

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 7 February 2013

**Public Authority:** Stoke-on-Trent City Council  
**Address:** Civic Centre  
Glebe Street  
Stoke-on-Trent  
ST4 1HH

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to companies providing domiciliary care services to Stoke-on-Trent City Council (the "council"). The council provided some of the requested information but withheld details of the hourly rates paid to providers under the exemption for prejudice to commercial interests.
2. The Commissioner's decision is that the council has correctly applied the prejudice to commercial interests exemption and that the public interest favours maintaining the exemption.
3. The Commissioner does not require the public authority to take any steps.

#### **Request and response**

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4. On 15 May 2012, the complainant wrote to the council and requested information in the following terms:

*"Please tell me:*

1. *The names of those companies currently contracted to provide home care for Stoke on Trent City Council and the hourly rate you pay them for this service.*

2. *The names of those companies newly contracted by yourselves to provide home care, from October of this year and the hourly rate you have agreed to pay them for this service."*
5. The council responded on 14 June 2012 and provided some of the requested information. Information about the hourly rates paid to companies was withheld under the exemption for prejudice to commercial interests. However, the council provided the complainant with the average hourly cost paid for providers under the current and new contracts referred to in the request.
6. Following an internal review the council wrote to the complainant on 31 July 2012. It stated that it was upholding its original decision to refuse part of the request.

### **Scope of the case**

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7. On 15 September 2012 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly withheld some of the requested information.
9. During the course of his investigation and, in the interests of exploring an informal resolution to the complainant, the Commissioner negotiated with the council and gained its agreement to provide the complainant with a redacted version of the withheld information, subject to them agreeing to withdraw their complaint. The complainant declined to withdraw so the Commissioner has set out his conclusions in this decision notice.

### **Reasons for decision**

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#### **Section 43 – commercial interests**

*Hourly rates paid to companies currently and newly (from October 2012) contracted to provide domiciliary care services*

10. Section 43(2) of the FOIA provides an exemption from disclosure of information which 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 term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43. This comments that:

*"...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."<sup>1</sup>*

12. Having viewed the withheld information the Commissioner notes that this consists of the hourly rates paid by the council to domiciliary care service providers. The Commissioner is, therefore, satisfied that the information relates to a commercial interest. However, it will only fall within the scope of the exemption if its disclosure would, or would be likely to prejudice a commercial interest. The Commissioner has gone on to consider the nature of the prejudice which the council has argued that disclosure would create.

### **The Nature of the Prejudice**

13. In investigating complaints which involve a consideration of prejudice arguments, the Commissioner considers that the relevant test is not a weak test, and a public authority must be able to point to prejudice which is "real, actual or of substance" and to show some causal link between the potential disclosure and the prejudice. As long as the prejudice is real and not trivial, its severity is not relevant to engaging the exemption – this will be factored in at the public interest test stage.
14. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.
15. The council has argued that disclosure of the information would be likely to prejudice the commercial interests of the service providers. However, it has also argued that it considers that disclosure would prejudice its

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[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/AWARENESS\\_GUIDANCE\\_5\\_V3\\_07\\_03\\_08.aspx](http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx)

own commercial interests and that this constitutes its primary argument for engaging the exemption.

*Prejudice to the council's commercial interests*

**Securing best value for customers**

16. The council explained that all providers identified in the withheld information (the provider list has been disclosed to the complainant) provide domiciliary care. It clarified that the expectations on each provider are the same and that they are each on the same framework contract. It explained that the actual service delivered varies depending on the needs of the individual that is having their needs met. However, the hourly rate paid for any company remains consistent.
17. The council provided the Commissioner with some background about the criteria it applied in assessing tender bids and explained why different companies are paid different hourly rates.
18. In essence, the council explained that it has two options in setting the tender conditions – it could either specify the hourly rates and leave the service terms negotiable or specify the delivery terms and allow companies to bid individual prices. The council explained that, whilst it followed the latter approach, it stipulated a minimum acceptable hourly cost (to ensure quality of service). It also confirmed that, in evaluating bids, costing was only a contributory factor, with quality being a more decisive consideration.
19. The council has first argued that disclosure of the information would prejudice its ability to secure the best value for customers of its care services and for council tax payers in general.
20. The council explained that the tender process provides the mechanism for it to achieve these goals and all elements of the tender process are transparent, including the service specification, contract and criteria for scoring. During the tender process, questions and answers about the bid are shared between providers and the council and this ongoing dialogue is seen by all providers (unless restrictions are deemed necessary to ensure the confidentiality of a particular bid) and transparency is, therefore, maintained.
21. The council considers that release of individual bidders' information could jeopardise the entire bidding process. It explained that disclosure during the bidding process may cause the process to be halted and restarted, resulting in the need for a new tender exercise and extra cost to the council and tax payer. Another outcome of this, the council argues, would be that providers would seek financial compensation from the council for the stalled process.

22. The council confirmed to the Commissioner that, at the time the request was received, it had made a decision on which providers would be awarded the care contract, although it had not publicised this or commenced the service. The council explained that it considered that, following completion of the tender process, the information retained its commercial sensitivity, allowing companies to make their mark in the market when bidding for future similar contracts.
23. The council stated that one of its goals putting contracts out to tender was to develop a diversity of available services. Making the information available may, in its view, encourage organisations to replicate bids that successful companies have submitted. An outcome of this would be that the council would have diminished choice and less opportunity to meet its goal of diversity.

### **Reducing market competition**

24. The council has argued that it can only achieve best value (the best possible services that can be purchased at most advantageous cost) by ensuring that there is market competition. The competitive nature of markets ensures that services adapt to the prevalent financial or qualitative requirements at the time of bidding.
25. The council has acknowledged that transparency of the tender criteria is crucial to ensure that there is a fair environment for bidders. However, the council considers that the release of individual bid information will neutralise the market differential. The council has argued that an outcome of releasing details of individual tender bids would be that, in future tender exercises, companies simply submit identical specifications to those of previous winning bidders making it impossible for the council to differentiate between good and poor quality providers.
26. The council provided the Commissioner with an example of how such scenario might arise and what the effects would be. If, for example during a tendering exercise, two companies were to submit bids that were so similar, it would raise suspicions that they had either colluded or had obtained bid information from the same source. The council explained that, were the bids of high quality, it would be necessary investigate and seek to exclude both companies. If tender details were routinely disclosed, it argued, such scenarios would become widespread, resulting in potential delays to tendering exercises.

### **Damage to the relationship with providers**

27. The council has argued that contractual management hinges on maintaining relationships with contracted providers to continue to improve quality and the customer experience. The council believes that

such relationships are based on mutual trust and understanding of and respect for shared objectives. It considers that, should either party discount the aims of another, for example, if a provider were to operate purely on a financial gain basis or if the council were to disregard a provider's need for a viable profit margin, this may cause the relationship to breakdown. An outcome of this might be that the service quality diminishes. The council considers that disclosure of the withheld information could produce such an effect, as providers lose trust in the council.

### *Conclusions*

28. The Commissioner agrees that disclosure of the information would be likely to reduce the diversity of options available to the council during the tender process. Disclosure of the information would be likely to lead to duplication of the costing elements of bids as companies would seek not to be outbid by rivals. As well as making it difficult for the council to differentiate between rival bids, the likelihood would be that the focus of the tender exercise would be on the costing aspect, a distraction from the more important weighting in the evaluation towards service quality.
29. Having considered the council's arguments, the Commissioner is satisfied that disclosure of the information would be likely to undermine the council's ability to conduct an efficient and cost-effective tender exercise and he has concluded that this would be likely to result in prejudice to its commercial interests. As he has concluded that the exemption is engaged he has gone on to consider the public interest.

### *Public interest in disclosure*

30. The council acknowledged that there is a public interest in disclosure of the hourly rates paid to each provider. It stated that disclosure would provide the public with the ability to scrutinise decisions made and would promote openness and transparency. This in turn would provide the public with understanding about the bidding company and the services they provide.
31. In support of disclosure, the complainant made reference to the minutes of a council cabinet committee meeting which confirmed that the tender for domiciliary care would set a minimum price below which providers would not be allowed to bid. Disclosure of the information would satisfy transparency and accountability as it would enable the public to see whether the council had observed this requirement.
32. The complainant has also argued that the information could also expose a councillor or council officer providing preferential consideration for a company in which they have an interest.

33. The Commissioner further notes that, as public authorities increasingly outsource and use private companies to provide public services, they must expect a certain level of scrutiny as to how public funds are spent and how providers perform under contract. There is, therefore, a general public interest in making procurement processes as transparent and accountable as possible, particularly where there is significant cost to the public purse.

*Public interest in maintaining the exemption*

34. The council has argued that withholding the information will enable it to continue to purchase effective, economically viable services for the public with relationships that allow contractual arrangements to be successful.
35. The council further argued that withholding the information would better serve the public interest because it would ensure that it would be able to obtain maximum value in relation to the services it provides, in turn, providing the most effective use of public funds. The council stated that this is particularly important at a time when it is also faced with the task of making savings of some £21 million over the coming year.
36. The council considers that, in this case, the public interest in accountability and transparency has been met by the public availability of total service costs and the disclosure to the complainant of the average hourly rate paid to providers.
37. The council acknowledged that, whilst it had not been made public, the tendering exercise for the new contracts had been completed at the time the request was received. However, it has argued that, even after contracts have been awarded, it would still be commercially advantageous for companies to know the unit costs of their competitors when submitting future tender bids. In addition to companies being, therefore, less inclined to share such information with the council in future, the resulting uniformity of tender bids or manipulation of bids to undercut competitors would prejudice the council's ability to evaluate submissions and determine which providers would deliver best value.

*Balance of the public interest*

38. The Commissioner has given due weighting to the general public interest in transparency and accountability around the expenditure of public funds, particularly in relation to the pressing social needs around the provision of domiciliary care. However, he is not convinced that disclosure of the hourly rates paid to each provider will add any value beyond the public interest which has been served by the availability of information regarding the overall value of the contracts. The



Commissioner notes that, in disclosing the names of the providers and the average cost which they are paid, the council has attempted to address any shortfall here.

39. In relation to the complainant's submissions that disclosure would allow the public to determine whether contracts had been allocated in accordance with the council's own guidelines or whether preferential consideration had been given to particular providers, the Commissioner considers that these are arguments which relate to potential malpractice.
40. Whilst he acknowledges there is a public interest in knowing the authorities follow best practice, the Commissioner has not been provided with any evidence which suggests this has not happened in the tender exercises to which the request relates. The Commissioner does not consider that general speculation about the possibility that this might happen is not a public interest argument which carries much weight. He further considers that when set against the specific arguments in favour of maintaining the exemption, namely the likelihood of disclosure causing disruption to the tender exercise and to the ability of the council to attract diverse bids and secure best value, such an argument does not, in this instance, tip the scales in favour of disclosure.
41. Having considered the relevant facts the Commissioner has concluded that the public interest, in this case, favours maintaining the exemption. He has not, therefore, gone on to consider the council's secondary arguments for engagement of the exemption, namely, the likelihood of disclosure causing prejudice to the third party providers.



## Right of appeal

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42. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

43. 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.
44. 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 .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
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**Water Lane**  
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