

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 October 2015

Public Authority: Wirral Metropolitan Borough Council

Address: Wallasey Town Hall
Brighton Street
Wirral
Merseyside
CH44 8ED

Complainant: Mr John Brace

Address: john.brace@gmail.com

Decision (including any steps ordered)

1. The complainant has requested two fees notices attached to specific invoices held by Wirral Metropolitan Borough Council ("the Council"). The Council stated this information was exempt on the basis of section 43(2) of the FOIA.
2. The Commissioner's decision is that the section 43(2) exemption is not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the fees notices relating to the invoices as set out in the request.
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 23 March 2015, the complainant wrote to Wirral Metropolitan Borough Council ("the Council") and requested information in the following terms:

"This Freedom of Information Act request is for the fee notes attached to the following two invoices:

1) Weightmans LLP Paid 16/7/13 Ref: 1411340 Amount £48,384

2) Weightmans LLP Paid 2/9/13 Ref: 1420583 Amount £2,700"

6. The Council responded on 21 April 2015. It stated that it considered the information in the fees notices to be exempt on the basis of section 42 of the FOIA as the fees notices attached to the invoices in question consisted of information contained in communications between the Council and its legal advisers.
7. Following an internal review the Council wrote to the complainant on 11 June 2015. It stated that after reviewing its original response it no longer considered section 42 to be applicable and was instead seeking to rely on the section 43 exemption to withhold the fees notices.

Scope of the case

8. The complainant contacted the Commissioner on 14 June 2015 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of his investigation to be to determine if the Council has correctly applied the provisions of section 43 to withhold the two fees notices requested.

Reasons for decision

Section 43 – 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 holding it.
11. The Council has applied section 43(2) to all of the withheld information which consists of information in invoices from Weightmans LLP to the Council for fees from 2013. Its arguments for the use of this exemption

were that the information is commercially sensitive and disclosure would be likely to prejudice the commercial interests of Weightmans LLP and the Council.

12. The Commissioner notes that the Council is relying on section 43(2) on the basis that disclosure of the requested information would be likely to prejudice the commercial interests of a third party, Weightmans LLP. The Commissioner would normally expect a public authority to obtain arguments from the third parties themselves. Arguments from a public authority that assume the position of a third party may be regarded as purely speculative, unless the public authority can explain their foundation e.g. based on a long standing working relationship.
13. The Council has stated it did consult with Weightmans LLP regarding disclosure and they advised that they considered the fees to still be commercially sensitive despite the passage of time. Weightmans LLP informed the Council that it was one of a number of local authority clients it acted for and it would therefore significantly disadvantage its market position if the specific rates charged were made available.
14. With regard to its own commercial interests; the Council has stated that the Council needs to be able to robustly engage in the process of negotiating and tendering for goods and services. This needs to take place in an environment which protects the commercial interests of suppliers of goods and services to the Council. The Council has argued it needs to be seen as a procurer of goods and services that understands the commercially sensitive nature of fees and charges issued by a third party. The Council does not believe it would be appropriate to disclose information into the public domain which would not normally be available in the public domain and which could then be used by a competitor to gain a market advantage.
15. The Council has not fully explained its specific arguments to support its view that the information, should it be disclosed, would or would be likely to prejudice its own or Weightmans commercial interests. For its own commercial interests the Commissioner has considered the central question to be whether disclosure of the withheld information would be likely to be prejudicial to the Council as it would affect its future procurement and negotiating position. With regard to Weightmans LLP the issue is whether disclosure would be likely to disadvantage its market position by revealing details of the specific rates charged.
16. The Commissioner has considered the limited arguments put forward by the Council and Weightmans to explain the perceived prejudice and to demonstrate any causal link between disclosure of the information and the prejudice that may occur to the Council and Weightmans.

17. The Commissioner can accept that at the time the information was created in 2013 the Council and Weightmans may have had a stronger case for arguing that the withheld information would have been likely to have had a prejudicial effect on their commercial interests as it would have revealed information on the fees charged by Weightmans. This could have been used by competitors to gain an advantage when bidding for work and impacted on the Council's ability to procure services at best value for money in the future.
18. The Commissioner was concerned about the fact that the information dated back to 2013 so asked the Council to specifically comment on why any perceived prejudice would still be real and significant given the passage of time. In response to the Commissioner's enquiries the Council explained it had contacted Weightmans who stated that despite the passage of time the fees still remained commercially sensitive.
19. As no further explanations for this position were offered the Commissioner can only conclude that the Council has failed to explain the causal link between the implied commercial prejudice, to its own interests and to Weightmans interests, and the disclosure of the information. He therefore does not consider that the Council has sufficiently demonstrated that there would be any prejudice to the Council's or Weightmans commercial interests and the section 43(2) exemption is not engaged.

Right of appeal

20. 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

21. 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.
22. 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 

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF