



IN THE FIRST TIER TRIBUNAL

Appeal No: EA/2015/0146

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

On appeal from the Information Commissioner's Decision Notice No FS50570261 dated 24 June 2015

Before

Andrew Bartlett QC (Judge)

Melanie Howard

Dave Sivers

Determined on the papers

Date of decision 9 November 2015

APPELLANT: ROBERT JORDAN

RESPONDENT: INFORMATION COMMISSIONER

Freedom of Information Act 2000 – qualified exemption – commercial interests

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

REASONS FOR DECISION

The request, the public authority's response, and the complaint to the Information Commissioner

1. On 4 June 2014 Mr Jordan made a request to Ashfield District Council for information which related to works done to his house on behalf of the Council pursuant to a grant. The work had been done by Vaughandale Construction Limited. The information he requested was 'a full and final cost breakdown'.
2. He stated that his request was made under the Data Protection Act. The Council decided that it should be treated as a request made under the Freedom of Information Act ('FOIA').
3. The Council confirmed to him that it held the requested information. It supplied a copy of the final account, being a list of 'adds' and 'omits', but with the prices redacted. It stated that the price information would be withheld because of its commercial sensitivity, and the balance of public interest, pursuant to the qualified exemption in FOIA s43. Mr Jordan requested an internal review. On review the Council adhered to its original decision.
4. Mr Jordan complained to the Information Commissioner. During the Commissioner's investigation the Council relied both on s43 (commercial prejudice) and on s41 (information provided in confidence). After investigation the Commissioner upheld the Council's decision in Decision Notice No FS50570261 dated 24 June 2015, on the basis of s43. The Commissioner did not investigate the application of s41.

The appeal to the Tribunal

5. Mr Jordan now appeals to the Tribunal against the Commissioner's decision.
6. He wishes to check whether the final work was correctly charged and whether the Council received value for money. He contends that s43 does not apply to prevent release of the information, because he would not disseminate the information if it were given to him. He also contends that the balance of public interest is in favour of the release of the information that was withheld, for reasons of transparency and accountability. This is because without seeing the full details of the breakdown he cannot check the final account. Since he used to carry out building works himself, he would be in a good position to do so.
7. We have considered only the question of the provision of the information pursuant to FOIA. We make no decision on whether or to what extent the request may have been valid as a subject access request pursuant to the Data Protection Act; the procedure for enforcing such a request is not within our jurisdiction.

Evidence and findings

8. The parties supplied us with written materials for our consideration.
9. The Council had previously provided to Mr Jordan the priced breakdown produced at the time of tendering in 2012. Our understanding is that this was provided to him in his capacity as the owner of the house, not under FOIA. If or in so far as it was confidential, he was bound to respect the confidentiality of the document. He has not disseminated it, except for providing a copy for the purposes of the present proceedings.
10. The works were carried out in 2013. The final account was dated 5 July 2013. The works which are individually listed in the final account are the changes to the works priced in the original specification.
11. Vaughandale Construction Ltd objected to the release of the information to Mr Jordan.
12. During the Commissioner's investigation, the Council contended:
 - a. Given the competitive nature of the market in construction services, release of the information could impact adversely on the contractor's commercial interests. It would put it at a competitive disadvantage, since other contractors could take advantage of knowing the prices charged by Vaughandale.
 - b. Release would also harm the Council's interests in seeking to achieve best value.
13. The essential point here is that the release of market sensitive information would undermine the process of competitive bidding. While the evidence provided is not strong, on balance we consider that we should accept that this is so.
14. Mr Jordan's statement that he would not further disseminate the information is not something that we can take into account. In most circumstances, disclosure under FOIA is equivalent to disclosure to the world. On the facts of this case, if the information were released to Mr Jordan under FOIA, he would not be under an obligation to keep it under wraps.
15. There comes a stage when the passage of time has the effect that sensitive information as to pricing is no longer of interest to competitors. We note that in this case the information request was less than 12 months after the date of the final account. We do not consider that the information had lost its sensitivity at the time when the request was answered.
16. We therefore agree that the exemption in s43(2) was engaged¹.
17. As regards the public interest balance pursuant to FOIA s2(2)(b), we agree with Mr Jordan that the relevant factor in favour of disclosure is that it is in the public interest that there

¹ Section 43(2) provides: '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).'

should be transparency and accountability in the use of public funds. Against disclosure is the need to ensure that public authorities, such as the Council, are able to obtain best value by a truly competitive bidding process which is not undermined by the release of a contractor's detailed prices. Weighing these considerations against one another, we agree with the Council and the Commissioner that the balance comes down on the side of maintaining the s43 exemption in the circumstances of this case. There would be little purpose in proceeding in a manner which would assist transparency and accountability (ie, releasing the information), in order to promote the proper use of public funds, if (as we accept) the release of the information would itself make it difficult for public authorities in the position of the Council to use their funds to best effect.

Conclusion

18. We have considerable sympathy with Mr Jordan's reasons for wanting to see the information, but for the reasons stated above we consider that we must dismiss his appeal.

Signed on original

/s/ Andrew Bartlett QC, Tribunal Judge

9 November 2015