also a strong public interest in protecting the ability of NEPO to be able to compete on an equal basis with private businesses within a competitive market. There is also a public interest in allowing it to reap the benefits of its own development process without having any innovative approaches it takes subsequently being copied by other competitors who may not have spent as much money or time designing and developing their own product designs.

57. The Commissioner notes the complainant's arguments that "the dispute resolution process is redacted and given that these are public contracts with public bodies then how the dispute resolution works is not confidential nor is it a trade secret." This argument is not correct. The exemption recognises that there will be some information which can be withheld due to the public interest in protecting the authority's ability to carry out its commercial activities in a competitive market.

Conclusions

58. Having considered the withheld information, the Commissioner considers that the council was correct to apply section 43(2) to withhold the information, and that the public interest rests in the exemption being maintained.

Right of appeal

59. 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

60. 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.

61. 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

Ian Walley
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