

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 June 2015

Public Authority: Ashfield District Council
Address: Organisational Development Unit
Urban Road
Kirkby in Ashfield
Nottingham
Nottinghamshire
NG17 8DA

Decision (including any steps ordered)

1. The complainant has requested information on the costs paid to third party building company which did work on his house on behalf of the council. The council has applied section 43(2) to the information (commercial interests). When it provided its arguments to the Commissioner it also sought to rely upon section 41 (information provided in confidence).
2. The Commissioner's decision is that the council was correct to apply section 43(2) to the information. He has therefore not considered the application of section 41 further.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 5 June 2014 the complainant wrote to the council and requested information in the following terms:

"I am requesting under the Data Protection Act 1998 a full and final cost breakdown of all the work carried out at the above address under the grant ref: [redacted] relating to [address redacted] to which I am entitled."

5. The council responded on 8 July 2014. It supplied the complainant with a redacted copy of the breakdown.
6. Following an internal review the council wrote to the complainant on 8 August 2014. It upheld its initial decision.

Scope of the case

7. The complainant contacted the Commissioner on 24 September 2014 to complain about the way his request for information had been handled.
8. The Commissioner considers that the complaint is that the council was wrong to apply section 43 and that the information should have been disclosed to him.
9. The complainant said to the Commissioner that he only wishes the information for himself and would not pass the information on to others. The Commissioner however needs to point out that any disclosure made under FOI is considered to be to the whole world rather than simply to the requestor.

Reasons for decision

10. Section 43(2) of the Act states that *"Information is exempt 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)."*
11. The council argues that the information is exempt because it is commercially sensitive and its disclosure would prejudice the commercial interests of the third party company. The information which has been exempted from disclosure is the pricing of individual items of work carried out on the complainant's home.

12. The council says that it has asked the company whether it would consent to the disclosure of the information on a number of occasions but it has refused each time. It provided arguments in support of the view that the information is commercially sensitive.
13. It said that the information relates to the activity of buying and selling goods and services and would therefore have an impact upon the commercial activity of the company if disclosed.
14. The construction market in which the company operates is a highly competitive market, and therefore a disclosure of the information could harm the company's commercial interests and its position within the market.
15. It argues that the council's interests in the future could also be prejudiced when tendering for other similar contract and seeking to achieve best value.
16. It further argues that the release of unit costs for individual items at the property is highly sensitive as it is likely to reveal market sensitive information such as profit margins. It says that this would result in the company's position within the market being weakened, placing them at a disadvantage when bidding for other contracts against their competitors.
17. It argued that a disclosure of the unit cost pricing from the withheld information in this case would affect future negotiations with other partners. The council also provided evidence that the contractor tenders for contracts across a wide range of private and public sector organisations to demonstrate the likelihood that this would occur.
18. The Commissioner has considered the above arguments. It is clear that the information which has been withheld does relate to unit costs for work carried out at the home. A disclosure of this information would clearly release market sensitive information which would affect the company in any future tenders. For instance if it chose to tender at a fixed price for work across organisations then competitors would be able to submit tenders which undercut the amount for each individual item in order to win the tender. If the company uses a band of prices dependent upon its desire to win particular contracts then this could affect its relationships with companies it currently works for, or affect its negotiations with other organisation who may demand the same lower price as it has provided in other tenders. These are simply examples as to how a disclosure of unit price can affect a company's ability to win tenders at the best advantage to it.

19. The council considered whether it would be possible to give an overall price for the work carried out on the property. Its view was that the same issues would apply. The Commissioner agrees with this argument. The work carried out on the property has been itemised, and providing an overall price, together with a list of the work carried out would still provide competitors with a very clear example of the pricing of the company when carrying out the contract, albeit that it might not specify exact charges for each individual piece of work which was carried out. Again it would be possible for competitors to extrapolate and infer rough indicators for the prices which the contractor charges for individual items of work from the disclosure of the information.
20. The Commissioner is therefore satisfied that section 43(2) applies to the information.
21. Section 43(2) is subject to public interest test where it is 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

The public interest in disclosing the information

22. The central public interest in the disclosure of the information is to provide transparency in the decisions taken by the council, and in allowing greater accountability for the financial decisions it has taken in agreeing a contract with the contractor.
23. A disclosure of the individual pricing would enable the public to identify whether the council is overpaying for work at the public's expense to a greater degree than a disclosure of the prices paid overall would. For instance the public would have a better understanding of the work involved for smaller work and can associate this with the cost which they might pay for similar work to be carried out themselves. From this they may be better able to extrapolate the overall costs which the council pays the contractor and roughly determine whether the contract as a whole amounts to good value for money.
24. On the counter side, a disclosure of the information would also provide greater public confidence in the council's financial decision making if it demonstrates that the contract was good value for money.
25. There is a strong public interest in the public being able to ensure itself that the council obtains good value for money on contracts it enters into, and that its financial decision making is good.

The public interest in the exemption being maintained

26. The central public interest in the exemption being maintained was expressed by the council quoting from the Commissioner's awareness guidance No 5. It quoted a paragraph regarding commercial interests and competition:

"There is a public interest in ensuring that companies are able to compete fairly. There is also a public interest in ensuring that there is competition for public sector contracts. In considering the release of information, authorities should therefore take these issues into account, including any reputational damage that disclosure might cause."

27. Reputational damage is not relevant in this case. The council argues that withholding the information is in the public interest as it protects both the competitiveness of the contractor and the council. It ensures that competition for public sector contracts is not affected by the disclosure of price sensitive information to the company's competitors.
28. The Commissioner accepts that argument that a disclosure of price sensitive information, particularly at the level of individual item costs would upset the current level playing field on tenders. Competitors could price match their own prices against those of the contractor and amend their own prices to be more competitive across the board in future tendering exercises against the contractor. The Commissioner is also satisfied that the likelihood of this occurring would be fairly high given the number of contracts which the company advertises it is involved in or its website. This encompasses both private and public contracts.
29. Although it was not raised as an argument by either the company or the council, the Commissioner notes that any favourable rates which it provides to the council would become evident and other large companies may then seek to negotiate their prices down to the same level, thereby affecting the potential profits of the company in its other business contracts. The public interest rests in protecting such favourable deals where they are in place. The Commissioner should point out here that he is not aware whether the council has been provided with favourable rates in respect of its contract with this council or not.
30. The Commissioner considers that there is a strong public interest in protecting the level playing field in order that the market is not affected by the disclosure of such information by those companies who contract with public sector organisations.

31. The Commissioner is satisfied that the public interest rests in maintaining the exemption in section 43(2) in this instance. The council was therefore correct to apply section 43(2).

Section 41

32. The council also applied section 41 to the withheld information. As the Commissioner has decided that section 43(2) was correctly applied he has not considered the application of section 41 further.

Right of appeal

33. 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@hmcts.gsi.gov.uk

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

34. 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.
35. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF