

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 October 2018

Public Authority: Stockport Metropolitan Borough Council
Address: Town Hall
Stockport
Cheshire
SK1 3XE

Decision (including any steps ordered)

1. The complainant made a freedom of information request to Stockport Metropolitan Borough Council (the Council) about the contractual arrangements for the A6 Manchester Airport Relief Road (A6MARR). The Council refused the request under the section 43(2) (commercial interests) exemption.
2. The Commissioner's decision is that section 43(2) was correctly applied and the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

Request and response

3. On 22 January 2018 the complainant requested the following information about the contractual arrangements for the A6MARR scheme:

'Under the provisions of the Freedom of Information Act 2000, please provide the following:

- The original Contract completion date for this project;*
- The revised completion date, if this has been amended under the provisions of the Contract;*
- The quantum of any Extension of Time request(s) submitted by the Contractor, which may be currently under review by the Engineer.'*

4. On 19 February the Council provided a response for the first 2 parts of the request. The original completion date is 31 March 2018 and *'there has been no revision to the date'*. The Council cited section 43(2) - commercially sensitive - to refuse to answer the third part of the request.
5. The complainant requested an internal review on 19 February 2018. The Council sent him the outcome of its internal review on 27 March 2018 upholding its decision to cite section 43. It explained:

'Upon meeting with the Service Area, it was clear to me that no defined Extension of Time request has yet been submitted by the contractor. The Council and the contractor are still in negotiations as to the completion date of the scheme and that the Section 43(2) exemption has been applied to the details of those negotiations. Once a revised completion date is known the Council would be happy to share this.'

Scope of the case

6. The complainant contacted the Commissioner on 27 March 2018 to complain about the way his request for information had been handled. He queried whether his request had been rejected because of section 43 or because the information is not there. He clarified that he was not seeking a revised completion date but he was seeking the *'quantum of the Contractor's EOT submissions'*.
7. The complainant further explained that *'to suggest that the Contractor has not submitted a defined EOT request is not feasible...the Contract contains specific provisions for Compensation Events to be submitted within prescribed time limits...the Contractor will have assessed his overall entitlement to EOT under the Contract based on the impact of Compensation Events on the original contract programme.'*
8. The Commissioner understands that there is one outstanding question from the original request: *'The quantum of any Extension of Time request(s) submitted by the Contractor, which may be currently under review by the Engineer.'* The Council provided information for the first 2 parts of the request and this has not been disputed.
9. Therefore the Commissioner has focussed her investigation on whether the Council correctly applied the exemption under section 43(2) of the FOIA to the third part of the complainant's request.

Reasons for decision

Section 43(2) - Commercial interests

10. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it. The exemption is subject to the public interest test which means that even if it is engaged account must be taken of the public interest in releasing the information.
11. The exemption can be engaged on the basis that disclosing the information either 'would' prejudice someone's commercial interests, or, the lower threshold, that disclosure is only 'likely' to prejudice those interests. The term 'likely' is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice is more probable than not.
12. For section 43(2) to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the Council alleges would be likely to occur if the withheld information was disclosed has to relate to the commercial interests;
 - Secondly, the Council must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e. whether there is a real and significant risk of the prejudice occurring.

Commercial interests

13. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner has considered the meaning of the term in 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."*¹

¹ See here: https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

14. The Council has confirmed that it holds information within the scope of the third question and has provided this withheld information to the Commissioner. The Council stated that there was further and extensive background information but this was not provided to the Commissioner.
15. The Council has explained that both parties' (the Council and the Contractor, Carillion Morgan Sindall) commercial interests would be adversely affected by '*disclosing the ongoing discussions around the proposed financial arrangements including extension of time to the contract and changes to the delay damages arrangements*'.
16. The Council explained that both parties
 - have been and continue to be in commercial discussions regarding contractual arrangements for the A6MARR scheme. The Contractor was seeking significant additional money and time to deliver the scheme whilst the Council was seeking to rebut these claims with the assistance of specialist commercial and legal advice.
 - The ongoing negotiations have led to positions being taken on both sides which are being formalised into the final agreement which is subject to the report to Cabinet which can be located here:
<http://democracy.stockport.gov.uk/documents/s145725/A6MARR%20update%20report%20Cabinet%20Meeting%20Summary%20Sheet.pdf>.
 - The final detail and wording of this agreement is still being discussed but both sides had agreed that the discussions will remain confidential.
17. The Commissioner notes that at the time of the request, the negotiations were continuing and she is satisfied that the actual harm alleged by the Council relates to commercial interests. Accordingly, she is satisfied that the first criterion is met.

Causal link

18. When investigating complaints which involve a consideration of prejudice arguments, the Commissioner considers that the relevant test is not a weak one and a public authority must be able to point to prejudice which is "real, actual or of substance" and to show some *causal* link between the potential disclosure and the prejudice.
19. The Council has provided the Commissioner with details of the way in which it believes its commercial activities would be affected by disclosure of the requested information. The Council has explained that

- the Contractor, whilst submitting compensation events for additional and changes to work throughout the scheme had not requested extra time however they indicated that they would wish to revisit their earlier compensation claims as they should have included time. This was disputed by the Project Manager as it was not in accordance with the contract. The Project Manager continued to administer the scheme in accordance with the contract whilst parallel commercial and legal discussions took place.
20. The complainant has commented the Project Manager should be a Professional Chartered Engineer: *'I believe he has a role of impartiality to review any extension of time requests on the merits of the Contractor's submission. To suggest his decision on any award would be influenced by public knowledge of any Extension of Time request or commercial interests would be in conflict with his professional duties.'*
21. The Commissioner is satisfied that there seems to be a causal link as the timing of the request and ongoing issues suggest there is a real risk of prejudice and suggests that there is a causal link between the requested information and its commercial interests.

Likelihood of prejudice

22. In Hogan and Oxford City Council v the Information Commissioner [EA/2005/0026 and 0030] the Tribunal said:
- "there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not."(paragraph 33)
23. In this case, the Council has confirmed that it is relying on the higher threshold to engage the exemption. The Council has argued that disclosure would prejudice its commercial interests. The Commissioner's view is that this places an evidential burden on the public authority to show that the risk of prejudice is more probable than not to occur (ie a more than a 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so).
24. The Commissioner's guidance says that information about the procurement of goods and services by a public authority is usually considered to be commercially sensitive.
25. The Council has stated that disclosure of the information could have adversely affected the commercial negotiations which both parties had agreed were confidential and without prejudice: *'the failure of the*

negotiations could have significantly extended the length of the delivery of the scheme and could have resulted in adjudication or other legal proceedings between the two parties with both sides wishing to protect their position prior to such an even [sic] occurring.'

26. The Commissioner has seen the withheld information and she is satisfied that there is more than a 50% chance that its disclosure, at the time of the request, would cause prejudice to the negotiations between the parties and their commercial interests.
27. This is not in itself a reason not to disclose the information under FOIA. However, it does indicate the importance that the Council attaches to this information and the prejudice that would be caused if it was disclosed.
28. For all of these reasons the Commissioner has found that the section 43(2) exemption is engaged and therefore has now gone on to consider the public interest test.

Public interest test

29. Section 43(2) is a qualified exemption which means that even where the exemption is engaged, information can only be withheld where the public interest in maintaining that exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

30. The complainant stated that disclosing the information to him would not affect the Project Manager's ability to assess and award the contractor. He has not provided any public interest arguments in favour of disclosure.

Public interest arguments in favour of maintaining the exemption

31. As regards the public interest in maintaining the exemption the Council said that the detailed negotiations between the Council and the Contractor were confidential. The Council had included the '*principles of the settlement arrangements in a report to Cabinet whilst keeping detailed financial arrangements confidential*'.

Balance of the public interest arguments

32. The Commissioner considers that there is always some public interest in the disclosure of information. This is because it promotes the aims of transparency and accountability, which in turn promotes greater public engagement and understanding of the decisions taken by public authorities.

33. However, the Commissioner's view is that in this case the public interest in protecting the commercial interests of the Council is especially strong given the timing of the request. At the time of the request in January 2018 the Council was negotiating with the contractor. Disclosure would have undermined the Council's competitive advantage and impact on the delivery of the scheme - the completion of the A6MARR.
34. The Commissioner notes that the A6MARR opened to traffic in October 2018 but work on the road continues. It is in the public interest to ensure that the Council is able to negotiate with its contractor fairly.
35. Therefore, given the limited public interest in disclosure and the sensitive timing of the request, the Commissioner has decided that in all the circumstances of the case, the public interest in maintaining the section 43(2) exemption outweighs the public interest in disclosure.

Right of appeal

36. 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

37. 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.
38. 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

Pamela Clements
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