

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 May 2024

Public Authority: Lancashire County Council
Address: Christ Church Precinct
County Hall
Preston
Lancashire
PR1 8XJ

Decision (including any steps ordered)

1. The complainant requested information from Lancashire County Council ("the Council") regarding a contract for the maintenance of traffic signals. The Council provided some of the information requested, however it refused to disclose the amount paid under the contract for the maintenance of traffic signals in the county, citing section 43(2) of FOIA (commercial interests) as its basis for doing so.
2. The Commissioner's decision is that the Council has correctly relied on section 43(2) of FOIA and that the balance of the public interest favours maintaining this exemption.
3. The Commissioner does not require further steps.

Request and response

4. On 29 August 2022, the complainant wrote to the Council and requested information regarding traffic signals:

"the authority has a maintenance contractor that provides a fixed price to maintain all the signals within the County".

Could you please provide details of the contract?

1. Name of contractor
2. Period of contract

3. The fixed price amount
4. A list of all signals with the county.”
5. The Council responded on 5 September 2022. It provided the information requested in parts 1 and 2 of the request. In response to part 4 of the request it provided the total number of signals in the county. However, it refused to provide the information requested in part 3 of the request, citing section 43(2) of FOIA (commercial interests) as its basis for doing so.
6. The complainant requested an internal review on 4 July 2023, in relation to part 3 of the request.
7. Following an internal review the Council wrote to the complainant on 28 September 2023. It maintained its original position.

Reasons for decision

Section 43(2) – prejudice to commercial interests

8. Section 43(2) provides that –

“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).”

9. In order for a prejudice-based exemption, such as section 43, to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, 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;
 - Secondly, 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
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e., 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 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.

Does the information relate to a person's commercial interests?

10. The Council argues that disclosure of the withheld information would prejudice its own commercial interests and those of its supplier, Yunex.
11. The term 'commercial interests' is not defined in FOIA; however, the Commissioner has considered his guidance on the application of section 43¹, which clarifies that: "A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent."
12. The withheld information consists of a single figure, which is the fixed amount that the Council pays Yunex each month under the contract to maintain all the assets that form part of the contract. The Council explained in its submissions to the Commissioner, "this not only includes traffic signals but also includes other asset types such as vehicle activated signs, traffic count sites and over height vehicle warning signs."
13. The Commissioner accepts that the interests in question are the commercial interests of the Council and of Yunex.

The causal relationship

14. Regarding Yunex's commercial interests, the Council argues, "Yunex's commercial interests would likely be harmed by disclosure in the sense that disclosure may give competitors information which could allow them to price a future tender return in a way which provides them a potential to beat Yunex on price, using information which they would not otherwise have. This could put Yunex at a competitive disadvantage and harm their commercial interests".
15. Regarding its own commercial interests, the Council argues, "disclosure would also likely harm Lancashire County Council's commercial interest as knowledge of the existing prices involved in the contract may allow a company to bid for a future contract at a value greater than that which

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

they may have bid at had they not had this information (for example, higher than what they would have bid at but still lower than the current figure) and would therefore result in Lancashire County Council not getting best value for money out of the competitive tender process”.

16. The Commissioner is satisfied that a causal relationship exists between the disclosure of the monthly amount paid under the contract and the prejudice to the commercial interests of the Council and Yunex that the Council described.

The likelihood of the prejudice occurring

17. The Council argues that a disclosure of the information “would be likely” to cause the prejudice it has foreseen. The Commissioner has therefore considered whether the chance of prejudice occurring meets the lower threshold of being a real and significant risk.
18. The Commissioner has considered the commercial interests of each relevant party and considers that the Council’s arguments are persuasive. He considers that, particularly as the structure of the contract means that it is a fixed fee paid each month, there is a real and significant risk that competitors of Yunex would use this information in the ways envisaged by the Council, the fact that it is a monthly fee also means the information will be current at the time that this contract comes up for tender again.
19. The Commissioner therefore accepts that the prejudice to the commercial interests of the Council and of Yunex foreseen by the Council is a real and significant risk if the monthly fee were to be disclosed.

The Commissioner's conclusions

20. The Commissioner has decided that the Council is correct in that section 43(2) is engaged by the withheld information. Since it is a qualified exemption, he must therefore go on to consider the public interest test required by section 2 of the Act.

The public interest

21. The test, as set out in section 2(2)(b), is whether “in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”.
22. The Council took into account the following public interest arguments in favour of disclosing the information:

“When considering the public interest test arguments in favour of disclosure the County Council has considered the general public interest in public authorities being accountable and transparent in relation to their activities. It is important for public authorities to be transparent in their operations to maintain public confidence and to not stifle public debate and scrutiny. This is particularly the case when it comes to large contracts such as this one with Yunex where the public has a significant interest in knowing that large sums of public money are being spent appropriately and wisely. The County Council being transparent on issues related to the maintenance of traffic signals is also in the public interest, as the functionality of traffic signals is of great important to travel and public safety within Lancashire.”

23. The Council took into account the following public interest arguments in favour of maintaining the exemption:

“When considering the public interest arguments against disclosure, the County Council has considered the commercial harm that would likely occur from disclosure. Disclosure could harm Yunex's ability to be competitive with commercial rivals in the future. Likewise, disclosure of this information could harm the County Council's ability to seek value for money when putting similar services out to tender. In the current economic climate, when local authorities are experiencing significant financial pressures, it is vitally important that the County Council can extract value for money when going out to tender. It is also important that the County Council can build constructive and mutually beneficial commercial relationships with companies such as Yunex to secure value for public money in the future. It is certainly not in the public interest for such commercial harm to occur to both the County Council and its commercial partners as such harm could disrupt essential public services.”

24. The Council provided the following information to the Commissioner regarding why it considers that, on balance, the public interest in maintaining the exemption outweighs that in disclosing the withheld information:

“The County Council has concluded on balance that the public interest favours maintaining the exemption. Although there are fair arguments in favour of disclosure, there is a clear and genuine risk that the commercial interests of both Yunex and the County Council could be harmed by disclosing this information. The County Council has determined that these potential risks override the benefits of disclosure. It is vitally important in the current economic climate that the County Council delivers value

for money when it comes to securing large public contracts, such as with this contract regarding the maintenance of traffic signals.”

The Commissioner's analysis

25. The Commissioner recognises that there is a general public interest in the disclosure of information in order to provide transparency to the public about how public money is being spent.
26. However, the Commissioner has already acknowledged that the envisaged prejudice would be likely to occur. He considers that the Council's arguments are strong in identifying likely issues which would arise from a disclosure of the withheld information. These issues would be likely to affect its ability to achieve best value for money in future tendering exercises. This would not be in the public interest.
27. In addition, the Commissioner believes that there is a public interest in ensuring fairness of competition. In his view it is against the public interest for the commercial interests of a third party to be undermined simply because they have entered into a contract with a public authority.
28. For these reasons, the Commissioner's decision is that the public interest in the exemption being maintained outweighs that in the information being disclosed on this occasion. The Council was not, therefore, obliged to disclose the requested information.

Right of appeal

29. 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

30. 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.
31. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Victoria James
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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