

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 April 2017

Public Authority: Manchester City Council
Address: Manchester Town Hall
Albert Square
Manchester
M60 2LA

Decision (including any steps ordered)

1. The complainant submitted an eleven-part request to Manchester City Council which relates to an Expression of Interest made by Manchester Active Lifestyles Community Interest Company, together with information concerning Sport England's Waterfall funding, the naming rights of the Sportcity estate and the contracting out of School Swimming, Major Sports Events and Sports Development which were challenged in the Expression of Interest.
2. The Commissioner has decided that Manchester City Council does not hold the information which the complainant seeks at parts 1, 3, 5, 6, and 7 of his request. She has decided that the Council is entitled to rely on section 42 of the FOIA in respect of a Report made by the City Solicitor to the Council's Commercial Board – part 4 of the complainant's request, and she has decided that the Council is entitled to rely on section 12 of the FOIA in respect of parts 9, 10 and 11 of the complainant's request. In respect of parts 9, 10 and 11 of the complainant's request, the Commissioner has decided that the Council has failed to provide advice and assistance and therefore the Council has contravened section 16 of the FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The Council is required to provide appropriate advice and assistance to the complainant pursuant to the duty provided by section 16 of the FOIA. The advice and assistance should be given with a view to determining what, if any, information relevant to parts 9, 10 and 11 of his request can be provided within the appropriate costs limit and

to allow the complainant to make a new request should this be possible.

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 25 April 2016, the complainant wrote to Manchester City Council and requested information in the following terms:

"I make the following Freedom of Information request (suitably redacted as necessary):

Please provide:

- i. Date, Time, Venue and Minutes of Commercial Board meetings in deciding what recommendation to make to The Treasurer following December 2014 EOI made by Manchester Active Lifestyles
- ii. Date, Time, Venue and Minutes of Commercial Board meetings in deciding what recommendation to make to The Treasurer following December 2015 EOI made by Manchester Active Lifestyles
- iii. Papers submitted to Commercial Board in deciding what recommendation to make to The Treasurer following December 2014 EOI made by Manchester Active Lifestyles
- iv. Papers submitted to Commercial Board in deciding what recommendation to make to The Treasurer following December 2015 EOI made by Manchester Active Lifestyles
- v. Copy of notification from the City Treasurer outlining the reasons the Commercial board rejected the EOI following December 2014 EOI. I never received this.
- vi. Commercial Board members in attendance considering my EOI in both Dec 2014 and Dec 2015.
- vii. Copy of notes/ minutes/ reports pertaining to the consultation with Executive Member following Dec 2014 EOI
- viii. Copy of notes/ minutes/ reports pertaining to the consultation with Executive Member following Dec 2015 EOI

- ix. Copy of all Material (Financial statements/Reports/ Minutes from meetings) pertaining to Sport England's Waterfall funding
 - x. Copy of all Material (Financial statement/Reports/ Minutes from meetings) pertaining to naming rights of Sportcity estate.
 - xi. Copy of agreement to contract out School Swimming, Major Sports Events or Sports Development which were challenged in my EOI Dec 2014. This to include dates of key decisions."
6. On 24 May 2016, the Council wrote to the complainant and advised him that it would require additional time to consider his request to determine where the public interest lies in disclosure. The Council informed the complainant that it aimed to respond to his enquiry within 40 working days.
 7. The Council confirmed that it holds the information he seeks and advised the complainant that it was necessary to consult with him to ascertain whether he would be happy for the Council to release all or part of the requested information or whether he would prefer the Council to withhold some or all it.
 8. The Council recognised that MAL CIC is the complainant's company and that the EOI contained potentially commercially sensitive information which would be subject to the application of section 43 of the FOIA. This being the case, the Council determined that it was necessary to consult with the complainant in line with the FOIA Code of Practice and following the advice given by its solicitor.
 9. On 21 June 2016, the Council sent its substantive response to the request. The Council advised the complainant that responding to his request would exceed the statutory cost limit of £450 (2.5 days of officer time) and therefore it was not obliged to comply with his request.
 10. Notwithstanding this position, the Council informed the complainant that it did not hold information in respect of parts 1, 3, 5, 6 and 7 of his request, and it provided information or explanation in respect of parts 2, 4, 6 and 8.
 11. In respect of parts 9, 10 and 11 of the request, the Council informed the complainant that providing this information will exceed the statutory cost limit.
 12. The Council provided the complainant with a redacted copy of a report made by the Council's City Solicitor which is relevant to part 4 of his request. The Council informed the complainant that the redactions were made in reliance on section 42 of the FOIA, on the grounds that the redacted information was subject to Legal Professional Privilege.

13. On 22 June 2016, the complainant wrote to the Council to complain about how it had handled his request and to ask it to conduct an internal review. The complainant submitted a detailed complaint which challenged much of the Council's response of 21 June.
14. On 20 July 2016, the Council sent the complainant its internal review decision which rebutted many of the complainant's assertions concerning its handling of his request and upholding its decision to withhold information in reliance on section 42.

Scope of the case

15. The complainant contacted the Commissioner on 30 September 2016 to complain about the way his request for information had been handled.
16. The Commissioner has determined that her investigation should be focussed on:
 - a. Whether the Manchester City Council holds any recorded information in respect of those parts of the complainant's request where it has indicated that no recorded information is held - parts 1, 3, 5, 6 and 7;
 - b. Manchester City Council's reliance on section 42 of the FOIA, where it has withheld information which it considers attracts legal professional privilege – part 4 of the request; and
 - c. Whether Manchester City Council is entitled to rely on section 12 of the FOIA, where it considers the cost of complying with parts 9, 10 and 11 of the complainant's request would exceed the statutory cost limit.

Background information

17. The complainant's information request primarily concerns an Expression of Interest submitted to Manchester City Council by Manchester Active Lifestyles Community Interest Company ("MAL CIC") to run several of the Council's sports services.

18. Part 5, Chapter 2 of the Localism Act 2011¹ introduced an initiative known as the 'Community Right to Challenge' under which MAL CIC submitted its Expression of Interest ("EOI").
19. The Community Right to Challenge is a right for 'relevant bodies' to express an interest in providing (or assisting to provide) a 'relevant service' that is currently provided by, or on behalf of, a local authority.
20. Where the local authority accepts an EOI it must run a procurement exercise.
21. EOIs may be rejected on grounds provided in the Rejection Regulations².
22. When Manchester City Council receives an EOI, its Integrated Commissioning Hub and Solicitor's Division check the EOI to ensure that it satisfies the requirements for validity.
23. If the EOI satisfies the validity requirements, the Council's Commercial Board is required to fully consider the EOI and make a recommendation to the City Treasurer to accept, reject or seek to modify it.

Reasons for decision

Section 1 – Does the Council hold recorded information in respect of parts 1,3,5,6, & 7 of the complainant's request?

24. Section 1 of the FOIA states that

"(1) 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.

¹ <http://www.legislation.gov.uk/ukpga/2011/20/contents/enacted>

²

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/5990/2168126.pdf page 19

25. The Commissioner has sought to determine whether the Council holds the information requested by the complainant at parts 1, 3, 5, 6 and 7 of his request.
26. To make this determination the Commissioner applies the civil test. This requires her to consider the question in terms of 'the balance of probabilities' as this is the test applied by the Information Rights Tribunal when it has considered whether information is held in past cases.
27. The Commissioner has investigated whether the Council holds information relevant to parts 1, 3, 5, 6 and 7 of the complainant's request by asking the Council questions about the searches it has made to locate the information which the complainant seeks and questions about the possible deletion/destruction of information which might be relevant to the complainant's request.
28. The Council has advised the Commissioner that it has reviewed the minutes of the Commercial Board's meetings held between 2 December 2014 and 4 February 2015 and had found no reference to the EOI submitted by MAL CIC.
29. Additionally, the Solicitor who dealt with the EOI confirmed that no information relating to the EOI submitted by MAL CIC was presented to the Commercial Board for consideration. This is because the EOI was rejected at an earlier stage in the Council's Community Right to Challenge procedure and before the stage at which the Commercial Board would become involved.
30. During the course of her investigation of this complaint, the Commissioner's representative spoke with the Council's Head of Corporate Procurement. He advised the Commissioner that he had been present at the relevant Commercial Board meetings and confirmed that MAL CIC's EOI had not been discussed.
31. The Council explained that it has a two-stage approach for handling EOIs:

Stage 1: At stage 1, applications are reviewed to verify that the EOI meets the basic requirements for validity, for example, that the EOI has been made by one of the types of organisation identified by the regulations; and

Stage 2: If the application meets the required criteria, the second stage is to consider the substance of the EOI. It is at stage 2 that the Council's 'Commercial Board' will consider the application and make a recommendation to the City Treasurer as to whether the

EOI should be accepted, rejected, or to ask the submitting organisation to modify its EOI.

32. Given that the EOI submitted by MAL CIC on 2 December 2014 was rejected at Stage 1, it was not presented to the Commercial Board for consideration. Therefore, the Commissioner's standard questions concerning the Council's searches, etc, are not applicable to the circumstances of this case.
33. The explanation given by the Council as to why it does not hold the information sought by the complainant at parts 1, 3, 5, 6 and 7 of his request fits with its two-stage approach to EOIs and is certainly plausible. Therefore, in the absence of any evidence to the contrary, the Commissioner has decided that, on the balance of probability, the Council has complied with section 1 of the FOIA.

Section 42 – legal professional privilege

Part 4 of the complainant's request

34. The Council has confirmed to the Commissioner that it is relying on section 42 of the FOIA to withhold the Report of made by the City Solicitor to the Commercial Board 3 March 2016.
35. The Report concerns the legal background of MAL CIC's EOI and its previous rejection at Stage 1 in the Council's EOI process. It is the Council's position that Report is subject to legal professional privilege and that it remains confidential.
36. The Council asserts that the content of the Report satisfies the criteria identified by the Commissioner:

The Report constitutes a communication between a professional legal adviser and a client and contains legal advice which is provided to the Council by the City Solicitor in her professional capacity as its legal advisor. The legal advice is given for the sole or dominant purpose of providing legal advice.

37. The Council has provided the Commissioner with redacted and unredacted copies of the minutes of the Commercial Board's meeting of 3 March 2016 (incorrectly dated as 3 March 2015), together with redacted and unredacted copies of the Report made to the Commercial Board by the City Solicitor dated 2 March 2016.
38. The Council has assured the Commissioner that the Report has not been shared outside of the Council, other than a copy which was provided to the Local Government Ombudsman solely for the purpose of his deliberation of a complainant.

39. Having examined the Report, the Commissioner is satisfied that the exemption provided by section 42 of the Act is properly engaged. The Commissioner must now consider whether it is in the public interest for the Report to be disclosed.

The public interest

Arguments favouring the disclosure of the requested information

40. The Commissioner considers that weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. Disclosure can assist the public in its understanding of how public authorities make their decisions.
41. Disclosure of publicly held information can help foster greater trust in public authorities and may allow wider public participation in the decision making process.
42. In this case, disclosure of the requested information would help the public to understand some of the issues considered by the Council in respect of MAL CIC's EOI. It would also allow the public to consider the quality of the legal advice which was provided to the Council's Commercial Board.

Arguments in favour of maintaining the exception

43. In her previous decisions the Commissioner has expressed the view that disclosure of information relating to legal advice would have an adverse effect on the course of justice through a weakening of the general principle behind the concept of legal professional privilege. This view has also been supported by the Information Tribunal.
44. It is very important that individuals and public authorities are able to consult with lawyers in confidence and be able to obtain confidential legal advice.
45. Should the legal advice be subject to routine or even occasional public disclosure without compelling reasons, this could affect the free and frank nature of future legal exchanges and/or may deter the public authority from seeking legal advice in situations where it would be in the public interest for it to do so.
46. The Commissioner's published guidance on legal professional privilege states the following:

"Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank

legal argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice."

47. Where a public authority is faced with a legal challenge, or a potential legal challenge, it is important that the authority can defend its position properly and fairly. Should the public authority be required to disclose its legal advice, its opponent would potentially be put at an advantage by not having to disclose his own position or legal advice beforehand.
48. The Commissioner considers that there will always be a strong argument in favour of maintaining legal professional privilege. It is a long-standing, well established and important common law principle. The Information Tribunal affirmed this in the *Bellamy* case when it stated:

"...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."
49. This does not mean that the counter arguments favour public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect.

Balance of the public interest arguments

50. The Commissioner appreciates that there is a general public interest in public authorities being as accountable as possible for the decisions they make.
51. In this case the Council's Commercial Board is responsible for making informed decisions in relation to the EOIs it receives under the Community Right to Challenge. The Commissioner considers that it is important that this decision making body should be able to obtain full and frank legal advice before making decisions which relate to large amounts of public funds.
52. The Commissioner fully appreciates the public interest invested in ensuring that public authorities are accountable, especially where large sums of public money and high value assets are involved. She accepts that this is particularly the case where the Council's decisions and actions relate to those funds and assets.
53. The Commissioner has seen no evidence of any misrepresentation or of any unlawful activity on the part of the Council.

The Commissioner's decision

54. The public interest in maintaining legal professional privilege is a particularly strong one. To outweigh the inherent strength of legal professional privilege would normally require circumstances where there are substantial amounts of public money at stake, where the decision would significantly affect large numbers of people, or where there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate authority.
55. Having considered this case, the Commissioner considers that there are no factors present which would equal or would outweigh the particularly strong public interest inherent in this exception. The Commissioner has therefore decided that the public interest favouring the continued withholding the City Solicitor's Report is greater than the public interest favouring disclosure.
56. The Commissioner is satisfied that the public interest is best served in this case by maintaining the council's right to obtain legal advice in confidence and for this information to be withheld. The Commissioner has decided that the council has properly applied section 42 to the withheld information
57. The information contained in the disclosed redacted minutes makes clear that MAL CIC's EOI was discussed at the Commercial Board's meeting of 3 March 2016 and that this discussion included the Board's consideration of the City Solicitor's Report.
58. The disclosed minutes make clear why MAL CIC's EOI was rejected and they include a recommendation that MAL CIC should bid for smaller works within the service as this would allow it to demonstrate its ability to deliver.
59. The Commissioner has considered the redactions made by the Council in respect of the Commercial Board's meeting of 3 March 2016. She is content that the redacted information does not fall within the scope of the complainant's request as it concerns unrelated matters. She notes that the minutes concern a meeting of the Commercial Board which was not open public attendance.

Section 12 – where the cost of complying with request exceeds the appropriate limit

Parts 9, 10 and 11 of the complainant's request

60. Under section 12(1) of FOIA a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit. The cost limit is set out in section 3(2) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations") and is currently set at £450.

61. The £450 limit must be calculated at the rate of £25 per hour. This effectively provides a time limit of 18 work hours. Additionally regulation 4(3) the Fees Regulations only allows for four activities which can be considered in relation to complying with the requests. These activities are:
- Determining whether the public authority holds the information requested;
 - Locating the information or documents containing the information;
 - Retrieving such information or documents; and
 - Extracting the information from a document or other information source.
62. The cost of redacting relevant but exempt information may not be taken into consideration for the purpose of calculating the appropriate limit.
63. The Council has informed the Commissioner that it has considered these three elements of the complainant's request as a single element, thereby aggregating them for the purpose of its consideration of section 12.
64. To support its position, the Council undertook a sampling exercise in respect of the requested information concerning Sports England Waterfall funding.
65. The Council points out that the request is open ended and that the agreement on the Waterfall funding dates back to 1999. This being the case, the Council advised the Commissioner that much of the information relevant to Sports England Waterfall funding is now held in the legal archives. Furthermore, over the last 17 years around 21 Council officers have held discussions with Sports England regarding this funding.
66. The Council provided the Commissioner with details of how it has estimated the likely time/cost to the Council in complying with the complainant's request for information concerning Sports England Waterfall funding. This estimate is based on a sampling exercise which the Council undertook.
67. The Council advised the Commissioner that, since 1999, there have been between 8-10 meetings per annum, where Waterfall funding has been discussed and that the minutes/records of each of these meetings would need to be reviewed.
68. The Council estimates that it would require 1 hour per meeting to search for correspondence, including that held electronically and as hand

written notes, including information now residing in the Council's legal archives.

69. Therefore, based on an average of 9 meetings per year, over a 17 year period, the Council calculate that it would require 153 in order to comply with the complainant's request at parts 9, 10 and 11.
70. The 153 hours equates to a cost of £3825 based on the standard £25 per hour rate which is provided by the Fees Regulations³.
71. The Council has confirmed to the Commissioner that its estimate is based on the quickest method it identified for gathering the requested information.
72. The Commissioner has considered the Council's estimate. On its face, the estimate appears to err on the side of being somewhat excessive. That said, even if the Council needed to spend only 15 minutes to examine the material for each of the 9 meetings over the seventeen year period, the costs limit would still be exceeded.
73. In view of this, the Commissioner has decided that, on the balance of probability, complying with parts 9, 10 and 11 of the complainant's request would exceed the cost limit and therefore the Commissioner has decided that the Council is entitled to rely on section 12 of the FOIA in respect of parts 9, 10 and 11 of the complainant's request.

Section 16 – advice and assistance

74. Under section 16 of the FOIA a public authority has a duty to provide advice and assistance to persons who propose to make, or have made, requests for information. This duty applies to all cases so far as it would be reasonable for the public authority to provide such advice and assistance.
75. Here, the Council has confirmed that it did not provide the complainant with any advice and assistance. This is because the Council took the view that the scope of the request at parts 9, 10 and 11 was open ended and it was "not considered practical" to provide advice to the complainant of how he might refine his request.
76. The Council's confirmation illustrates an absence of engagement with the complainant: It is based on the Council taking a unilateral view of

³ http://www.legislation.gov.uk/ukxi/2004/3244/pdfs/ukxi_20043244_en.pdf

what information it may or may not be able to disclose to the complainant within his area of interest, without giving the complainant any opportunity to discuss his matter.

77. The Commissioner considers that the Council's failure to provide the complainant with an opportunity to refine his request is sufficient for her to conclude that it has not met its section 16 duty.

Right of appeal

78. 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

79. 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.

80. 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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