

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 March 2017

Public Authority: Cardiff Council
Address: County Hall
Atlantic Wharf
Cardiff
CF10 4UW

Decision (including any steps ordered)

1. The complainant has requested information relating to payments for the supply of ballot papers. Cardiff Council refused the request, relying on the exemption for prejudice to commercial interests, section 43(2) of the FOIA.
2. The Commissioner's decision is that Cardiff Council failed to issue a valid refusal notice and breached section 17(1)(c), and failed to show that section 43(2) was engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant.
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 7 July 2016, the complainant wrote to Cardiff Council (the "council") and requested information in the following terms:

"I am trying to ascertain the value of payments made to MPS Marketing Services Ltd. for April 2016 and May 2016."

6. The council responded on 8 July 2016. It stated that it was withholding the requested information under the exemption for prejudice to commercial interests – section 43(2) of the FOIA.
7. Following an internal review the council wrote to the complainant on 21 August 2016. It stated that it was maintaining its position.

Scope of the case

8. On 17 November 2016 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the information under section 43(2) of the FOIA.

Reasons for decision

Section 17 – refusal notice

10. Where an authority is refusing a request under one of the exemptions in part II of the FOIA it should, under section 17(1), issue a refusal notice which:
 - (a) states that fact,
 - (b) specifies the exemption in question,
 - (c) states (if that would not otherwise be apparent) why the exemption applies.
11. In this case the council's initial response to the request took the form of a refusal notice which confirmed that it was relying on the exemption in section 43(2) to withhold the requested information. In relation to the reason for the application of the exemption the council stated that the "...exemption applies because the information sought is too commercially sensitive."

12. In the Commissioner's view, stating that information is "commercially sensitive" does not explain why disclosing the requested information would or would be likely to result in prejudice to the commercial interests of a party or parties. As it is not self-evident from the information requested that the exemption is applicable, the Commissioner considers that the council's refusal notice should state why the exemption applies; however, it did not do this.
13. In its internal review response the council reiterated that the information was being withheld under section 43(2) because it was "commercially sensitive".
14. Having considered the council's responses the Commissioner has concluded that the council failed to issue a valid refusal notice and breached section 17(1)(c).

Section 43(2) – commercial interests

15. Section 43(2) provides an exemption from disclosure for information which 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.
16. "Commercial interests" in the context of this exemption encapsulates a wide variety of activities. In this case, the withheld information relates to ballot paper printing work carried out by MPS Marketing Services Ltd. (MPS) for the council. The Commissioner is satisfied that the withheld information relates to a commercial activity and falls within the scope of the exemption.
17. In order for the exemption to be engaged it is necessary for it to be demonstrated that disclosure of information would result in some identifiable commercial prejudice which would or would be likely to be affect one or more parties.
18. The ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; i.e. either prejudice 'would' occur or prejudice 'would be likely to' occur.
19. With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15).

20. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
21. The council has argued that disclosure of the information would prejudice the commercial interests of MPS and would be likely to prejudice the council's own commercial interests. The Commissioner has gone on to consider the nature of the prejudice.

The Nature of the Prejudice

Prejudice to MPS

22. In stating that disclosure would prejudice the commercial interests of MPS, the council is relying on the second limb of the test which places a stronger evidential burden on an authority to show the likelihood of prejudice.
23. The council's initial response to the request stated that the information was being withheld under section 43(2) because "*Specific information relating to the amount paid to a company is commercially sensitive therefore is exempt from this request.*" The council's internal review did not expand on this reasoning.
24. In relation to the council's own submissions, therefore, the Commissioner considers that it has failed to define the nature of the prejudice or explain how disclosure would cause the prejudice
25. The council confirmed that, in handling the request, it sought the views of MPS as to what information it might be reluctant to place in the public domain. The Commissioner notes that this approach is in keeping with the recommendations of the code of practice issued under section 45 of the FOIA¹.

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<http://webarchive.nationalarchives.gov.uk/20150730125042/http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

26. The council provided the Commissioner with submissions received from MPS in this regard. The central argument employed is that disclosing the information would enable someone with knowledge of the cost value of ballot papers to ascertain MPS' profit margin. Ultimate responsibility for deciding whether information should be disclosed or withheld rests with public authorities and, in this case, the council has accepted this argument as grounds for withholding the information under section 43(2).
27. In its submissions, MPS has also asserted that the requester is a commercial rival and that the request is self-serving and "vexatious" in nature. The Commissioner notes that "vexatious" in this context has been used in the sense defined within section 14 of the FOIA. However, as section 14 has not been invoked in this case, the Commissioner does not see that it is a relevant consideration in determining whether disclosure would result in prejudice to commercial interests. She considers that the reference is a peripheral one, highlighting the relationship between the companies and raising matters which fall outside the purview of the FOIA and the role of the Commissioner.
28. Generally and, certainly in the case of section 43(2), the Commissioner considers that the identity of a requester or the imagined purposes for which a request are made are not relevant factors when considering whether an exemption is applicable.
29. In relation to the specific arguments provided in this case, the Commissioner accepts that in some circumstances it might be commercially prejudicial for information about a company's income to be placed in the public domain. However, she considers that it is for public authorities to explicitly explain the nature of the prejudice that would occur in any given, specific case and to link the prejudice to the information being disclosed. The Commissioner can find nothing in MPS' submissions or in those provided by the council which explain why, in this case, disclosing the information would present a real and significant risk to MPS' commercial interests.
30. As noted above, the Commissioner accepts that an argument could be made that disclosing the information would result in prejudice to MPS' commercial interests. However, simply saying that information would be prejudicial or of value to competitors does not, in the Commissioner's view meet the evidential threshold required to demonstrate that prejudice would occur. This is particularly so in light of the lack of information available surrounding the context of the request.

31. The Commissioner notes that the council's website makes no reference to any services provided by MPS to the council, so the knowledge of the amount paid over one month would be impossible for the general public to tie in with whatever service was provided. Moreover, without any breakdown of the constituent parts of the amount, it is unclear what possible value a total figure could be to any competitor. In the absence of specific arguments from the council in this regard the Commissioner has concluded that there is nothing in the information which, if disclosed, would be of benefit to a competitor to the detriment of MPS.
32. Where an authority has failed to provide adequate arguments in support of the application of an exemption, the Commissioner does not consider it is her responsibility to generate arguments on its behalf.
33. In the absence of sufficient arguments the Commissioner has concluded that the council has failed to show that disclosure would result in prejudice to the commercial interests of MPS.

Prejudice to the council's interests

34. The council has stated that disclosure of the information would be likely to prejudice its own commercial interests.
35. In support of its position the council has stated that going against MPS' desire that the information not be disclosed would be likely to prejudice the council's relationship with MPS. Although public interest considerations are not relevant to the engagement of the exemption, the Commissioner notes that the council has further stated in its public interest arguments that:

"The procurement process only works properly where there is trust between the authority and the supplier, so that suppliers do not fear that their information will be communicated to third parties including competitors.

Releasing the information may affect the working relationship between the council and the third party which may cause prejudice to the best value achieved by the council."

Releasing the information could impact on the commercial activities of the Council. "

36. The Commissioner considers that the arguments regarding the putative prejudice which would be likely to be caused to the council's commercial interests relate to the relationship between the council and MPS and the impact of disclosure on this relationship.

37. The Commissioner acknowledges that section 43(2) provides protection in cases where it can be demonstrated that disclosure would (or would be likely) to result in commercial prejudice. However, it is incumbent on authorities in each specific case to make the case that an exemption is engaged.
38. Furthermore, since the coming into force of the FOIA, all information held by public authorities can be the subject of requests and it would represent good practice for authorities engaging with third parties to alert them to this.
39. In relation to the notion of trust between the authority and suppliers, the Commissioner accepts that the relationship between a public authority and a service provider can influence the nature of the commercial interaction.
40. However, the Commissioner does not consider that trust or specifically the loss of trust is in itself an example of commercial prejudice and the council has not provided any explanation why this would be likely to result in prejudice to its own commercial interests and what form this would take.
41. More widely, the Commissioner considers that the council must also have regard to its own commitment to transparency. In the council's Statement of Accounts 2015/16 the following observation was made

*"Internal Audit reports are regularly reporting limitations to assurance on the basis of a lack of clear contracts for high value spend and instances of lapsed contracts, in addition to weaknesses in contract management where contracts are in place."*²
42. The Commissioner has concluded that the council has failed to show that the chance of prejudice being caused to its own commercial interests is more than a hypothetical possibility. She finds that, in relation to its own commercial interests, the council has failed to demonstrate that the exemption is engaged.
43. As she has found that the exemption is not engaged the Commissioner has not gone on to consider the public interest.

² <https://www.cardiff.gov.uk/ENG/Your-Council/Council-finance/Managing-the-Councils-Finances/Documents/Statement%20of%20Accounts%202015-16%20For%20Website.pdf> at paragraph 159

Other matters

44. Although they do not form part of this decision notice the Commissioner would like to note the following matters of concern.
45. During the course of her investigation the Commissioner put it to the council that it is common practice for public authority expenditure on goods and services to be published, either as a matter of good practice or in accordance with the duty under section 19 of the FOIA to adopt and publish in accordance with a publication scheme. The Commissioner directed the council to her own website, specifically the section which publishes details of all expenditure on goods and services of a value greater than £25,000³.
46. The council directed the Commissioner to its own publication scheme and, having viewed the scant information which is made available, the Commissioner has concerns that the council might not be complying with its duties in this regard⁴.
47. In her duty to promote good practice under section 47 of the FOIA, the Commissioner advises the council to revisit its publication scheme and ensure that its practice in this regard complies with its duties under section 19.

³ <https://ico.org.uk/about-the-ico/our-information/income-and-expenditure/>

⁴ <https://www.cardiff.gov.uk/ENG/Your-Council/Data-protection-and-FOI/Freedom-of-information/Publication-scheme/Pages/default.aspx>

Right of appeal

48. 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

49. 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.
50. 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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