

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 December 2013

Public Authority: London Borough of Barnet
North London Business Park (NLBP)
Oakleigh Road South
London
N11 1NP

Decision (including any steps ordered)

1. The complainant requested information relating to a parking contract. London Borough of Barnet (the Council) disclosed some information but withheld the remainder, citing sections 22 (information intended for future publication) and 40 (personal information) of the FOIA as well as section 44 (prohibitions on disclosure) and, in the alternative, section 43 (commercial interests). During the course of the Commissioner's investigation, the Council disclosed some further information within the scope of the request and clarified its application of sections 44 and 43.
2. The Commissioner has considered the Council's application of sections 44 and 43 to the information withheld by virtue of those exemptions. His decision is that the Council correctly applied sections 44 and 43 of the FOIA to the withheld information. He requires no steps to be taken.

Background

3. The Public Contracts Regulations (PCR) implement EU Directive 2004/18/EC which aims to promote a single European market and increase competition for public sector procurement. The PCR set out procedures that must be followed when awarding public sector contracts for the delivery of capital projects or for the provision of goods and services. This includes the requirement that contracts are advertised in the Official Journal of the European Union (OJEU) which provides contractors throughout Europe with an equal opportunity to tender. The PCR only applies to contracts over particular values.

Request and response

4. On 13 March 2012 the complainant wrote to London Borough of Barnet and requested information in the following terms:

"Paragraph 4.1 of agenda item 12, Award of Parking Contract, at CRC on 14 December 2011 said the following:

The pre-qualification stage of the procurement process involved evaluations of the applicant organisations' experience, capability and financial viability. Environmental, Human Resources, Equalities and Health & Safety aspects were also evaluated.

Please provide a copy of the financial viability evaluations which were done at the pre-qualification stage.

Please provide a copy of the signed Parking contract, signatures redacted (as provision of service is imminent I have assumed that the contract is now signed - if it isn't please tell me the scheduled date of signature and I will resubmit the question at that time)

Please provide a copy of the Parent Company Guarantee or Performance Bond, as the case may be".

5. The Council responded on 29 August 2012. It advised that it had responded separately about those parts of the request relating to the financial viability evaluations and the parent company guarantee or performance bond. With respect to the copy of the parking contract it provided some information within the scope of the request but refused to provide the remainder. It cited the following exemptions of the FOIA as its basis for doing so:

- section 40(2) personal information;
- section 43 commercial interests; and
- section 22 information intended for future publication.

6. The complainant requested an internal review of that response on 7 November 2012. Specifically, he requested the Council to review its application of section 43 to the following information:

"Schedule 2 – the specification

Schedule 9b – the original version of the specification

Schedule 9c, 11 and 12 – the target cost schedules

Schedule 9g the contract plan

Schedule 9I(1)(2) the completed bond and guarantee (signatures should be redacted)”.

7. In other words, he asked the Council to reconsider its application of the section 43 exemption to the part of his request that relates to the parking contract.
8. The Council sent him the outcome of its internal review on 14 February 2013. It revised its position, applying section 44(1) of FOIA (prohibitions on disclosure) to the disputed information and citing section 43(2) in the alternative.

Scope of the case

9. The complainant contacted the Commissioner on 6 June 2013 to complain about the way his request for information had been handled. He told the Commissioner:

"There is one element of the response which was promised to me, the Financial Viability Evaluations, and I cannot see that they were received and despite asking the council did not send it again. I am sure if you remind them they will do so.

As to the S44 exemption I don't think that any of the redacted items I asked to be reviewed are in any way "technical or trade secrets" (as set out in regulation 43) and I am content for you to decide if they are or not as you will be able to see them and make an informed decision whereas I can only surmise as to the content of documents that I have not seen”.

10. During the course of the Commissioner's investigation, the Council reassessed its handling of this case. It identified further material, previously withheld, that it disclosed to the complainant.
11. With respect to the financial viability evaluations, as the Council was unable to confirm whether they had previously been provided to the complainant, it acknowledged that they may not have been sent. The Commissioner understands that that information has now been provided to the complainant.

12. Following the Commissioner's intervention, the Council wrote to the complainant clarifying its application of the section 43 and 44 exemptions in relation to the remaining withheld information. It summarised the position as follows:

"Schedule 2 and schedule 9b – these are both the same documents. Schedule 2 is the specification – the council's written requirements for the contract plan. Schedule 9b is the specification that was sent out to potential tenderers as part of the ITT (Invitation to Tender). The two documents are identical. The ITT was included in the final contract so the same documents has been included in the contract twice. Its not clear why. However, schedule 2 and 9b are identical. The council's position is that they are exempt under section 43(2). This includes the specification and Appendix 1 [sic].

Schedule 9g- the contract plan was submitted by NSL Ltd. The council's case is that this is exempt under section 44 and in the alternative section 43(2).

Appendix 2 of schedule 9g has been disclosed in part. The remaining parts have been withheld, under section 44 and in the alternative section 43(2).

Schedule 9C, 11 and 12 – the council's case is that these are exempt under section 44 and in the alternative section 43(2)".

13. In light of the above, the Commissioner considers the scope of his investigation to be the Council's application of section 43 and section 44 to the information withheld by virtue of those exemptions.

Reasons for decision

Section 44 prohibitions on disclosure

14. In this case, the Council considers that section 44(1)(a) of FOIA applies. Section 44(1)(a) provides that information is exempt if its disclosure is prohibited by or under any enactment. The Council told the complainant:

"The legislation which prohibits disclosure is the Public Contracts Regulations 2006, Regulation 43".

15. During the course of the Commissioner's investigation, the Council told the complainant with respect to Appendix 2:

"The council contends that the redacted parts of the Survey and deployment plan are exempt under section 44 as it falls within Regulation 43 of the Public Contracts Regulations 2006. The Public Contracts Regulations apply to this contract, and the tender was advertised in the OJEU".

16. It also told the Commissioner:

"The council contends that the withheld parts of Schedule 9g and the target cost schedules are exempt under section 44".

17. Regulation 43 of the Public Contract Regulations 2006 provides:

"(1) Subject to the provisions of these Regulations, a contracting authority shall not disclose information forwarded to it by an economic operator which the economic operator has reasonably designated as confidential.

(2) In this regulation, confidential information includes technical or trade secrets and the confidential aspects of tenders."

18. The Commissioner acknowledges that the complainant, in bringing his complaint to the Commissioner's attention, said that he did not think that any of the items he asked to be reviewed are 'technical or trade secrets'. In the Commissioner's view, those terms - as used in the wording of the regulation - are examples of what can be included within the term 'confidential information'.

19. The Commissioner has issued guidance¹ that explains the impact that the statutory prohibition created by regulation 43 of the Public Contract Regulations 2006 (PCR) has on the disclosure of information under FOIA and the EIR.

20. That guidance states that, in a case such as this one, the onus is on the public authority to satisfy the Commissioner that the information relates to a relevant procurement exercise. The Commissioner will then consider whether regulation 43 applies - whether the information was forwarded

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[http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/public-contract-regulations-foi-eir.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/public-contract-regulations-foi-eir.ashx)

by the economic operator and that it was reasonably designated as confidential.

Does the information relate to a relevant procurement exercise?

21. The PCR apply to certain procurement exercises and regulation 43 only protects information supplied by an economic operator.
22. During the course of the Commissioner's investigation, the Council provided its submissions regarding the procurement exercise. Having considered its submissions, the Commissioner is satisfied that the information relates to a relevant procurement exercise.

Was the information forwarded to the contracting authority?

23. The Council told the complainant:

"The information was forwarded to the council by the tenderer – it is part of their submission to the council in response to the Invitation to Tender. It is not a document jointly provided by the council and NSL – it was solely produced by NSL and submitted to the council as their bid for the contract".

Reasonably designated?

24. The Council told the complainant:

"The information has been designated by the tenderer as being confidential. The council believes that the designation in respect of the withheld information is reasonable and that there is a duty of confidence".

25. The Council brought to the complainant's attention a clause in the contract relating to the requirement for all parties to keep matters relating to the contract confidential.
26. The Council also explained why it considers that there is a common law duty of confidence in relation to the disputed information. For example, it said that the information was imparted "*in circumstances giving rise to an expectation of confidence*" and that the information is "*substantive and not trivial*".
27. The Commissioner recognises that during the procurement process a contractor will often disclose commercially sensitive information to the body offering the contract. In this case, he acknowledges that the withheld information contains detailed methodology for the provision of a service, including details about costing.

Is section 44 engaged?

28. Section 44 of FOIA provides that information is exempt if its disclosure is prohibited by or under any enactment. This would include the prohibition created by regulation 43 of the Public Contract Regulations 2006 (PCR). Therefore if the information is protected by regulation 43 PCR, it will also be exempt from freedom of information requests under section 44 of the FOIA.
29. The Commissioner is satisfied that the information relates to a relevant procurement exercise. He is also satisfied that the information was forwarded to the Council by an economic operator as part of that procurement exercise.
30. With respect to the matter of confidentiality, the Commissioner is satisfied that the Council has consulted with the third party likely to be affected by any disclosure. He has had the opportunity to consider the representations NSL - the tenderer - made to the Council on the subject of confidentiality.
31. In this case, he is satisfied that the Council owes the economic operator a common law duty of confidence, for example because the information was imparted in circumstances giving rise to an expectation of confidence and because it has the necessary quality of confidence.
32. Having considered the matter, and viewed the information withheld by virtue of section 44 of FOIA, the Commissioner is satisfied that, at the time of the request, the information was protected by regulation 43 PCR.
33. It follows that he finds section 44 of FOIA engaged.

Section 43 commercial interests

34. The Commissioner has next considered the information withheld only by virtue of section 43(2). That information comprises Schedule 2, Appendix 1 of Schedule 2 and Schedule 9b.
35. As noted above, Schedule 2 and Schedule 9b – the specification - are identical. For the purposes of this decision notice, rather than refer to the two schedules, the Commissioner will refer only to Schedule 2.
36. The Commissioner asked the Council for further explanation about its application of section 43 to the specification – a document which by its very nature is necessarily provided to bidders as part of the procurement process. In response, the Council advised him that the

Invitation to Tender (ITT) included a confidentiality clause. Describing that clause, it said:

"Essentially any company receiving a copy of the ITT documentation (including the specification) agreed to treat the information as confidential and agreed to use the information only for the preparation or submission of the tender".

Applicable interests

37. Section 43(2) of FOIA sets out an exemption from the right to know if release of the information is likely to prejudice the commercial interests of any person, including those of the public authority holding the information.
38. When identifying the applicable interests, the Commissioner must consider whether the prejudice claimed is to the interest stated.
39. In correspondence with the complainant about Schedule 2, the Council told him:

"This is joint copyright of Parking Associates Limited and LBB and Parking Associates do not agree to this being released as it will affect their commercial interest".
40. In correspondence with the Commissioner, the Council confirmed that it considers that disclosure of the information withheld by virtue of section 43 would be likely to be prejudicial to the commercial interests of Parking Associates Limited.
41. During the course of the Commissioner's investigation, it confirmed that it had consulted with the relevant third party and provided the Commissioner with evidence in support of its submissions.

Nature of the prejudice

42. The Commissioner's view is that the use of the term 'prejudice' is important to consider in the context of the exemption at section 43. It implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way.

43. Secondly, there must be what the *Hogan*² Tribunal called a 'causal link' between the disclosure and the prejudice claimed. The authority must be able to show how the disclosure of the specific information requested would, or would be likely to, lead to the prejudice.
44. With respect to the nature of the prejudice to Parking Associates Limited, the Council told the complainant:

"Writing specs and consultancy is one of their core functions and they do not want this document in the public domain".
45. By way of further explanation, it told the Commissioner that the harm caused to Parking Associates Limited is that they "would be likely to lose business and therefore income".
46. The Commissioner understands that the loss of business relates to "producing similar parking specifications for other local authorities". In that respect, the Council provided the Commissioner with evidence in support of its view that disclosure of the disputed information would be harmful to Parking Associates Limited's commercial interests.

Likelihood of prejudice

47. The Council confirmed that it is relying on the lower level of threshold – that disclosure of Schedule 2 and Appendix 1 'would be likely' to have a prejudicial effect.

Is the exemption engaged?

48. In determining whether or not the effect of disclosure in this case would be detrimental or damaging in some way to the commercial interests of Parking Associates Limited, the Commissioner has considered the nature and likelihood of harm that would be caused.
49. In considering the matter, he has also taken into account that the information at issue relates to a specification including an appendix. He

accepts that the information, by default, comprises both their content and the way in which the content was presented.

50. The Commissioner considers it important that, in claiming the section 43 exemption on the basis of prejudice to the commercial interests of a third party, the public authority must have evidence that this does in fact represent or reflect the view of the third party.
51. In the Commissioner's view, a commercial interest relates to a person's ability to participate competitively in a commercial activity, ie the purchase and sale of goods or services. The Commissioner recognises that companies compete by offering something different from their rivals. For example, that difference may be the price at which goods or services can be delivered.
52. The Commissioner has had the opportunity to consider the representations Parking Associates Limited made to the Council on the subject of disclosure. He is not only satisfied that the Council consulted with the third party likely to be affected by any disclosure but also that the Council has reflected its views in its submissions to him.
53. The Commissioner considers that the prejudice test is not a weak test, and that 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 of specific withheld information and the prejudice.
54. In this respect, the Council explained that disclosure of the information:

"would mean that an authority would not need Parking Associates services thus depriving them of business... which would harm their commercial interests".
55. In the Commissioner's view, the level of competition within an industry can affect whether the release of information will harm someone's commercial interests.
56. In this case, the Commissioner accepts that disclosure of the disputed information could harm Parking Associates Limited's ability to operate in a competitive market. It follows that the Commissioner finds the exemption engaged.

The public interest test

57. Having established that the section 43 exemption is engaged the Commissioner must go on to consider the public interest test as set out in section 2(2)(b) of FOIA.

Public interest arguments in favour of disclosing the requested information

58. In favour of disclosure, the Council acknowledged the general public interested in releasing information:

"as it facilitates the accountability and transparency of public authorities for decisions they take, and also allow individuals to understand decisions made by public authorities and how public money is spent".

59. It also told the complainant that the Council "has a fiduciary duty to its residents" to spend council money properly.

Public interest arguments in favour of maintaining the exemption

60. In favour of maintaining the exemption, the Council said:

"It is not in the public interest for the council to disclose information that would be likely to damage the commercial interests of a company, as this could lead to financial problems for the company and or loss of jobs, which is not in the public interest".

61. It also told the Commissioner:

"There is no wider public interest in disclosing this information, there is little wider public call for it".

Balance of the public interest

62. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. The presumption is in favour of disclosure and there will be occasions where information is released even though it is a trade secret or is likely to prejudice someone's commercial interest.

63. There is a presumption running through the FOIA that openness is, in itself, to be regarded as something which is in the public interest. In that respect, the Commissioner acknowledges that, in providing the complainant with a substantial amount of information within the scope of his request, the Council has gone some way to address the public interest.

64. The Commissioner recognises that there is a public interest inherent in prejudice-based exemptions, in avoiding the harm specified in the exemption – in this case harm to the commercial interests of Parking

Associates Limited. Having found the exemption engaged, he must take into account that there is automatically some public interest in maintaining it.

65. In all the circumstances of the case, and in the absence of sufficiently persuasive countervailing public interest arguments, the Commissioner considers that it would not be in the public interest to disclose the withheld information. It follows that the Council is entitled to rely on the exemption at section 43(2) as a basis for withholding it.

Right of appeal

66. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

67. 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.
68. 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

Jon Manners
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