

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 June 2017

Public Authority: Ulster University
Address: Cromore Road
Coleraine
BT52 1SA

Decision (including any steps ordered)

1. The complainant has requested information relating to the University's Belfast campus development. The University disclosed some of the requested information to the complainant, agreed to allow him to attend to inspect some more of the requested information, however it withheld the remainder, citing section 43(2) as a basis for non-disclosure.
2. The Commissioner's decision is that the University has not correctly applied section 43(2) to the remaining requested information ("the withheld information").
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the remaining withheld information within the scope of the complainant's request 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. The complainant wrote to the University and requested information in the following terms:
 - a) A soft copy of the Cost Management PQQ Scoring Matrices at *PQQ stage* and any and all related computational, ranking and other files that include additional calculations.
 - b) Access to view ALL Cost Management tender hard copy documents by Ulster and ALL soft copy files held by the University on their servers or elsewhere *for PQQ and ITT stages up to and including the day before the date of tender submissions.*
6. The University responded on 11 December 2016. It stated that it was refusing to disclose the requested information and citing section 43(2) of FOIA as a basis for non-disclosure. The complainant requested an internal review of the University's decision on 6 January 2017.
7. Following an internal review, the University wrote to the complainant on 3 February 2017. It stated that the reviewer was upholding the original decision.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. Following the Commissioner's intervention, the University agreed to allow the complainant to visit the University and view the information in part b) of the complainant's request. The Commissioner also understands that the University has now also disclosed some of the information in part a) of the request, however it disclosed some of the information with redactions ("the withheld information").
9. The Commissioner has considered the University's application of the exemption in section 43(2) of the FOIA to the remaining information in part a) of the request ("the withheld information")

Reasons for decision

Section 43(2) – commercial interests

10. The University has withheld elements of tender documentation in respect of various different suppliers for work on the University's Belfast campus development.
11. 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.
12. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered her awareness guidance on the application of section 43. This comments that:

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."
13. In this case, the withheld information relates to a tender exercise in respect of the procurement of services, i.e. work on a new University campus development. The Commissioner is satisfied that the withheld information relates to a commercial activity and falls within the scope of the exemption.
14. 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 affect one or more parties.
15. 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.

16. With regard to "likely to prejudice," the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner*¹ 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).
17. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner*² commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
18. The University has argued that disclosure would be likely to prejudice the commercial interests of both the University and its suppliers. The Commissioner has gone on to consider the nature of the prejudice in this case.

The nature of the prejudice

19. In its submissions to the Commissioner the University has stated that disclosure of the information:

"would be likely to prejudice the University's commercial interests by damaging the confidence that suppliers have in the University and thereby disadvantaging the University in future negotiations in relation to the Belfast development. The information contained in PQQ submissions relates to the technical, economic and financial standing of suppliers, their annual turnover for the previous three years, credit check scores and information about previous contracts that were either terminated or the suppliers withdrew from prematurely."

¹ EA/2005/0005

² EA/2005/0026 & 0030

20. The University goes on to state that the information contained in the suppliers' ITT submissions contains actual tendered pricing information which is clearly of a commercially sensitive nature and disclosure of this information would be beneficial to the suppliers' competitors. The University considers that disclosure of the information could cause reputational damage to suppliers and the University does not want to damage its relationships with suppliers. The University did not consult with the suppliers as it did not want them to lose confidence in the University's ability to protect commercially sensitive information that suppliers provide to the University.
21. In reaching a determination in this case the Commissioner has referred to the University's response to the Commissioner's request for detailed submissions with regard to the application of section 43(2). The Commissioner notes that these submissions refer to the requested information as a whole, rather than specific sections of it. Since the date of those submissions, the University has agreed to allow the complainant to attend to inspect the information requested in part b) of his request. The University has also disclosed most of the information in part a) of the request other than the names of the suppliers on the scoring matrices, which have been redacted.
22. The Commissioner notes that no further details about the nature of the prejudice in relation to the names of the suppliers have been provided. The University in its initial submissions refers to specific information within the ITT and PQQ submissions from the suppliers, which has since been disclosed to the complainant. Therefore, the Commissioner has only considered these arguments in relation to the specific information still being withheld, i.e. the names of the suppliers, disclosure of which would enable matching with the scoring matrices.
23. The Commissioner further notes that, in accordance with the code of practice issued under section 45 of the FOIA, the University should have consulted with the suppliers and sought their views as to whether the information might be disclosed. The Commissioner observes that the University carried out no such consultation process, as it stated that even consulting with the suppliers could damage their confidence in the University.
24. In relation to prejudice likely to be caused to the University's commercial interests, the University has stated that disclosure would be likely to damage its relationship with the suppliers, which would be likely to damage its position in future negotiations regarding the Belfast development.

25. The Commissioner has considered the University's arguments in relation to prejudice in the context of both prejudice to the suppliers' commercial interests and prejudice to the commercial interests of the University itself.

Nature of prejudice to the commercial interests of the suppliers

26. As stated in paragraph 26 above, the University has not sought representations from the suppliers as to the likely prejudice which would be caused to their commercial interests by disclosure of their names on the scoring matrices. The University has stated in its submissions that it considers that disclosure of the requested information would be likely to be of benefit to the suppliers' competitors.
27. The Commissioner notes that this referred to financial information, tender pricing information and credit checks. A large part of that information has since been disclosed to the complainant, so the Commissioner must decide whether the exemption at section 43(2) is engaged specifically in relation to the names redacted from the scoring matrices.
28. The Commissioner has examined the unredacted versions of the scoring matrices. These do provide financial, technical and economic information about the suppliers, however they are around 7 years old, so are not recent, and therefore unlikely, in the Commissioner's view, to be of any benefit to competitors of the suppliers at this stage.
29. Where a public authority has failed to provide adequate arguments in support of the application of an exemption, the Commissioner does not consider it to be her role to generate arguments on its behalf. In this instance although the University defined the nature of the likely prejudice to its suppliers, the Commissioner is of the view that in this instance the University has not linked any likely prejudice caused to the suppliers specifically to the remaining withheld information.

Nature of prejudice to the commercial interests of the University

30. The University stated that disclosure of the requested information would be likely to prejudice the University's commercial interests by damaging the confidence that suppliers have in the University and thereby disadvantaging the University in future negotiations in relation to the Belfast development. However, these submissions were made in relation to the entirety of the requested information, most of which has now been disclosed. There were no specific submissions made in respect of continuing to redact the suppliers' names from the scoring matrices and the particular prejudice which would be likely to be caused to the University's commercial interests by disclosure of that specific information.
31. Having considered the information and the University's submissions, the Commissioner does not consider that the University has provided adequate and convincing arguments as to why disclosure of that particular information, which is at least 7 years old, would be likely to damage suppliers' confidence in the University and disadvantage its position in future negotiations.
32. The Commissioner has concluded that, although the University has defined the prejudicial effects it considers that disclosure would cause to both its commercial interests and those of the suppliers, it has not adequately linked this to the remaining withheld information and it has failed to demonstrate that it would be more likely than not that such effects would occur. As the Commissioner has determined that the exemption at section 43(2) is not engaged she has not gone on to consider the public interest.

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

Deirdre Collins
Senior Case Officer
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