

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 February 2020

Public Authority: Halton Borough Council
Address: Municipal Building
Kingsway
Widnes
Cheshire WA8 7QF

Decision (including any steps ordered)

1. The complainant has requested a report relating to SEND provision in the borough. Halton Borough Council disclosed some information and withheld other information under the exemption for commercial interests (section 43(2)).
2. The Commissioner's decision is that Halton Borough Council has correctly applied the exemption in section 43(2) to withhold some of the requested information but that, in relation to some of the information, the public interest favours disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information identified in the confidential annex.
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 8 May 2019, the complainant wrote to Halton Borough Council (the "council") and requested information in the following terms:

"...a copy of the report that was provided to the council by Peopletoo in relation to the review that they undertook at the request of the council concerning SEND provision in the borough."

6. The council responded on 19 June 2019. It stated that it was withholding the information because it was marked "strictly confidential".
7. Following an internal review the council wrote to the complainant on 19 July 2019. It stated that it was withholding the information under the exemption for information provided in confidence – section 41 of the FOIA.

Scope of the case

8. On 25 July 2019 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. During the Commissioner's investigation the council disclosed some of the requested information and withheld other information under the exemption for prejudice to commercial interests – section 43(2) of the FOIA.
10. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly applied section 43(2) to the withheld information.

Reasons for decision

Section 43(2) – Commercial Interests

11. The council explained to the complainant that it withheld information of the following description from the disclosed Peopletoo Report (the "report"):

"In this specific instance a relatively small amount of information has been redacted from the report upon the basis that it reflects information provided to the report author in circumstances whereby there was an implicit expectation of confidence. Those engaging with the company

during the course of the review did so upon the understanding that such engagement was intended to inform the preparation of the report which would be shared with the Council in order to inform its thinking concerning the future provision of its services. At that time there was no inference or suggestion on the part of the consultant that the report would be used for any other purpose."

12. Section 43(2) of the FOIA states:

"Information is exempt information 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)."

13. The information in question is a report produced by consultants (Peopletoo Ltd) for the council in relation to special educational needs and disability (SEND) provision in the borough. The report was commissioned by the council and produced by Peopletoo as a commercial activity.

14. Section 43(2) of the FOIA is a prejudice-based exemption and in order to be engaged, the following criteria must be shown to apply:

- the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

15. The council has argued that disclosing the information would be likely to prejudice the commercial interests of Peopletoo. In reaching this conclusion the council consulted with Peopletoo and sought its views. The Commissioner has had sight of the relevant correspondence and is satisfied that the council has accurately reflected Peopletoo's concerns about the information.

16. The council has argued that the release of the information into the public domain would likely result in a loss of trust with those with whom Peopletoo engaged during the review process and this may result in the

reticence of such parties to fully engage in the free and frank exchange of views in similar circumstances in the future.

17. The council has argued that this, in turn, would likely result in the reputation and credibility of Peopletoo being undermined and leading to commercial detriment through a loss of confidence in its provision of consultancy services within the competitive commercial market.
18. Having considered the withheld information and the council's arguments, alongside the submissions from Peopletoo itself, the Commissioner notes that stakeholders were consulted with an expectation that the information would not be more widely published. She accepts that contradicting this expectation would be likely to undermine trust in Peopletoo which in turn might result in harm to its reputation. The Commissioner accepts that this, in turn would be likely to result in damage to its ability to compete in the commercial consultants market, whereas similar harm would not be done to its competitors.
19. In light of the above the Commissioner has concluded that disclosure of the information would be likely to prejudice Peopletoo's commercial interests. She has, therefore, gone on to consider the public interest.

Public interest in disclosing the information

20. The council has acknowledged that there is a broad public interest in maintaining the transparency and accountability of its actions and that disclosure would facilitate this.
21. The complainant has argued that the council is withholding the information to avoid embarrassing information being made public which would assist parents to achieve appropriate services for SEND children. The complainant has suggested that the council's service is deemed unfit for purpose and a summary has been made public but no details. They have argued that it is imperative that this detail is available to allow parents to ascertain whether provision is also unfit for purpose, and whether needs are being ignored and services are being delivered against budget and not need.
22. The Commissioner notes that it is a matter of public record that the council's special needs provision has been criticised and that it has been reported that "...Children with special needs are being let down by services "not fit for purpose" in an area with some of the region's

*highest exclusion rates, a report has found.*¹. Without commenting on the veracity of such reports the Commissioner does note that the appearance of inadequacy can be just as damaging to a public authority's reputation as proven deficiencies. Disclosure in such cases would serve to either promote accountability where it is needed or, where it is less relevant, to dispel such concerns.

Public interest in maintaining the exemption

23. The Commissioner acknowledges that the exemption is designed to protect commercial interests and she has given due weighting to the public interest in maintaining such protection in this specific case.
24. The Commissioner has noted submissions from Peopletoo to the council, which affirm that the report was written with a level of detail to be of maximum use to the council in driving improvements. In order to facilitate such endeavours, it is argued that the content contains sensitive information in relation to specific providers which was provided to Peopletoo in good faith that it would be used appropriately and not for wider public consumption. The council, via Peopletoo, have argued that the information is of use to the council in serving the public interest in developing its provision but that disclosure would damage Peopletoo's relationship with future clients on the basis of a loss of trust.
25. The council has argued that relatively small amount of information has been redacted from the report and that it considers the public interest has been served by the provision to the complainant of a summary of the redacted information.

Balance of the public interest

26. The Commissioner is mindful of the interests that the exemption is designed to protect and has ensured that these are given due weighting in the public interest analysis.
27. The Commissioner has taken the complainant's general concerns about the council's practice in relation to SEND provision and the general public interest in transparency and accountability into account. She also acknowledges the complainant's specific concerns about publicly reported failings by the council in these matters. It is not the

¹ <https://www.liverpoolecho.co.uk/news/liverpool-news/special-needs-services-branded-unfit-15873687>

Commissioner's role to adjudicate on the substantive matter, namely, whether the council's SEND provision is fit for purpose. However, the Commissioner does consider that perceived failings that, on the face of it, have some credibility, constitute a specific, legitimate public interest argument in favour of transparency and accountability. Disclosure in this case, the Commissioner accepts, would serve to either hold the council to account for failings or exonerate it. In either outcome disclosure would serve the public interest in accountability.

28. However, the Commissioner is mindful that the focus of the exemption is to protect commercial interest and that the focus of her analysis must, therefore, be on those factors which orient where the public interest lies.
29. In relation to details provided by specific stakeholders the Commissioner acknowledges that it is likely that disclosure would result in damage to Peopletoo's ability to work with stakeholders on a trust basis. She accepts that this would be likely to result in harm to its ability to perform in this specific commercial market, where its competitors would not be subject to equivalent inhibition. She finds that the public interest benefits of disclosure in respect of this information would not outweigh the public interest in allowing Peopletoo to continue to carry out its commercial functions.
30. However, the Commissioner notes that certain sections of the withheld information relate to broader matters and also to the council's own performance and practice. She considers that, in relation to this information, it is unlikely that much detriment would be caused to the identified interests of Peopletoo and that, in any event, these interests are outweighed by the public interest in transparency and accountability in respect of the council. In relation to this information the Commissioner has found that the public interest favours disclosure and she has identified the specific information which the council should provide to the complainant in the confidential annex to this decision notice.

Right of appeal

31. 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@justice.gov.uk

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

32. 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.
33. 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
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SK9 5AF