

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 January 2020

Public Authority: Milton Keynes Council
Address: Civic Offices
1 Saxon Gate East
Central Milton Keynes
MK9 3EJ

Decision (including any steps ordered)

1. The complainant has requested information about a Housing Infrastructure Fund Bid. Milton Keynes Council disclosed some information and withheld other information under section 43(2) of the Act.
2. The Commissioner's decision is that Milton Keynes Council has disclosed all the information it holds in relation to parts 1 and 2 of the request and complied with section 1(1) but that, in relation to part 3 of the request, it has failed to demonstrate that section 43(2) is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information in part 3 of the request which it withheld under section 43(2).
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 1 April 2019 the complainant wrote to Milton Keynes Council (the "council") and requested information in the following terms:

"I am writing to you under the Freedom of Information Act 2000 to request information about the Housing Infrastructure Fund (HIF) bid for forward funding that was submitted by Milton Keynes Council on 22 March 2019.

I would be grateful if you could provide the following information relating to the HIF bid in electronic format:

1 Copies of all communication between Officers and the Leader of the Council, Cllr Pete Marland.

2 Copies of all communication between Officers and [redacted];

3 Copies of all communication between Officers and Homes England;

4 A copy of the Chief Financial Officer's certification.

5 A copy of the Section 151 Officer's report and agreement to the submission;

6 A copy of the independent assessment of the costings."

6. The council responded on 2 May 2019 and disclosed some information. It withheld other information under the exemptions for information intended for future publication (section 22) and commercial interests (section 43(2)).
7. Following an internal review the council wrote to the complainant on 20 June 2019. The council confirmed that it had revised its position, disclosing the assessment in part 6 of the request previously withheld under section 22. The council redacted parts of the report under section 43(2) and confirmed that other information was not held.
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Scope of the case

8. On 20 June 2019 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. During the course of the Commissioner's investigation the council disclosed significant additional information, including correspondence identified in parts 2 and 3 of the request and redacted versions of the independent assessment of the costings identified in part 6 of the request.
10. In relation to part 2 (and 1) of the request the council confirmed that no further relevant information was held. In relation to part 3 of the request, the council confirmed that it was withholding the outstanding information under the exemptions for personal data (section 40), information provided in confidence (section 41) and commercial interests (section 43(2)).
11. The complainant confirmed that they wanted the Commissioner to consider the following:
 - Whether the council had disclosed all held information falling within the scope of part 1 and 2 of the request;
 - Whether the council had correctly withheld some of the correspondence between Officers and Homes England, as per part 3 of the request. In relation to this part of their complaint, the complainant confirmed that the Commissioner could disregard the information withheld under section 41 and section 40 and focus exclusively on information withheld under section 43(2).

Reasons for decision

Section 1 – duty to provide information held

12. Section 1(1) of the FOIA requires public authorities to confirm or deny whether the information specific in a request is held and, where it is, to provide it to a requester.
13. The complainant has disputed the council's confirmation that, in relation to parts 1 and 2 of their request, no further relevant information is held. For the avoidance of doubt, these requests asked for the following information:

1 Copies of all communication between Officers and the Leader of the Council, Cllr Pete Marland.

2 Copies of all communication between Officers and Cllrs Crooks and McCall;

14. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
15. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
16. In this case, in order to establish where the balance of probabilities was weighted, the Commissioner approached the council with standard questions she puts in such situations. The questions (in italics) and summaries of the council's responses are set out below.
17. *What searches have been carried out to check no information was held within the scope of the request and why would these searches have been likely to retrieve any relevant information?*

The council confirmed that officers involved in the bid were all required to search their email mailboxes, electronic files (both individual and shared folders) and any paper files they held. It stated that it did not believe it possible for the data requested to be held in any other form and it was satisfied any relevant information had been retrieved.

18. *Please describe thoroughly any searches of relevant paper/electronic records and include details of any staff consultations.*

The council confirmed that all electronic and paper files were searched by officers involved in the Bid.

19. *If searches included electronic data, which search terms were used and please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.*

The council confirmed that search terms advised to officers included "HIF", "Housing Infrastructure Fund", "MHCLG", "Homes England", the names of the requested Councillors and the names of any contacts at Homes England (the search question had also been posed to the council in relation to part 3 of the request).

20. *If no or inadequate searches were done at the time, please rectify this now and let me know what you have done*

The council stated that it considered that adequate searches were completed at the time of the initial response, however, a second search was completed and this retrieved one additional email which was not included in the initial disclosure due to it being relevant only to the expression of interest, rather than the bid itself.

21. *If the information were held would it be held as manual or electronic records?*

The council confirmed that information was held only in electronic records. It stated that, although paper records were also checked no information in relation to this request was found within paper records.

22. *Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?*

The council stated that it was possible that some correspondence between officers and Councillors or Homes England was deleted in order to free up mailbox space, for example, because the email was superseded in the email trail or because the email no longer contained relevant information that the officer felt they needed to retain. The council confirmed that it was, however, confident that no correspondence was deleted following receipt of the FOI request as officers were made aware of the request, the need to ensure any information was retained from this point and the need to search their held information promptly.

23. *If recorded information was held but is no longer held, when did the council cease to retain this information?*

The council confirmed that it was confident that no information was deleted following receipt of the FOI request as officers were made aware of the request, the necessity to retain the information and the need to search their held information promptly. It stated that it was not possible to confirm or deny any information which may have been deleted prior to the information request being received or when it was deleted.

24. *What does the council's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can the council describe the way in which it has handled comparable records of a similar age?*

The council confirmed that it was confident that the only records which could have potentially been deleted prior to the request and in relation to this request were correspondences. It confirmed that this would

typically be emails and its corporate retention policy for emails is at the officer's discretion, based on their content.

25. *Is there a business purpose for which the requested information should be held? If so what is this purpose?*

The council stated that there was not.

26. In relation to part 2 of the request the complainant provided the Commissioner with a copy of a document created by Councillor Crooks which they contended had been provided to the council, should have been held at the time of the request but which had not been directly disclosed in response to their request.
27. The Commissioner put this matter to the council and the council directed the Commissioner to a section of their website where the document in question had been published¹. The complainant confirmed to the Commissioner that they had already accessed the document in question via the council's website.
28. The Commissioner does not consider that a public authority's publication of information on a publicly accessible website is suggestive of a disposition to block access to information or to otherwise conceal its existence.
29. In respect of this specific matter and other more general concerns raised by the complainant the Commissioner considered whether there was any evidence to suggest that the council might have committed an offence under section 77 of the FOIA². The Commissioner found that there was no evidence to suggest that such an offence had been committed by the council and the matter was not pursued further.
30. Whilst the Commissioner is alive to the complainant's concerns that the volume of information created and retained by the council in relation to these elements of their request appears minimal, she has no evidence to directly contradict the council's confirmation that no further information is held. Having considered the details of the searches conducted by the council and other relevant evidence the Commissioner is satisfied that, on the balance of probabilities, it is likely that the council has disclosed

¹ <https://milton-keynes.cmis.uk.com/milton-keynes/Calendar/tabid/70/ctl/ViewMeetingPublic/mid/397/Meeting/6134/Committee/1241/SelectedTab/Documents/Default.aspx>

² Section 77 of the FOIA makes it an offence for a public authority to alter, deface, block, erase, destroy or conceals any record held with the intention of preventing the disclosure of such information to which the requester would be entitled.

all the relevant information it holds in respect of parts 1 and 2 of the request.

Section 43(2) – commercial interests

31. The council withheld some of the information identified in part 3 of the request, namely:

“Copies of all communication between Officers and Homes England”

32. 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).”

33. 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.

34. The council has stated that the information is commercial in nature and to release it would prejudice the commercial interests of the council and Homes England. It has further argued that the information would be likely to prejudice the effective operation of the HIF bidding process; in particular the decision making process on the HIF bid made by the council.

35. In considering this matter the Commissioner has had regard for the decision of the First-Tier (Information Rights) Tribunal (the “Tribunal”) decision in Hartlepool Borough Council vs the Information Commissioner (EA/2017/0057). In this case, in paragraph 54 of the decision, the Tribunal stated the following in relation to the affected party (“Peel”)

“What Peel has completely failed to do, however, is to support its assertions with evidence. There are no witness statements, and no

evidence or even arguments to link the disclosure of any specific aspect of the information with any specific business interests that would or would be likely to be prejudiced by its disclosure. Peel has not said, for example, that it is in the process of tendering for another development project which is comparable...."

36. In paragraph 55 the Tribunal goes on to say:

"The Commissioner had highlighted the need for a much greater level of specificity. Peel's response that it does not consider the Commissioner's request for a more "granular explanation" is reasonable, misses the point. The need for the explanation does not arise from the Commissioner's request. It arises because the onus rests with the party making the assertion that the exemption is engaged to make good its claim. So, for example, if a manufacturer of widgets were to claim that disclosure of information relating to its dealings with a particular commercial partner would or would be likely to prejudice its commercial interests, it would not be sufficient for it to say simply that the manufacture of widgets is a competitive business, that it enters into similar agreements as part of its business and will therefore suffer prejudice if the information became available to its competitors. It would need to demonstrate the link between the specific information in issue and the claimed prejudice. So for example, it might show that the information would disclose that it manufactures its widgets in a particular way that is cost effective, and that is not known by its competitors, or that it had structured its agreement in a way that is unusual in the industry by charging its widgets at an unusually low mark-up because of a commitment that it would provide training at a higher return than usual."

37. The Commissioner considers that the general principle identified is that public authorities must be able to identify explicit instances of harm and link this to the disclosure of specific information. In short, it must be shown that specific prejudice would follow as a direct result of specific information being disclosed.

38. The Commissioner notes that the council's submissions here provide no specific details about any elements of the withheld information the disclosure of which would or would be likely to result in harm.

39. As set out above, the Commissioner considers that it is not enough to define information in terms which locate the information within the geography of the exemption. Firstly, the exemption is not absolute so information cannot be deemed exempt simply by dint of it falling within a general category. Secondly, arguments in relation to putative prejudice need to describe specific elements of information and link the disclosure of these elements to specific harm. The council's submissions

fail to meet any of these requirements and, whilst the Commissioner accepts that an argument could be made for withholding the information, she does not consider it to be her role to generate such arguments on the council's behalf. The Commissioner is also mindful that the council has had several opportunities over the course of her investigation to provide arguments in relation to its position.

40. In addition to failing to identify discrete elements of the withheld information the Commissioner notes that the council has not properly defined the nature of any prejudice which would or might ensue from disclosure. The descriptions of prejudice employed by the council are generic in nature and suggest that the council either does not understand the level of detail required to engage the exemption or that it has attempted to apply it on a blanket manner. In relation to this latter point, whilst she is mindful that the council has disclosed a significant quantity of information to the complainant and withheld only such information it considers to be properly exempt, she has not been presented with proper grounds for withholding the outstanding information from the complainant. She considers that the council's submissions fail to meet the threshold required to engage even the lower burden provided by the "*would be likely to*" limb of the exemption.
 41. In light of the above, the Commissioner has determined that the exemption is not engaged in relation to any elements of the withheld information. She has not, therefore, gone on to consider the public interest test.
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Right of appeal

42. 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

43. 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.
44. 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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SK9 5AF