

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 March 2019

Public Authority: Rossendale Borough Council
Address: Business Centre/Futures Park
Bacup
OL13 0BB

Decision (including any steps ordered)

1. The complainant has requested information relating to an Empty Homes Revolving Fund Agreement. Rossendale Borough Council refused the request under the exemption for commercial interests – section 43(2) of the FOIA.
2. The Commissioner's decision is that Rossendale Borough Council failed to respond in time and breached section 10(1) and that it failed to demonstrate that section 43(2) is 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 5 March 2018, the complainant wrote to Rossendale Borough Council (the "council") and requested information in the following terms:

"...a copy of Schedule 1 Approved Bid from this separate 18 March 2013 Empty Homes Revolving Fund Agreement (Revolving Fund Agreement), in order, to show how its costs build up relates to those of the 14 November 2012 "Consortium Agreement", at the inception of this stage of the Pennine Lancashire Empty Homes Programme."
6. The council responded on 3 October 2018. It stated that it was withholding the information under the exemption for commercial interests – section 43(2) of the FOIA.
7. Following an internal review the council wrote to the complainant on 5 October 2018. It stated that it was maintaining its position.

Scope of the case

8. On 24 October 2018 the Commissioner accepted the complainant's complaint about the way his request their information had been handled.
9. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the requested information.

Reasons for decision

Section 10(1) – time for compliance

10. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

11. Section 10(1) of the FOIA states that a public authority must respond to a request promptly and *"not later than the twentieth working day following the date of receipt."*

12. From the evidence provided to the Commissioner in this case, it is clear that in failing to issue a response to the request within 20 working days, the council breached section 10(1) of the FOIA.

Section 43(2) – commercial interests

13. Section 43(2) provides that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person.
14. The council explained that the request relates to an Empty Homes Scheme and specifically to a grant agreement made between the council and the then Homes and Communities Agency, now known as Homes England. The council confirmed that it has been the lead authority in this scheme along with 4 other neighbouring local authorities.
15. The council clarified that the agreement is dated 18th March 2013 but the scheme is a project that sees empty properties being brought back into use by the Council. It explained that the scheme provides that the council would take a lease from the property owner and then renovate and lease out the property for a period of up to 10 years.
16. In order to apply section 43(2), a public authority must satisfy itself that disclosure of the information would, or would be likely to, prejudice or harm the commercial interests of any person (this can include the public authority holding it). This is known as the prejudice test.
17. The term “would...prejudice” means that prejudice is more probable than not to occur, that is, there is more than a 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so.
18. The council stated that it considered that disclosure *would* prejudice its own commercial interests and those of Homes England. The council confirmed that, in accordance with the recommendations of the code of practice issued under section 45 of the FOIA, it consulted with Homes England and sought its views in relation to the withheld information¹. The council provided the Commissioner with copies of its consultation correspondence with Homes England and confirmed that it was maintaining its position as set out in its refusal notice of 3 October 2018.

¹ The code of practice issued under section 45 of the FOIA is published online here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

The Commissioner notes that the council's arguments for withholding the information mirror those provided by Homes England during the consultation process.

19. The council has argued that disclosure of the information would harm Home England's interests, impacting on its ability to operate effectively and competitively. The council, after Homes England, considers that disclosure would give both competitors and potential developers an advantage for future schemes or projects and *"...would or would be likely to undermine Homes England's ability to effectively negotiate and ensure the best outcome for a development and best value for money."*
20. In relation to its own commercial interests, the council stated that disclosure would be prejudicial to its *"....dealings in the market place as price transparency would disadvantage them commercially."*

Conclusions

21. In considering this matter the Commissioner has had regard for the decision of the First-Tier (Information Rights) Tribunal (the "Tribunal") decision in Hartlepool Borough Council vs the Information Commissioner (EA/2017/0057). In this case, in paragraph 54 of the decision, the Tribunal stated the following in relation to the affected party ("Peel")

"What Peel has completely failed to do, however, is to support its assertions with evidence. There are no witness statements, and no evidence or even arguments to link the disclosure of any specific aspect of the information with any specific business interests that would or would be likely to be prejudiced by its disclosure. Peel has not said, for example, that it is in the process of tendering for another development project which is comparable...."

22. In paragraph 55 the Tribunal goes on to say:

"The Commissioner had highlighted the need for a much greater level of specificity. Peel's response that it does not consider the Commissioner's request for a more "granular explanation" is reasonable, misses the point. The need for the explanation does not arise from the Commissioner's request. It arises because the onus rests with the party making the assertion that the exemption is engaged to make good its claim. So, for example, if a manufacturer of widgets were to claim that disclosure of information relating to its dealings with a particular commercial partner would or would be likely to prejudice its commercial interests, it would not be sufficient for it to say simply that the manufacture of widgets is a competitive business, that it enters into similar agreements as part of its business and will therefore suffer prejudice if the information became available to its competitors. It would

need to demonstrate the link between the specific information in issue and the claimed prejudice. So for example, it might show that the information would disclose that it manufactures its widgets in a particular way that is cost effective, and that is not known by its competitors, or that it had structured its agreement in a way that is unusual in the industry by charging its widgets at an unusually low mark-up because of a commitment that it would provide training at a higher return than usual.”

23. The Commissioner notes that the submissions provided by Homes England and the council in this case are almost entirely generic, making no reference to any specific details of the withheld information and identifying no specific effects of disclosure. The Commissioner is mindful that, where a competitor has access to information about a rival’s strategy or costings which would enable it to change its strategy to the detriment of the rival, without any reciprocal disclosure being made, it might well be that adverse effects would ensue. However, it is the duty of a public authority to explain what the specific effects would be and how disclosure would produce them. In short, it is insufficient for the engagement of the exemption to simply state that disclosing the information would benefit a competitor or otherwise harm a party’s commercial strategy. Such an approach does not take us very much beyond the wording set out in the exemption and certainly does not convince that the higher threshold for engaging the exemption has been met.
24. As noted in the Tribunal decision above, in order to show that some adverse effects would ensue, an authority needs to identify specific elements (such as pricing) associated with delivery of a service and show how it would be of specific value to a competitor and how this would be detrimental. The council’s submissions make no reference to any discrete elements of the withheld information, instead relying on generic descriptors with no explanation of how disclosure would cause the rather vague effects identified.
25. The Commissioner considers that although the council has consulted with Homes England in relation to this matter, the arguments relating to prejudice are couched in generic terms and are not specifically linked to the withheld information in this case. She considers that there is little clarity around the specific nature of the prejudice which disclosure could cause and how this would be generated by the withheld information. This lack of clarity indicates that the council has struggled to meet the evidential and explanatory burden set by the exemption.
26. As stated earlier, in order for the exemption to be engaged it is necessary to demonstrate that disclosure of information would result in specific harm to a party or parties’ commercial interests and to explain

the causal sequence. She considers that the council's arguments, whilst identifying possible effects, fails to make these effects sufficiently concrete and fails to identify the causal link with the withheld information. She considers that it is for public authorities to fully explain the relevant causes and effects.

27. The Commissioner considers that the council has been given sufficient opportunity to provide evidence and arguments in support of its position. When making her enquiries in this case, the Commissioner informed the council that her general approach is to allow one further opportunity for a public authority to submit thorough arguments in support of its position, with reference to the specific withheld information and the precise circumstances of the case, before recommending a decision.
28. In cases where a public authority has failed to provide sufficient arguments to demonstrate that exemptions are engaged, the Commissioner is not obliged to generate arguments on a public authority's behalf or to provide the causal link. In this case, the Commissioner does not consider that sufficient arguments have been provided to demonstrate that disclosure would prejudice either the council's commercial interests or the commercial interests of Homes England.
29. The Commissioner has decided that the exemption is not engaged and has, therefore, not gone on to consider the public interest test.

Right of appeal

30. 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

31. 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.
32. 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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