

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 5 October 2011

Public Authority: Queen's University Belfast
Address: University Road
Belfast
BT7 1NN

Summary

The public authority organises an annual arts event and puts out to tender services required to facilitate that event. The complainant requested a copy of the full tender submissions for two of the tenders. The public authority released some generic information but withheld information unique to the two tenders, relying on section 43 (commercial interests) to do so. The Commissioner decided that the exemption was engaged and that the public interest test favoured maintaining the exemption.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. Belfast Festival, organised by Queen's University Belfast ("the University"), is an annual arts event. The University places out to tender services to be undertaken for the event.
3. The relevant tenders, for the purposes of this Decision Notice, were –
 - Lot 1 – Sound and Backline – the provision of sound and backline as requested by the artists and by agreement with the Festival Director

- Lot 2 – Lighting and Rigging – the provision of lighting and rigging as requested by the artists and by agreement with the Festival Director
4. The invitation to tender was issued on 23 August 2010 and the deadline for submitting tenders was 3 September 2010. Companies were informed of the outcome of the tendering process on 16 September 2010.

The Request

5. The complainant, on 19 October 2010, made a request to the public authority for the full tender submissions as submitted by:
- Production House for sound and backline (lot 1)
 - Production Services Ireland for lighting and rigging (lot 2)
6. The University provided its response to the complainant on 16 November 2010 in which it refused to disclose the information requested on the basis of the exemption contained in section 43 (commercial interests) of the Act.
7. The complainant requested an internal review of the University's decision on 19 November 2011. On 13 December 2011 the University wrote to the complainant with the details of the result of the internal review it had carried out. The result of the review was the upholding of the original decision.

The Investigation

Scope of the case

8. On 7 February 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

Chronology

9. The Commissioner wrote to the University on 27 April 2011. He sought from it a copy of the withheld information and answers to his queries regarding its reliance on section 43 of the Act.
10. The University provided a copy of the withheld information and its substantive reply to the Commissioner's queries by way of a letter dated 18 May 2011. The University also informed the Commissioner that it was

releasing a proportion of the tender information, namely schedule B of it. This was, so the University explained, since only a small proportion of that information was generated by the companies and the remainder by itself.

11. As to its reliance on section 43 it said that only a very small number of companies have the requisite skills and resources to provide these services to the Festival. These companies view the disclosure of detailed pricing information as likely to have a negative impact on their position in the competitive environment by revealing their financial position in a way that is detrimental to their commercial interests. The University further maintained that a previous release of commercial information caused one company to no longer bid for contracts for its services at the Festival and provided by way of evidence a letter dated 28 September 2010 from that company. It stated that this lessening of competition is likely to inflate the University's cost of running the festival.

Reasons for decision

12. Section 43(2) provides an exemption from a public authority's duty to disclose requested information on the grounds that disclosing the information 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.
13. The Commissioner notes that the withheld information consists of the tender quotes, the breakdown of those quotes and queries and replies thereto between the University and the tendering companies. The University in a letter dated 18 May 2011 informed the Commissioner that it believed releasing the information would be likely to prejudice the commercial interest of it and/or a third party. To evidence this, the University has provided the Commissioner with a letter from a third party (see paragraph 11 above) who complains that a previous release of tendering information had harmed the company commercially and therefore it would no longer tender.
14. In *Hogan & Oxford City Council v The Information Commissioner* (EA/2005/0026, EA/2005/0030) the Tribunal stated that "The application of the 'prejudice' test should be considered as involving a numbers of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption.....Second, the nature of 'prejudice' being claimed must be consideredA third step for the decision-maker concerns the likelihood of occurrence of prejudice". (para 28 to 34).

Commercial Interests of the University

Step 1 - Identifying the applicable interests within the relevant exemption

15. The University states that releasing the information would likely harm its relationship with tendering companies and the tendering process in the production of the Festival. In this regard, it provided evidence from a business that ceased engaging in the tendering process due to similar information being released previously (see paragraph 11 above). The University explains that such reduction in tenders undermines its commercial role in organising the festival by reducing potential suppliers.
16. The Commissioner accepts the University's position on the above point. That is releasing the withheld information would likely harm its relationship with tendering companies for subsequent Festivals which is a commercial one. Notwithstanding this finding in favour of the University the Commissioner is aware that this factor will diminish over time. The older the requested information is, the less likely its release would affect the University's relationship with tendering companies. However, in this case the Commissioner is satisfied that the information is sufficiently current / recent for it to have retained its currency, especially considering that the festival is an annual event and the University would need to tender for such services accordingly.

Step 2 – Considering the nature of the prejudice

17. The Tribunal in *Hogan* commented as follows (at paragraph 30): "Second the nature of the 'prejudice' being claimed must be considered. An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thoroton has stated "real, actual or of substance" (Hansard HL (VOL. 162, April 20, 2000, col. 827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected."
18. The University states that the diminution of tendering companies negatively impacts on its ability to participate competitively in a commercial activity. The Commissioner is of the view that the University has evidenced (paragraph 13 above) and made its case on this point. That is, releasing the withheld information could cause the prejudice that section 43 (2) seeks to prevent - the prejudice to the commercial interests of any person.

Step 3 – Considering the likelihood of the prejudice

19. In the case of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)* the Tribunal confirmed that “the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.” (paragraph 15). In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote. The Commissioner takes cognisance that the University has provided evidence that a previous release of similar information actually resulted in at least one business not tendering in the future. This lessening of competition undermines the University’s ability to obtain services on terms most favourable to itself. This prejudice is amplified by the fact that the companies that could or would bid to undertake these services are more limited given the University’s location. A reduction in those bidding means that the University has a smaller pool of skill to call upon. This, in turn hampers the quality of the Festival.
20. The Commissioner’s decision is, having regard to the evidence, that releasing the information would be likely to harm the commercial interests of the University. This is because releasing the information will be likely to disrupt the future tendering for the performance of services in relation to the Festival by reducing the number of tenders. Such reduction means less competition which in turns means a reduction in the available skill pool to the University yet the cost of purchasing those skills may rise due to the lessening of competition.

Commercial Interests of a Third Party

21. As to the damaging of a third party’s commercial interests the Commissioner’s view is that the University must adduce evidence or arguments originating from that third party itself to support its contention. This view concurs with that of the Information Tribunal as stated at paragraph 39 of *Keene v the Information Commissioner & the Central Office of Information (EA/2008/0097)*. As stated above the University provided the Commissioner with a copy of a letter dated 28 September 2010 from a third party. It said that the third party had been harmed by a previous similar release of information and that had persuaded it to not tender again. However the withheld information does not originate from a third party in this case (i.e. in relation to the withheld information). The University has therefore not provided the Commissioner with evidence or arguments from a third party that believes that releasing the withheld information in this case would (or would be likely to) harm its commercial interests. Accordingly the Commissioner finds that, given the absence of relevant evidence, there are insufficient grounds to find that releasing the requested information

will harm the commercial interests of a third party. However, given the Commissioner's finding in respect of the University's own commercial interests, which applied in respect of all the information which continues to be withheld in this case, the Commissioner is satisfied that section 43(2) is engaged.

22. Having found that the exemption, as regards the commercial interest of the University, was engaged the Commissioner must next consider the application of the public interest test.

23. **Public interest arguments in favour of disclosing the requested information**

- The University acknowledged the wider interest of the general public in having access to information about how effectively a University awards contracts.
- There is a public interest in ensuring that there is competition for public sector contracts resulting in obtaining value for public monies.
- The Commissioner is mindful of the presumption of openness in approaches to requests for information under the Act, and of the strong public interest in openness, transparency, public understanding and accountability in relation to the activities of public authorities.

24. **Public interest arguments in favour of maintaining the exemption**

- Releasing the information would be likely to prevent or inhibit future bidding by some potential tenderers. Less competition would likely mean a higher price having to be paid by the University when it buys services.

Balance of the public interest arguments

25. The Commissioner is sceptical that releasing the withheld information would somehow increase the numbers of tenderers with a resulting saving of public money. This is because the Commissioner accepts the view of the University that only a limited number of companies have the capacity and capability to provide the particular services as tendered by the University.

26. The Commissioner has, in any event, found that the exemption is engaged. That is, releasing the information would be likely to, prejudice the commercial interests of the University by undermining the tendering process, a function of which is to facilitate competition resulting in cost

savings for the University. To stymie or inhibit this is not in the public interest. If the University is required to disclose information which effectively prejudices its commercial interests then the funds it loses out on are funds which the public are likely to eventually have to forgo or pay for.

27. The Commissioner accepts that there are valid and relevant general public interest factors which favour the disclosure of this information, as outlined above. However, he is not persuaded that they are sufficient to override the arguments particular to the circumstances of this case which favour the maintenance of the exemption. Therefore the Commissioner's decision, having regard to all the relevant circumstances, is that the public interest in maintaining the exemption outweighs the public interest in releasing it.

The Decision

28. The Commissioner's decision is that the University dealt with the request for information in accordance with the Act.

Steps Required

29. The Commissioner requires no steps to be taken.

Right of Appeal

30. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

31. 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.
32. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 5th day of October 2011

Signed

**Alexander Ganotis
Group Manager – Complaints Resolution
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