

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 September 2012

Public Authority: Buckinghamshire County Council

Address: County Hall
Walton Street
Aylesbury
Buckinghamshire
HP20 1UA

Decision (including any steps ordered)

1. The complainant has requested the annex attached to the 2011 report to Buckinghamshire County Council's (the council) cabinet regarding the options considered in setting the usual price for accommodation for long term care. The council refused to provide the information relying on section 43(2) as the information was prejudicial to its own commercial interests.
2. The Commissioner's decision is that the council has incorrectly relied on section 43(2) to withhold the requested information.
3. The Commissioner requires the public authority to provide the requested information to the complainant to ensure compliance with the legislation.
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 25 January 2012 the complainant wrote to the council and requested information in the following terms:

- *"A copy of the complete Laing & Buisson analysis which has been referred (sic) to in the document "Appendix 2. Options around Usual Price for Older People by Service Type" as part of the July 2009 report to cabinet.*
 - *Any subsequent updates or revisions to the aforementioned Laing & Buisson analysis which have been made to date.*
 - *All additional appendices to the 2009 'Usual Price' report*
 - *All additional appendices to the 2011 'Usual Price' report*
 - *Any other documents which would be covered by the MKBCare 15 April 2011 FoI request"*
6. The council responded on 23 February 2012. It provided information in relation to part of the request and stated that some information was not held. In relation to the fourth part of the request it stated that it was relying on section 43(2) to withhold the information.
7. The complainant then wrote to the council on 13 March 2012 to request an internal review in respect of part four of the request for *"all additional appendices to the 2011 'Usual Price' report"*.
8. The council communicated the outcome of its internal review on 21 May 2012. It upheld its original position with regard to part four, stating that the information would prejudice its commercial interests with regard to negotiating with care providers. It also confirmed that it considered that the public interest was in maintaining the exemption.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular he has complained about the council's response to part 4 of his request regarding the appendix to the 2011 'Usual Price' report.
10. The Commissioner therefore considers the scope of his investigation is to consider whether the council was correct to rely on section 43(2) to withhold the appendix to the 2011 report (the withheld information).

Background

11. Local authorities are obliged by the National Assistance Act 1948 (the NAA 1948) to provide residential accommodation for adults in need of

care. The NAA 1948 obliges the local authority to set the fees payable to independent care providers. The NAA 1948 (Choice of Accommodation) Directions 1992 provide that the local authority is only required to make arrangements for a person at their preferred accommodation if it would not be required to pay more than it would usually expect to pay having regard to his assessed needs. This is generally known as the 'usual price' of care and is the basis on which local authorities set the fees that they will normally pay to care homes.

12. Whilst local authorities are obliged to set a usual price which it will pay to independent care providers, the service user may still chose a care provider whose fees exceed the usual price. In this situation, the service user must arrange for a third party top up of his fees above the usual price to ensure that the care provider's fees are paid in full.
13. During the financial year 2010/2011 there was a legal challenge by care providers in Pembrokeshire about the way Pembrokeshire County Council had set the usual price¹. The court found that parts of the methodology employed in setting the usual price were unlawful, and this has impacted the way local authorities set the usual price.
14. In the financial year 2009/2010 the council decided that the 'majority' of placements should fall within its 'usual price'. Majority was defined as 75% for all categories of older people; residential, residential EMI (Elderly Mentally Ill) and nursing provision except nursing EMI, for which 51% was deemed appropriate. The decision in 2011 was to continue defining majority in this way which resulted in the usual price for residential, residential EMI and nursing remaining the same and the usual price for nursing EMI increasing slightly. Other options regarding block and spot placements and definitions of 'majority' were considered by the council in the annex to the report which is the withheld information in this case.
15. The council publishes yearly reports outlining its decision regarding the level of the usual price for the next year. These are available to view on the council's website.

¹ Forest Care Home Limited and others v Pembrokeshire County Council [2010] EWHC 3514; R v Pembrokeshire County Council, Ex parte Mavalon Care Ltd and others [2011] EWHC 3317

Reasons for decision

16. Section 43 of FOIA sets out an exemption from the right to know if release of the information is likely to prejudice the commercial interests of any person, including those of the public authority holding the information.
17. In this case, the information withheld by the council by virtue of section 43(2) comprises an annex to the report "Usual price for long term care" dated 7 September 2011 (the 2011 report). The annex details the options considered by the council for setting the usual price for the financial year 2011/2012, including comparisons between different definitions of 'majority' and considering different types of placement.

Applicable interests

18. When identifying the applicable interests in this case, the Commissioner must consider whether the prejudice claimed is related to the interest stated. In this case, the council confirmed that it considered that disclosure of the requested information would prejudice the commercial interests of the council itself.
19. In the Commissioner's view, a commercial interest relates to a person's ability to participate competitively in a commercial activity, such as the purchase and sale of goods or services.
20. The council has explained that the Local Authority Circular (2004)20 requires councils to have regard for Best Value requirements under the Local Government Act 1999 when setting the usual price. The Commissioner agrees that information regarding possible usual prices and associated considerations will be commercial information.

Nature and likelihood of the prejudice

21. In the Commissioner's view, the term prejudice implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way. If a trivial or insignificant prejudice is claimed, such that it cannot be said to have any real detrimental or prejudicial effect, then the exemption will not be engaged. In addition to this, the public authority must be able to demonstrate a causal link, in that the disclosure of withheld information would lead (or would be likely to lead) to the harmful consequence claimed.
22. In its correspondence with the complainant, the council argued that disclosure of the information would or would be likely to compromise its

negotiating position with potential care providers. It argued that this in turn would or would be likely to lead to a situation where the prices for care were set at a rate which would adversely affect the council's commercial interests.

23. In its submissions to the Commissioner the council explained that the withheld information regarding the options and alternatives considered for setting the usual price was for internal audiences only. The council stated that its position is that disclosure *would be likely* to prejudice its ability to secure best value because it would give an unrealistic indication of how the usual price could be set. It has added that it considers that this likely prejudice would compromise its negotiations with providers.
24. The Commissioner has investigated the way in which the usual price is set and the nature of any negotiations that take place with care providers when setting it. He asked the council directly about the type of negotiations that it undertakes with care providers when setting the usual price and the council referred to the 2011 report for information about this.
25. The 2011 report sets out that as a result of the recent legal challenges regarding the setting of the usual price (referred to in paragraph 13), the council is obliged to take into account local data regarding the actual cost of care. Whilst consultation with local care providers is not compulsory, it is considered necessary in order to obtain the type of local costing information that must be taken into account when taking decisions relating to care fee levels.
26. In the 2011 report, the council had regard to local factors such as the size of the care homes in the area, the size of the self-funding market, local demand and staffing, administration and building costs. The report also stated that:

"There is no statutory requirement for the council to consult specifically on setting the usual cost under LAC 2004 (20). Discussions have taken place with providers around understanding their costs. Consideration has also been given to a range of local intelligence".

27. It is therefore likely that there is a degree of consultation with care providers when setting the usual price. The Commissioner considered what form this consultation takes and the extent to which the process could be characterised as 'negotiation'.
28. The complainant, who represents an association of care providers in the local area has advised that in his experience when the council sets the

usual price, it is not negotiated directly with the providers as it is the council's statutory responsibility to set it.

29. In addition to this, the Commissioner notes that whilst the usual price is the price at which the council will pay a care provider for care, this does not necessarily mean that the care provider will lose out if the usual price is set below their standard price. This is because where the cost of care in a specific care home is more than the usual price, the user has the option to use a third party top up, as stated in paragraph 12.
30. The Commissioner has not seen any evidence that there is much negotiation, if any, with care providers when setting the usual price. However, he concedes that there is consultation in the form of intelligence gathering. The Commissioner has also considered the report dated 2 April 2012 (the 2012 report) about the level of the usual price for the financial year 2012/2013. The 2012 report states that:

"It is important to note that these [usual prices] are a guide price. The council through its purchasing team approaches the market on a case by case basis and the market determines the price the county council pays for care through negotiations between the council, service user, often their carers and the provider."

31. This statement supports the council's position that it does negotiate with care providers, however, it is clear that this is on a case by case basis. The council's arguments that its negotiation position would be likely to be prejudiced could be taken to be with regard to the negotiations that take place when placing users on an individual basis. The council has suggested that if the care providers know what other options were considered in 2011 they would use this knowledge to argue that the council should pay them more.
32. The Commissioner has also had regard to the council's 2009 report on establishing a usual price for long term care². This takes a similar form to the 2011 report in its reasoning for setting the usual price. However, the 2009 report also contains a much higher level of analysis regarding the various options which the council could have followed than the 2011 report. The analysis includes options for setting the usual price using various percentage definitions of 'majority' and provides the figures for each option. The Commissioner considers that this information is similar to the withheld information in this case. He does recognise however that

² <http://democracy.buckscc.gov.uk/mgConvert2PDF.aspx?ID=8213>

there are differences in the information. In particular, the percentage definitions of usual price and the resulting different usual prices discussed.

33. With regard to the council's claim that its commercial interests would be likely to be prejudiced by disclosure of the withheld information, the Commissioner notes that the 2009 report was dated 3 July 2009 and was published on 10 July 2009. It is therefore clear that the council has previously taken the decision that information of a very similar nature was not prejudicial to its commercial interests at that time. The council has not provided any information to substantiate its apparent position that the withheld information is substantially different enough from the 2009 analysis as to result in a likely prejudice (which was not existing in 2009) to its commercial interests with regard to any negotiations with care providers.
34. The council has also informed the Commissioner that it considers that the information contained in the annex is misleading. It has said that some of the information has since been updated and some of it is incorrect. It has also suggested that as the council chose to go with the option published in the 2011 report, the other options considered should not be released.
35. The Commissioner does not consider arguments about misleading information to be relevant to the engagement of an exemption. The FOIA only provides a right to information already held by the public authority and there is no requirement for this to be complete, accurate or easily comprehensible. In short, there is no exemption for misleading information and indeed if the information is misleading it is open to the council to provide appropriate context explaining the position.

Conclusions

36. In conclusion, the Commissioner is not satisfied that the council has demonstrated how disclosure of the information would result in prejudice to its commercial interests. He notes that the council has previously disclosed comparable information and he considers that it has not demonstrated that there is a real and significant risk that disclosure of the withheld information would be likely to prejudice its negotiating position with care providers. The Commissioner is, therefore, not satisfied that the council has shown that the identified prejudice is real, actual and of substance.
37. It follows that the Commissioner does not find the section 43 exemption engaged in this case and so he has not gone on to consider the public interest test.

Right of appeal

38. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

39. 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.
40. 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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