

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 October 2012

Public Authority: City of Bradford Metropolitan District Council

Address: 4th Floor Britannia House

Hall Ings

Bradford

BD1 1HX

Decision (including any steps ordered)

1. The complainant requested the contract between City of Bradford Metropolitan District Council (the Council) and a debt collection company. The Council refused to disclose this information under the exemptions provided by sections 41(1) (information provided in confidence) and 43(2) (commercial interests) of the FOIA.
2. The Commissioner's decision is that the Council withheld some of the information correctly under section 41(1). However, in relation to the remainder of the information the conclusion of the Commissioner is that this is not exempt.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant all of the information falling within the scope of the request, aside from the 'pricing schedule' which the Commissioner has concluded was exempt under section 41(1).
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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 14 February 2012 the complainant made the following information requests:

"1. Does the council outsource any aspects of its parking and traffic management operation (e.g. charge collection, ticket machine operation, enforcement, etc.)?"

2. Which aspects are outsourced?"

3. To whom are the services outsourced? If different services are outsourced to different suppliers, please denote which service is provided by which provider.

4. From what date were the services outsourced? If different services were outsourced on different dates, please denote the date of each.

5. What is the value of the outsourcing contract? If different services are contracted separately, please denote the value of each.

6. Please supply a copy of the contract between the council and the provider. If different services are governed by different contracts, please supply a copy of each."

6. The Council responded on 13 March 2012. Answers were provided to requests 1 to 5. In response to request 6 the Council cited the exemption provided by section 43(2) (prejudice to commercial interests) of the FOIA.
7. The complainant contacted the Council on 13 March 2012 and requested an internal review in relation to the citing of section 43(2). The Council responded with the outcome of the internal review on 12 June 2012 and stated that it no longer relied on the exemption provided by section 43(2). Instead the Council now relied upon the exemptions provided by sections 40(2) (personal information) and 41(1) (information provided in confidence) and maintained the refusal to disclose the information specified in request 6. However, the Council provided no explanation for the citing of these exemptions.

Scope of the case

8. The complainant contacted the Commissioner on 19 June 2012 to complain about the way his request for information had been handled.

The complainant indicated at this stage that he was dissatisfied with the refusal to disclose the requested information. The complainant also raised the delay in completion of the internal review and the failure by the Council to explain the citing of the exemptions upon which it relied.

9. As noted above, at internal review stage the Council withdrew the citing of section 43(2) and instead cited sections 40(2) and 41(1). However, in correspondence with the ICO the Council stated that section 40(2) had been cited in error as the information in question did not contain any personal information, and it reintroduced section 43(2). The analysis below therefore covers sections 41(1) and 43(2).
10. During the investigation of this case the Council supplied to the ICO the information withheld from the complainant. This consisted of what appeared to be a pro forma contract for the acquisition of bailiff services and answers provided by the contractor to questions posed as part of the tendering process that led to the award of the bailiff contract, which included what the Council referred to as a 'pricing schedule'. The Council identified this information as that it held which fell within the scope of the request for the contract.
11. There was a lack of clarity as to which parts of this information the exemptions cited were being applied. In correspondence with the Commissioner's office the Council stated that section 41 was cited in relation to the 'pricing schedule' and it was evident that the primary concern of the Council related to the disclosure of that information. However, when it was suggested to the Council that it disclose to the complainant all information aside from the pricing schedule it declined to do so.
12. The Commissioner has taken the approach of considering section 41(1) only in relation to the pricing schedule, which is in line with the comments made by the Council in its correspondence to the Commissioner's office of 8 August 2012. Also, some of the information in question was clearly not supplied by the contractors to the Council and so could not have been covered by section 41(1). Section 43(2) has been considered in relation to the entirety of the information in question.

Reasons for decision

Section 41

13. Section 41(1) of FOIA provides an exemption for information that was obtained by the public authority from another person and where the disclosure of that information would constitute an actionable breach of

confidence. Consideration of this exemption is a two-stage process; first, the information in question must have been provided to the public authority by a third party, referred to here as an A to B transfer. Secondly, the disclosure of this information must constitute an actionable breach of confidence. As a breach of confidence would no longer be actionable if there is a defence that this breach was in the public interest, the Commissioner will also consider whether there would be any such public interest defence in this case.

14. As covered above, this exemption has been considered only in relation to the pricing schedule. Covering first whether this information was supplied to the public authority in an A to B transfer, this clearly was the case in that this information was supplied by the contractor to the Council in response to questions posed as part of the tendering process.
15. Turning to whether disclosure of this information would constitute an actionable breach of confidence, the approach of the Commissioner to this exemption is that he will consider the following points:
 - whether the information has the necessary quality of confidence;
 - whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure of this information would result in detriment to the confider.
16. The approach of the Commissioner is that information will have the necessary quality of confidence if it is not otherwise accessible and is more than trivial. On the issue of whether this information is otherwise accessible, the Commissioner is aware of no evidence that this is the case and the stance of the Council suggests that it is not. On this basis, the Commissioner accepts that this information is not otherwise accessible.
17. As to whether this information is more than trivial, the question here is whether the confider, in this case the contractor, would regard this information as such. The view of the Commissioner on this point is that the contractor would consider this information to be of importance to it; this forms part of a bid to secure a contract with the Council and so it is reasonable to conclude that it is of importance to this business.
18. Turning to whether the information was imparted in circumstances importing an obligation of confidence, the clearest means to show that this was the case would be if there had been an explicit agreement between confider and recipient that this information would be kept confidential. Alternatively, an implied obligation of confidence may be said to exist if, for example, the content of the information suggests that the confider would have expected it to remain confidential.

19. In this case, the Council has not provided evidence of an explicit agreement between it and the contractor that this information would remain confidential, but has asserted that this information was provided to it in confidence. Without evidence of this, the Commissioner has considered what the content of the information suggests about whether the contractor would have held a reasonable expectation that this would be held in confidence.
20. This content shows the fees that would be charged by the contractor for its services. The complainant has argued that bailiffs fees are set by statute, but the Commissioner notes that the content of the information suggests that there is some flexibility in the charges levied, presumably as a result of some variation in how the statutory requirements are implemented, or because there are some areas of the work of the contractors where the charges are not bound by statute.
21. The view of the Commissioner is that the contractor would have expected this information to remain confidential. The context in which this information was provided to the Council was as part of a tender exercise and the view of the Commissioner is that it is clear that the contractors in question would not wish for the details of their fees to be made public to other potential contractors and that it would expect the Council to understand this. The contractors would, therefore, hold a legitimate expectation that the Council would maintain the confidentiality of this information.
22. Although it is not always the case that there must be an element of detriment to the confider for a breach of confidence to be actionable, the citing of section 43(2) in part on the basis of prejudice to the commercial interests of the contractor indicates that the Council believes that disclosure could result in detriment to the confider. The issue of detriment to the confider has, therefore, been considered.
23. As covered above, the contractor would have expected the information in question to remain confidential on the basis that they would not wish their competitors to be privy to it. Clearly this could lead to their competitors gaining an advantage and to the contractors losing business as a result. The view of the Commissioner is, therefore, that there is a possibility of detriment to the confider resulting through disclosure.
24. As referred to above at paragraph 13, the final step when considering if this exemption is engaged is to consider whether there would be a public interest defence to the breach of confidence that would result through the disclosure of the information in question. Such a defence would mean that this breach of confidence would no longer be actionable and so the exemption provided by section 41(1) would not be engaged.

25. Consideration of the public interest in relation to section 41(1) is not the same as consideration of the public interest test in relation to qualified exemptions. That test is whether the public interest in maintenance of the exemption outweighs the public interest in disclosure. The test here is whether the public interest in disclosure of the information exceeds the public interest in the maintenance of confidence.
26. The view of the Commissioner is that an obligation of confidence should not be overridden on public interest grounds lightly and that a balancing test based on the individual circumstances of the case will always be required. There must be specific and clearly stated factors in favour of disclosure for this to outweigh the public interest in the maintenance of confidence.
27. The protection provided by the duty of confidence here is to the process of tendering for services on which public funds are to be spent. The Commissioner believes there to be a public interest in the ability of the public authority to carry out this process effectively as this process is intended to ensure that public funds are used appropriately. If disclosure would prejudice the ability of the public authority to carry out this process - by discouraging commercial organisations from participating in this process, for example - this would be counter to the public interest. If the public authority was unable to secure the services of the best quality and value providers, this would not be in the public interest.
28. The Commissioner recognises a valid public interest on the basis of understanding more about the process undertaken by the Council to ensure that it secures value for money when undertaking a tendering process. However, this factor must be weighed against the harm to the confider that the Commissioner has accepted could occur as a result of disclosure.
29. Whilst the Commissioner has recognised this argument in favour of disclosure, he is also of the view that protecting the ability of the Council to spend public money appropriately is a weighty argument against disclosure. This, combined with the possible detriment to the confider, means that the Commissioner does not believe that the public interest in maintaining the confidence is outweighed. The Commissioner concludes that a valid defence could not be made in this case that the breach of confidence was in the public interest. The breach of confidence would, therefore, be actionable.
30. The Commissioner concludes that the exemption provided by section 41(1) is engaged in relation to the information in question. This conclusion is based on his findings that the information was provided to the public authority from a third party; the information is subject to the quality and obligation of confidence, and any breach of this confidence

would result in detriment to the confider. This means that disclosure of this information would constitute an actionable breach of confidence. The Commissioner has also found that a breach of this confidence would not cease to be actionable due to a defence that the breach would be in the public interest.

Section 43

31. The Council has cited section 43(2), which provides an exemption for information the disclosure of which would, or would be likely to, prejudice the commercial interests of any person. As noted above the Commissioner has considered this exemption in relation to all of the information falling within the scope of the request. Consideration of this exemption is a two-stage process; first, the exemption must be engaged as a result of prejudice to commercial interests being at least likely to occur. Secondly, this exemption is qualified by the public interest, meaning that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
32. Covering first to whom the Council believed prejudice would be likely to result, it has specified three parties; the contractors, other bidders in future tendering processes and the Council itself. In general, where a public authority has cited this exemption on the basis of prejudice that it believes would be likely to occur to the commercial interests of a third party, the Commissioner would require the public authority to have consulted the third party for its views on disclosure. In this case, the Commissioner is not aware of the public authority having consulted any third party for their views on disclosure.
33. The Council has asserted that prejudice to the commercial interests of other bidders in future tendering processes would be likely to result, but this argument has not been made out. The Council has not given any description of its reasoning here, nor has it consulted any third party about disclosure, and for this reason the Commissioner does not accept that prejudice to such third parties would be likely to result.
34. In relation to the contractors, the Commissioner does not regard the apparent failure to consult with them as necessarily fatal to the arguments of the public authority, provided that the content of the information proves a sufficient basis on which to find that prejudice would be likely. As the pricing schedule has been covered and excluded from disclosure above, only the remainder of the information excluding the pricing schedule has been considered here.
35. Having considered the remainder of the information excluding that detailing the charges it would levy, the Commissioner is not clear how

disclosure of this would be likely to result in prejudice to the commercial interests of the contractors. This consists of the aforementioned pro forma contract, which did not originate from the contractor, and a series of answers given to questions posed by the Council as part of the tendering process. The stance of the Council is apparently that disclosure of this information could harm the chances of this company securing future tenders. Without expansion on this argument, however, the Commissioner does not accept that this prejudice to the contractors would be likely to result.

36. Finally, the Council has argued that prejudice would be likely to result to its own commercial interests. In support of this argument the Council has stated that:

"...it is essential to ensure non-discrimination against all potential bidders, and it is vital to ensure the integrity of the bid documentation that we receive, so that we are able to have in place a contract of the highest quality."

37. How disclosure would prevent the Council from having in place a quality contract is not, however, clear. Indeed, it could be argued that full disclosure of information from previous tendering exercises could result in bidders being able to prepare more effectively, resulting in a more competitive tendering process and ultimately a contract that represents better value for public money. Neither, therefore, does the Commissioner accept that disclosure would be likely to result in prejudice to the commercial interests of the Council.
38. The Council has been inconsistent in its application of this exemption in response to the complainant's request. At the internal review stage it stated that "[section] 43 does not come into play as we don't hold the value of the contract as there is no cost to the Council". The view of the Commissioner is that the Council has not convincingly set out how prejudice to commercial interests would be likely to occur and his conclusion is, therefore, that the exemption provided by section 43(2) is not engaged. At paragraph 3 above the Council is required to disclose all of the information in question, aside from the pricing schedule.

Procedural requirements

39. The complainant raised the issue that when introducing the exemptions provided by sections 40(2) and 41(1) of the FOIA at internal review stage, the Council failed to provide any explanation of what these exemptions covered or why they were considered to apply in this case. The Commissioner would stress to the Council that section 17(1)(c) of the FOIA requires that a public authority must explain why an exemption

is believed to apply. The Council failed to comply with this requirement when introducing sections 40(2) and 41(1) at internal review stage and it must ensure that in future requesters are given a thorough explanation of exemptions cited. The Commissioner would agree with the complainant that doing so may mean that it will be less likely that a requester will feel it necessary to make a complaint to his office.

Other matters

40. The Commissioner also notes that the Council was inconsistent in the exemptions it cited at each stage, taking a different stance in each of the refusal notice, internal review response and in correspondence with the ICO. Whilst the Commissioner recognises these stages do provide an opportunity to reconsider its position, the Council should endeavour in future to reach a fully and properly considered position by the time of the refusal notice and to avoid the inconsistent approach taken in this particular case.

Right of appeal

41. 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

42. 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.
43. 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

**Gerrard Tracey
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