



2 December 2020

[REDACTED]

Dear [REDACTED]

FREEDOM OF INFORMATION ACT 2000 – REQUEST REF CA97

I write with reference to your information request received on 19 October 2020, our acknowledgment of 26 October 2020 and our further email of 17 November 2020.

Request

*The New University of Peterborough – Phase 1 Build Contract Reference number:
DN477580*

I refer to the above procurement exercise.

I wish to request under the Act the following information:

- 1. Copies of the pre-qualification questionnaires submitted by those shortlisted to tender.*
- 2. The scores attributed to the above firm's pre-qualification questionnaire.*
- 3. Copies of the technical/qualitative submission elements submitted by those shortlisted to tender.*

Response

The Combined Authority does hold the information you have requested but for the reasons set below will not be disclosing it to you.

Section 43(2) of the Freedom of Information Act 2000 [“the Act”] provides that:

(2) 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)

The Information Commissioner’s guidance on the commercial interests exemption at section 43 is available at:

<https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

The Mayor’s Office
72 Market Street
Ely
Cambs
CB7 4LS

In order for this exemption to be engaged the following criteria must be met:

- *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.*

The guidance explains that:

“would...prejudice” means that prejudice is more probable than not, ie that there is a more than 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so. “Would be likely to prejudice” is a lower threshold. It means that there must be more than a hypothetical or remote possibility of prejudice occurring; there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%.

And defines “commercial interest” as follows:

“...a commercial interest relates to a person’s ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services.”

Section 43(2) is a qualified exemption and is therefore subject to public interest considerations.

It is the Combined Authority's view that disclosure of the pre-qualification questionnaires and the scoring of the questionnaires plus the technical/qualitative elements submitted by the tenderers would be likely to prejudice the commercial interests of both the Authority and the individual participants in the procurement process.

Were the Authority to disclose the information requested it could affect its ability to contract services at a competitive rate in the future by making potential bidders reluctant to engage with procurement exercises for fear of any commercially sensitive information provided in their bid being disclosed to their competitors. Parties who were well placed to submit competitive bids in future procurement exercises might therefore decide not to do so thereby undermining the Authority's ability to procure goods and services at competitive rates and prejudicing its commercial interests.

The information requested contains commercially sensitive information about the individual participants' business models, pricing and methodologies for providing the required service. The section 43(2) exemption is therefore engaged. The Combined Authority must therefore consider the balance of public interest in deciding whether to disclose the information.

There is clearly a general public interest in public bodies being open, transparent and accountable particularly in the context of the expenditure of public funds.

However there is also a public interest in public bodies being able to procure goods and services effectively without potential bidders being reluctant to participate for fear of their commercially sensitive information being disclosed to competitors.

On balance the Combined Authority takes the view that the public interest arguments in favour of maintaining the exemption and withholding the information, in particular the arguments about the likely prejudice to both the Authority's and participants' commercial interests, outweigh the public interest arguments in favour of disclosure.

Your request for information is therefore refused on the basis that the information requested is exempt from disclosure under section 43 of the Act.

The Authority has also considered the application of the exemption from disclosure under section 41 of the Act to items 1 and 3 of the requested information, which both consist of information provided by tenderers.

Section 41(1) of the Act provides that:

41.— Information provided in confidence.

(1) Information is exempt information if—

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

The Information Commissioner's guidance on the application of this exemption is available at:

<https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

The guidance confirms that:

Information will be covered by Section 41 if:

- *it was obtained by the authority from any other person,*
- *its disclosure would constitute a breach of confidence.*
- *a legal person could bring a court action for that breach of confidence, and*
- *that court action would be likely to succeed*

When determining if disclosure would constitute a breach of confidence, the authority will usually need to consider:

- *whether the information has the quality of confidence,*
- *whether it was imparted in circumstances importing an obligation of confidence, and*
- *whether disclosure would be an unauthorised use of the information to the detriment of the confider.*

[...]

When determining if an action for breach of confidence would be likely to succeed, the authority will need to consider whether there would be a public interest defence to the disclosure.

The exemption is designed to give those who provide confidential information to public authorities, a degree of assurance that their confidences will continue to be respected, should the information fall within the scope of a freedom of information request.

In considering whether disclosure would be a breach of confidence with regard to items 1 and 3 of the requested information:

- Given that the information provided is more than trivial and is not otherwise accessible it has the necessary quality of confidence and those providing the information have a genuine interest in the contents remaining confidential. The guidance confirms that the information does not have to be highly sensitive, but nor should it be trivial. The preservation of confidences is recognised by the courts to be an important matter and one in which there is a strong public interest.
- The content of the information, due to its commercial sensitivity, makes it implicit that there is an obligation of confidence.
- Disclosure of these elements of the requested information would be an unauthorised use of the information to the detriment of those providing the information because the disclosure of commercially sensitive information will be detrimental to their commercial interests by making that information available to potential competitors.

In considering whether the section 41 exemption would apply to disclosure of items 1 and 3 of the requested information:

- The information was obtained by the Authority from other persons, namely tenderers;
- As above, its disclosure would constitute a breach of confidence; and
- Those providing the information could bring a court action for that breach of confidence in order to protect their commercial interests from detriment

It is also necessary to consider whether such court action would be likely to succeed. Although section 41 is an absolute exemption, meaning that it is not subject to the application of a public interest test, the issue of public interest does still arise because a public interest defence would be available to a legal action for breach of confidence. The caselaw referred to in the Information Commissioner's guidance confirms that the test is now whether there is a public interest in disclosure which overrides the competing public interest in maintaining the duty of confidence. The test assumes that the public interest in maintaining confidentiality will prevail unless the public interest in disclosure outweighs the public interest in maintaining the confidence. As the guidance puts it:

[...] in cases where the duty of confidence protects a person's private interests, it is hard to envisage circumstances where the public interest in transparency and accountability alone, would be sufficient to override the public interest in maintaining that individual's privacy

In this case there is no suggestion of misconduct, illegality or gross immorality (such as misfeasance, maladministration or negligence) in the procurement exercise to support disclosure nor is there any suggestion that disclosure would serve to protect public safety.

In all the circumstances the Authority has concluded that the public interest in disclosure does not override the competing public interest in maintaining the duty of confidence. In making that judgement the Authority has had particular regard to the potential detriment that disclosure would cause to the commercial interests of both the authority and those participating in the procurement exercise, including the fact that disclosure could reveal information that would assist competitors and would undermine confidence in the Authority's ability to maintain confidentiality in procurement exercises.

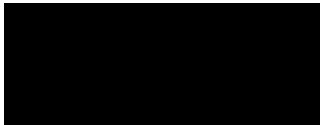
Your request for items 1 and 3 of the requested information is therefore refused on the basis that the information requested is exempt from disclosure under section 41 of the Act.

I hope this information is helpful but if you are unhappy with the service you have received in relation to your request and wish to make a complaint or request a review, you should write to us via our contact us email address – contactus@cambridgeshirepeterborough-ca.gov.uk or write a letter to Complaints, Cambridgeshire and Peterborough Combined Authority, the Mayor's Office, 72 Market Street, Ely, Cambs CB7 4LS within 40 days of the date of this e-mail.

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF, or via their website: <https://ico.org.uk/>

Generally, the ICO will not undertake a review or make a decision on a request until the internal review process has been completed.

Yours sincerely



Sue Hall
Governance Assistant