

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 October 2022

Public Authority: London Borough of Bexley
Address: Bexley Civic Offices
Broadway
Bexleyheath
Kent
DA6 7LB

Decision (including any steps ordered)

1. The complainant has requested contract information associated with 11+ tests provided by the Centre for Evaluation and Monitoring (CEM). London Borough of Bexley ('the Council') has disclosed some information within scope of the request and withheld some information citing sections 43(2) - prejudice to commercial interests, section 41(1) – confidentiality and section 40(2) and 40(3)(a) – personal information of FOIA.
2. The Commissioner's decision is as follows:
 - The Council is entitled to withhold the information under section 43(2) of FOIA and the public interest favours maintaining this exemption.
 - The Council is also entitled to redact the disclosed information for the purpose of section 40(2) of FOIA. However, the Council breached sections 10 and 17 of FOIA in failing to provide their response and a refusal notice within the statutory time limit of 20 working days.
3. The Commissioner does not require the Council to take any steps as a result of this decision notice.

Request and response

4. On 9 August 2021, the complainant requested information in the following terms:

"I understand that Bexley Council uses 11+ tests provided by the Centre for Evaluation and Monitoring (CEM). I would like to request the following information.

1. A copy of the contract between Bexley Council and CEM to supply tests.

2. The amount spent on the tests if this is not contained in the contract. (Please explain if this covers multiple years and approximately how many children are tested)

3. Copies of any communications from CEM in the first three months of 2021 relating to disclosure of information. (These may have been sent by letter or email. Correspondence sent by email have come from the solicitors, Hewitsons, with an email address @hewitsons.com or @hcrlaw.com. Email correspondence from CEM may have come from @cem.org. This is intended to be helpful rather than an exhaustive list of all the methods CEM may have used to communicate with Bexley Council.)"

5. On 8 September 2021, the Council responded. It released some redacted information within scope of the request for Q1 and Q2, and withheld some information under section 43, advising a nil return for Q3.
6. The Council provided an internal review on 7 October 2021. It maintained its reliance on section 43, and in addition cited sections 41(1), 40(2) and 40(3)(a) to withhold the remaining information.

Scope of the case

7. The complainant contacted the Commissioner on 31 October 2021 to complain about the way their request for information had been handled.
8. The Commissioner's investigation has focussed on whether the Council is entitled to withhold the information requested under section 43(2) of FOIA, and the balance of the public interest. The Commissioner will also consider if the Council were correct to rely on section 40(2) to withhold some of the information.

Reasons for decision

Section 43 – commercial interests

9. Section 43(2) of FOIA says that information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
10. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met. First, the actual harm that the public authority alleges would, or would be likely, to occur if the withheld information were disclosed has to relate to the applicable interests within the relevant exemption.
11. Second, 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 that is alleged must be real, actual or of substance.
12. Third, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – e.g., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather, there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not. Section 43(2) is subject to the public interest test.
13. In their correspondence to the Commissioner the complainant raised the following points:

"the response I received is. (name redacted) refused to provide the values of the contracts. Her letter says.

Disclosure of the redacted information - being the price paid by the Council for CEM's 11+ tests would also be detrimental to the Council as it would allow competitors negotiating with us to use the CEM price as leverage to obtain a better price themselves. The result would be a risk of higher prices for the Council and other purchasers of 11+ tests.

This would only be true if, as claimed in court by (name redacted), CEM's tests were more expensive. The Information Commissioner should (name redacted) response in full, but the purpose of it was

clearly intended to give me the false impression that CEM's tests were more expensive.

The reason I know this impression is false was because my attention was drawn to a website <https://www.bexley11plus.co.uk>. Under a section entitled 'News,' this claims that

"Bexley extended contracts with CEM at a cost of £88k and Bexley has purchased the copyright of the tests. It is notable when Bexley's contract was put out to tender both CEM and GLA submitted bids. In each case CEM's bid was lower."

14. In its submission to the Commissioner the Council said:

"As advised to the Complainant in our response to the internal review dated 8 October 2021, the redacted information sought is commercially sensitive to CEM and it is important for their competitiveness that they are able to remain as a participant in the market. Specifically, the differences between CEM's offering and that of its competitors include its pricing. Making pricing information, including the redacted information, publicly available would give competitors a distinct advantage with regards to any similar future business that they sought to win, as the information would: provide competitors with commercial details that would inform and influence their bids and jeopardise any future business opportunities that CEM might attempt to participate in by reducing its bargaining power and therefore its competitive edge."

15. With its submission to the Commissioner the Council included correspondence which detail the supplier's concerns about releasing the data. The Council also provided a copy of the contract in question. The Council says that it is clear from the contract that the contract is current and in place and noted that the contract also includes clauses relating to FOIA.

16. The Council says that when it was considering whether it was appropriate to apply the section 43 exemption, it took into account the information the supplier provided. The Council says it has had to consider its relationship with the supplier and the possible impact of disclosure on the supplier and also any impact for the Council regarding future negotiations. The Council confirmed that, on balance and because of the supplier's concerns, it considers the section 43 exemption was appropriate.

17. In their correspondence to the Council, the supplier confirmed that it considered information about its detailed pricing processes and methods of operation to be commercially sensitive.

18. The Council considered that releasing the information “would likely” prejudice the supplier’s commercial operations. The Council also drew attention to section 41 of FOIA (which concerns information provided in confidence) and advised that any contractual arrangements between it and the supplier that the Council holds under an actionable obligation of confidentiality, is exempt from disclosure. (The Commissioner notes that that does not necessarily guarantee that, under section 43(2), such information will not be disclosed).
19. Noting the three criteria at paragraphs 10-12, the Commissioner is first satisfied that the actual harm that the Council alleges would, or would be likely, to occur if the withheld information were disclosed relates to the interests applicable within section 43 as it relates to the Council’s supplier’s commercial interests.
20. Regarding the second of the criteria, the Commissioner considers that from the information the Council has provided, he has been able, on this occasion, to identify that such a causal relationship exists.
21. The Commissioner accepts that disclosing the financial detail of a contract that was live at the time of the request and which remains live would or would be likely to prejudice the supplier’s commercial interests. This is because it would provide the supplier’s competitors with information about its pricing and processes to which those competitors would not otherwise be privy. Disclosure would or would be likely, therefore, to undermine the supplier’s future negotiating position, with the Council in this case or with other organisations, and it would put competitors in a stronger position. The Commissioner is also satisfied that such commercial prejudice is not trivial and would be of substance.
22. Finally, the Council’s position, via its supplier, is that the envisioned prejudice would likely happen. The Commissioner considers the prejudice would likely happen is credible which means that the chance of prejudice occurring is more than a hypothetical possibility and that there is a real and significant risk.
23. Since the three criteria have been met, the Commissioner’s decision is that the disputed information engages the exemption under section 43(2) of the FOIA. He has gone on to consider the associated public interest test.

Public interest test

Public interest in disclosing the information

24. The Council recognises the general public interest in demonstrating openness and transparency, as well as financial accountability.
25. The Commissioner has noted the complainant's arguments for disclosure, above. And he considers that there is a general public interest in public authorities being transparent about their financial arrangements to reassure the public that it is achieving the best value for money.

Public interest in maintaining the exemption

26. The Council said within its public interest argument that: "the Council had to balance the likelihood of disclosure having an adverse effect on the commercial interest of CEM and the Council itself. This would have a negative impact on the Council's ability to tender contract competitively and could impact our ability to deliver services on a cost-efficient basis. It would also impact on CEM's competitive advantage for the reasons outlined above. Having considered the arguments for and against disclosure, the Council has decided that the public interest in this case served best by maintaining the exemption and not disclosing the information requested." The Commissioner has noted the correspondence from the Council and accepts that there is a public interest in the supplier maintaining its competitiveness. This benefits both the supplier and the Council.

Balance of the public interest

27. The information being withheld is the cost to the Council of its 11+ tests. The applicant may well have their own personal interest in that specific information, but the Commissioner does not consider they have made a convincing case for there being a wider public interest in it outside of the general interest in the Councils expenditure.
28. The Commissioner has considered the circumstances of this case and taken into account that the Council provided information within scope of the request. He is satisfied that there is greater public interest in the Council's supplier not being disadvantaged through disclosure of the information at the time of the request. Disclosure could result in the supplier being less willing or less able to engage in future contracts with the Council, or other bodies. This would be to the detriment of the supplier. Disclosure could also disadvantage the Council – with an already limited pool of two potential suppliers with which the Council can contract, it would be more difficult to achieve value for money. The Commissioner therefore finds that the public interest favours maintaining the section 43(2) exemption with regard to the request.

Section 40 – personal information

29. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A), (3B) or (4A) is satisfied.
30. In this case, the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data (“the DP principles”), as set out in Article 5 of the UK General Data Protection Regulation (“UK GDPR”).
31. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (“DPA”). If it is not personal data, then section 40 of FOIA cannot apply.
32. Secondly, if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the withheld information personal data?

33. Section 3(2) of the DPA defines personal data as:

“any information relating to an identified or identifiable living individual.”
34. The two main elements of personal data are that the data must relate to a living person and that the person must be identifiable.
35. An individual is “identifiable” if they can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of the individual.
36. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

37. The Commissioner considers that an individual can be indirectly or directly identifiable when information held by a public authority can be combined with other information either previously disclosed to an individual or in the public domain to identify the individual.
38. The Commissioner has been provided with a copy of the withheld information. The information consists of correspondence and copy contracts containing the personal information of employees of both the Council and the supplier.
39. The Commissioner is satisfied that this information falls within the definition of "personal data" in section 3(2) of the DPA.

Would disclosure of the information contravene any of the DP principles?

40. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
41. The most relevant DP principle in this case is the one contained within Article 5(1)(a) of the UK GDPR, which states:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."
42. In the case of an FOI request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair, and transparent.
43. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

44. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and

freedoms of the data subject which require protection of personal data, in particular where the data subject is a child².”

45. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information.
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question.
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
46. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

47. In considering any legitimate interest(s) in disclosing the withheld information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
48. Further, a wide range of interests may be legitimate interests. They can be the requester’s own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
49. The Commissioner considers that there is a legitimate interest in knowing the general policies and procedures the public authority has in place to ensure it is compliant with relevant legislation around the specific issue raised here. However, the Commissioner does not consider

² Article 6(1) goes on to state that:- “Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:- “In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”

that there is a pressing social need to interfere with the privacy rights of individuals in order to disclose the withheld information.

50. He considers that there is a generic legitimate interest in how the Council has adhered to its responsibilities for openness and transparency.

Is disclosure necessary?

51. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so a measure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least restrictive means of achieving the legitimate aim in question.
52. In its submission, the Council told the Commissioner that: As the documents contain reference to specific named individuals, they are considered as relating to those individuals.
53. The Commissioner does not consider that there is pressing social need to interfere with the privacy rights of third-party individuals in order to satisfy the legitimate interest in obtaining the information requested. Disclosing the withheld information is not the least restrictive means of satisfying this legitimate interest.
54. The Commissioner is mindful that disclosure under FOIA is disclosure to the world at large. Therefore, the effect of complying with this request would be that the third-party individual's personal details were effectively being publicly disclosed and would be accessible to anyone, for any purpose.
55. The Commissioner has therefore concluded that disclosing details with relation to individual employees would not be lawful and therefore article 6(1)(f) of the GDPR is not met. Disclosure of the withheld information would therefore breach the first data protection principle and thus is exempt from disclosure on the basis of section 40(2) of FOIA.
56. As the Commissioner has concluded that the necessity test has not been met, he has not gone on to consider the balancing test in this case.
57. The Commissioner has therefore decided that the Council was entitled to withhold the redacted information under section 40(2), by way of section 40(3A)(a).

Procedural matters

58. Section 10 of FOIA requires a public authority to confirm whether or not it holds the requested information and to communicate any non-exempt information within 20 working days of receiving an information request.
59. Section 17 of FOIA requires a public authority that wishes to rely on an exemption to either withhold information or to neither confirm nor deny that any information is held, to issue a refusal notice within 20 working days.
60. In this case, the Council did not confirm whether any information was held and did not issue a refusal notice specifying the exemption on which it was relying to withhold the requested information within 20 working days. The Council therefore breached both section 10 and section 17 of FOIA in responding to the request.

Right of appeal

61. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

62. 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.
63. 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

Phillip Angell
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF