

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 November 2020

Public Authority: Milton Keynes Council

Address: Civic Centre
1 Saxon Gate East
Central Milton Keynes
MK9 3EJ

Decision (including any steps ordered)

1. The complainant requested from Milton Keynes Council ("the Council") information relating to the Free School competition run by the Council for Glebe Farm School. The Council withheld the requested information under sections 43(2) (commercial interests) and 36 (effective conduct of public affairs) of the FOIA. The Council subsequently withdrew its reliance of section 36 and applied section 43(1) (trade secrets) of the FOIA to the request.
2. The Commissioner's decision is that the Council correctly applied section 43(2) of the FOIA to the information requested. Therefore, she has not gone on to consider the application of section 43(1) of the FOIA.
3. The Commissioner does not require the Council to take any steps as a result of this decision.

Request and response

4. On 25 February 2020 the complainant requested information under the FOIA of the following description:

"Under the Freedom of Information Act, I should like to request information relating to the free school competition run by MKC for Glebe Farm School.

In particular

- *Information sent to interest parties*
 - *All internal and external emails, and any other correspondence, related to the free school competition for Glebe Farm School*
 - *Applications received and all supporting documentation*
 - *Name and designation of the people on the panel that short listed applications*
 - *Documentation related to the short listing decision and supporting information, including assessment criteria, weighting of criteria and performance of each application against scoring system*
 - *Presentation agenda for short listed Trusts, meeting notes/minutes from these meetings, and names and role of attendees*
 - *Final selection decision and supporting information, including assessment criteria, weighting of criteria and performance of each application against scoring system*
 - *The submission to the Regional Schools Commissioner for approval of preferred provider and all supporting information”.*
5. On 27 February 2020 the Council responded. It refused the request and applied section 36(2) (prejudice to the effective conduct of public affairs) and section 43(2) (commercial interests) of the FOIA to the withheld information.
 6. On 28 February 2020 the complainant asked for an internal review.
 7. On 18 May 2020 the Council provided its internal review outcome. The Council maintained its original position to withhold the requested information under the exemptions cited.

Scope of the case

8. The complainant contacted the Commissioner on 25 June 2020 to complain about the way her request for information had been handled. Specifically, the complainant disagrees with the Council's refusal to provide the information, and indicated that there could be involvement of potential maladministration.
9. During the course of the Commissioner's investigation of this case, the Council withdrew its reliance of section 36 and applied section 43(1) of the FOIA to the information requested. The following analysis focuses on whether the exemptions at sections 43(2) and 43(1) of the FOIA were cited correctly to the request.

Reasons for decision

Section 43(2) – prejudice to commercial interests

10. Section 43(2) of the FOIA states that information is exempt if its disclosure would or would be likely to prejudice the commercial interests of any person, including the public authority holding it. This is a qualified exemption and is, therefore, subject to the public interest test.
11. The exemption can be engaged on the basis that disclosing the information either “*would*” prejudice commercial interests, or the lower threshold that disclosure “*would be likely*” to prejudice those interests. The term “*likely*” is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice would be more probable than not.
12. For the Commissioner to accept that prejudice *would* result, she must be satisfied that this outcome would be more likely than not. The Council considered that disclosure of the requested information “*would*” prejudice third parties, and it listed these third parties to the Commissioner.
13. The withheld information consists of documents relating to the Free School competition run by the Council for Glebe Farm School. It includes specification and application forms, stakeholder list, panel members, miscellaneous correspondence, competition questions, scoring sheet, emails, decision letters, all associated with the Free School bid and the decision.
14. The Commissioner notes from viewing the local media reports, news of the new school announced for Glebe Farm¹ and that the new school is expected to open in September 2022.
15. The Council stated its position that the information sought is the business processes of the partnership with the DfE, which is a confidential competitive process. It said that it would cause prejudice to the interest of third parties if the information were disclosed. The Council provided the Commissioner with the information which it considered commercially sensitive and listed the third parties.

¹ <https://www.mkfm.com/news/local-news/major-new-school-announced-for-glebe-farm/>

16. The Commissioner accepts on the basis of this reasoning that the information is commercial in nature. The next step is for the Commissioner to consider the prejudice which disclosure would or would be likely to cause and the relevant party or parties that would be affected.
17. For Section 43(2) to be engaged 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 commercial interests;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the withheld information and the prejudice to those commercial interests; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, meaning whether there is at least a real and significant risk of the prejudice occurring.
18. With regards to the first criterion, the Commissioner accepts that the prejudice envisaged would be to the commercial interests of third parties. Therefore, the Commissioner is satisfied that the first criterion is met. This is not to say that she agrees it will happen; simply that the criterion is met.
19. The Council stated "*It is our reasonable opinion that disclosure of the information under FOI would inhibit the free and frank exchange of views for the purposes of deliberation. The competition is one run in partnership with the Department for Education. Many providers put forward their business cases for running schools on the basis that this information will not be shared with others. The marking systems and deliberations that go on are vitally important for the board making the determination*".
20. The Council added "*To share these (and by sharing this information, we would be sharing it with the world at large) would discourage the free and frank exchange of views, as it would discourage providers from putting forward business cases if they believed that they would be shared with the public at large. It would also further it would discourage the board and the DfE from being able to frankly exchange views, which is essential in judging competitions of this type.*"

21. Having considered the arguments, together with the withheld information, the Commissioner is satisfied that the Council demonstrated that a causal relationship exists between the potential disclosure of the information being withheld, and the prejudice to its commercial interest. Therefore, the Commissioner considers that the second criterion has also been met.
22. Turning to the third criterion, the Council believes that there could be reputational damage to third parties, should information concerning their submission be *"publicly shared"*. The Council compared the submission process to be similar to *"applying for a job"*, and there is an expectation that this information would not be disclosed into the public domain.
23. The Council considers that there would be a real prejudice to future competitions, *"such that the submitting schools would not feel comfortable in providing the information for fear of it being released under FOI."* It also considers that there is a real prejudice occurring from the release of the specifics of the submissions put forward to those schools' competitiveness in future competitions.
24. The Council confirmed that it had not approached third parties regarding this request, and that its arguments are based on prior knowledge of a particular third party and their concerns. The Council said that it had consulted with its service area with regards to the impact on disclosing the information, as they have a relationship with the partners.
25. The Commissioner has considered these details and she believes that the Council has clearly demonstrated that the disclosure of the information, would have a detrimental impact on its commercial activities; specifically, upon businesses to effectively bid in future competitions.
26. In light of the Council's submissions, it is clear that disclosing the withheld information could result in competitors having access to sensitive commercial information. This could be used for a bid in the next tender for the same project. The Commissioner is of the view that it would not be fair to disclose information that would disadvantage companies in future tender processes.
27. Having viewed the withheld information and considered the arguments made, the Commissioner accepts that prejudice to the commercial interests of third parties, would result through disclosure of the information in question. She therefore finds that disclosure would result in prejudice to the commercial interests of third parties, and on this basis, section 43(2) of the FOIA is engaged.

Public interest test

28. Having found that the exemption is engaged, the Commissioner has gone on to consider the public interest factors in favour of disclosing the withheld information and of maintaining the exemption. Although the Commissioner has found that section 43(2) exemption is engaged, the information may still be released if the public interest in disclosing it outweighs the public interest in maintaining the exemption.

Public interest arguments in favour of disclosure

29. The Council recognises that there is a public interest in the openness and transparency of public authorities. It accepts that there is local and national interest in the running of schools, quality of educational provision and the use of public funds. Also, the Council stated, to "*provide clarity of process and facilitate new and or speculative applications potentially opening up the competition to a wider audience – giving interested parties more information about success criteria and what the local authority is looking for from a supplier.*"
30. The complainant argued that the Council should provide the information requested to demonstrate that a fair process has taken place, and that there has been no maladministration. She informed the Commissioner that the DfE publishes on its website, the application forms for Free Schools that have been awarded through their Wave process.
31. The complainant believes that it is in the public interest to release the information. Specifically, "*documents that will indicate whether or not there has been serious maladministration relating to the award of the schools through the local competition process.*" She considers that the information, if provided, would enable proper scrutiny of the process followed in awarding these schools to the successful bidders. Also, she said, it would reveal whether the competition was conducted fairly or whether maladministration had taken place.

Public interest arguments in favour of maintaining the exemption

32. The Council explained that Free School competitions are run as procurement type activity. It is a competition to supply and operate a service, in this case, the delivery of educational facilities in the borough. The Council said that "*the contract sits with the DfE but the local authority runs the competition and shapes it as they are closer to the local demand.*"

33. The Council argued that there could be plagiarism of other competitors' submissions, providing a blueprint for successful submissions. It said that the impact of this being "*a reduction in fairness and room for innovation*". Also, reduction in the variety of applications, as they will all become homogenous, which would reduce the choice available to the local authority for selection of winners.
34. The Council further argued that there is a risk that successful organisations will lose talent/staff to other organisations. Successful organisations would fear the loss of talent to other competitors who seek to employ the skills to win this sort of competition. The Council said it would discourage the DfE from providing information to the local authority which is vital to the quality of the process. It explained that the process involves the local authority, and includes advice and guidance on key elements of the competition to publish reference to information shared by the DfE with the Council, which the Council believes "*would give pointers to competitors*".
35. The Council stated that disclosure of the information would discourage the board (the judging panel) and the DfE from being able to frankly exchange views, which is essential in judging competitions of this type. It said that the DfE and the local authority share information and views regarding the competition during the process. The Council considers that it would negatively impact the relationship between the local authority and the DfE, which would limit the scope of discussions that take place. Also, it considers an impact on the specification development of the competition and this therefore effects the quality of the bids.
36. The Commissioner recognises that there is a public interest in preventing prejudice to the commercial interests of third parties. As covered above at paragraphs 19 and 20, the competition is run in partnership with the DfE. Providers submit their business cases for running schools on the basis that this information is not shared with the public. Releasing the information would discourage them to compete, because providers would be reluctant to submit their cases due to the risk of information being shared. This would have an impact well beyond the third parties, thus contradicting the public interest.

Balance of the public interest

37. The Commissioner accepts that there is a strong and legitimate public interest in the openness and transparency of public authorities with regard to their decision-making processes. This is because it promotes the aims of transparency and accountability, which in turn promotes greater public engagement and understanding of the decisions taken by public authorities.

38. In this case, the information relates to the Free School competition run by the Council. All the associated documentation including the decision, was made in a confidential competitive process. The Commissioner recognises that the complainant has concerns regarding the process of awarding a free school via a local competition, and she notes the complainant's suggestion of potential maladministration. With regards to any wrongdoing, there is no evidence of this that the Commissioner is aware of, and no evidence which would add weight to the arguments for disclosure. The only public interest arguments for disclosure are seemingly those of accountability and transparency.
39. The Commissioner accepts that disclosure of the withheld information would provide an insight into how the decision was made, and reveal details of the competition process, strategies and commercial approach. It would also reveal discussions between third parties and the exchange of views conducted during this competition.
40. The Commissioner also accepts that disclosing the information would allow competitors to take advantage of this knowledge and use it for the next bid for future tenders. She is aware that competitors are likely to have significant interest in obtaining confidential information that can be used to their own advantage. The Commissioner notes that opponents and competitors could seek to undermine third parties' bids for future tenders.
41. The Commissioner considers that there is a strong and inherent public interest in ensuring fairness of competition, and in her view it would be firmly against the public interest if the commercial interests are harmed. She also considers that protecting third parties' ability to operate effectively within a competitive market, by not disclosing information that competitors could use to its commercial disadvantage, outweighs the public interest arguments for the information's disclosure. The Free School competition process which involves marking systems and deliberations (important for the board/judging panel in making the determination) has also been considered.
42. The Commissioner is of the view that it would not be fair to disclose information that would disadvantage third parties in bids for future tenders, or in decision-making. She considers this to have significant weight in balancing the public interest.
43. The Commissioner has considered whether disclosure of the information would add significantly to the public and understanding of the decision-making process. She has taken into account the harm that would occur to third parties, should associated documentation relating to the Free School competition be released into the public domain.

44. The Commissioner has examined the arguments presented by the complainant and the Council. She accepts that disclosure of the withheld information would erode the competitive advantage in similar and future procurement exercises. The Commissioner is therefore satisfied that the greatest weight must be given to the potential harm to the commercial interests of third parties, should the withheld information be disclosed.
45. Given the level of likelihood that commercial harm would occur should the information be disclosed, the Commissioner has decided that the balance of public interests currently favours maintaining the exemption.

Conclusion

46. The Commissioner's conclusion is that the public interest in disclosure of the withheld information is outweighed by the public interest in maintaining the section 43(2) exemption. Therefore, the Council was not obliged to disclose the requested information.
47. As the Commissioner has decided that the information requested is exempt from disclosure under section 43(2) of the FOIA and that the public interest favours maintaining the exemption, it has not been necessary to go on to consider the application of section 43(1) of the FOIA.

Right of appeal

48. 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

49. 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.
50. 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

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