

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **6 August 2013**

Public Authority: **Haringey Council**

Address: **Civic Centre
High Road
Wood Green
London
N22 8LE**

Decision (including any steps ordered)

1. The complainant has requested copies of 24 bids which were successful in securing funding from Haringey Council's Voluntary Sector Investment Fund ("VSIF"). The council disclosed the information it held about the requester's own bid application, but withheld information relating to those of other bidders, citing section 40(2) and section 43. During the Commissioner's investigation the council also claimed that the exemptions at section 21(1) and section 41 applied. The Commissioner's decision is that the council is entitled to withhold some of the requested information under section 40(2) and section 43(2), but that section 21 and section 41 are not engaged.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - In respect of the 11 bidders who consented to the full disclosure of their bid applications and the two who consented but asked for the removal of personal data, to disclose the bid application documents, except for the information the Commissioner has identified in this decision notice as being exempt under section 40(2) (the CRB check information captured at Stage 1, question 31 of the bid application documentation).
 - In respect of the four bidders who declined to give consent to the disclosure of their bids, to disclose the bid application documents except for the information the Commissioner has identified in this decision notice as being exempt under section 40(2) (the CRB check information captured at Stage 1, question 31 of the bid

application documentation) and section 43(2) (the financial information captured at Stage 2, questions 11 and 12 of the bid application documentation).

- In respect of the one bidder who consented to the bid being disclosed except for the financial information in question 23, to disclose the bid application documents except for the information the Commissioner has identified in this decision notice as being exempt under section 40(2) (the CRB check information captured at Stage 1, question 31 of the bid application documentation).
 - In the particular circumstances of this case, in respect of the remaining six successful bidders, who have not expressed a view and whose bid applications the Commissioner has not had sight of, to disclose the bid application documents, redacting the following details, which the Commissioner considers will be exempt under section 40(2) or section 43(2) for the reasons set out in this decision notice.
 1. In respect of section 40(2), the CRB check information captured at Stage 1, question 31 of the bid application documentation
 2. In respect of section 43(2), the financial information captured at Stage 2, questions 11 and 12 of the bid application documentation.
3. 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.

Background

4. The council's VSIF gives funding to local organisations (usually charities) which deliver community based projects that help the council to meet the aims and outcomes specified in its strategic priorities. The maximum potential award per organisation is £50,000.
5. The council invited bids for funding for the period 2012-2015 in early 2012. Sixty-four bids were received, of which 24 were awarded

funding¹. The complainant represents an organisation which was unsuccessful in securing funding on this occasion.

Request and response

6. On 5 July 2012, the complainant wrote to the council and requested information in the following terms.

"1.Exact detailed written feedback as to why our bid was unsuccessful.

2. Full names and departments of the evaluation panel assessing the bids.

3. Please forward me the notes and scoring cards of the evaluation panel re: our bid.

4. Copies of the bids, notes and scoring cards of all the bids that were successful."

7. The council responded on 2 August 2012 and addressed the four points of the request as follows.

1. It offered to provide verbal feedback at a forthcoming meeting.

2. It identified the departments from which evaluation panel members were drawn, but did not name them.

3. It provided the score cards of the evaluation of the complainant's bid.

4. It refused to provide any information about the successful bids, citing the exemption at section 43 of the FOIA.

8. The complainant requested an internal review on 9 August 2012, commenting that the council's response was deficient in a number of ways.

¹ http://www.haringey.gov.uk/index/community_and_leisure/voluntary-sector/voluntary-sector-investment-fund.htm

1. The request specifically asked for written feedback and only verbal feedback had been offered.
 2. The request specifically asked for the names of panel members, not just the departments they worked in.
 3. The request specifically asked for the evaluation panel's notes relating to the complainant's bid, not just the electronic score cards that had been completed.
 4. The complainant challenged the application of section 43.
9. The council responded on 12 September 2012, maintaining its position.
1. It stated "*there is no written feedback*", and reiterated its offer to provide verbal feedback at a forthcoming meeting.
 2. It refused to name panel members, explaining that to do so would breach section 40 of the FOIA.
 3. It explained that the evaluation process was conducted electronically, via the completion of score cards, and that it held no separate written notes.
 4. It upheld its application of section 43, but promised that a project summary of bids would be released shortly, together with the length and value of the contracts.²

Scope of the case

10. The complainant contacted the Commissioner on 30 October 2012 to complain about the way her request for information had been handled. She referred the Commissioner to a request she had made to the council in 2009, for similar information, which had yielded copies of bids and names of assessors. She felt this demonstrated that the council had responded incorrectly in its handling of her current request.
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² An outline of the 24 winning project was subsequently placed on the council's website.
http://www.haringey.gov.uk/haringey_voluntary_sector_investment_fund_successful_applications_project_descriptions_2012-15.pdf

11. The Commissioner has considered whether the council holds further information it could provide in relation to questions 1 and 3.
12. He has also considered whether section 40 applies in respect of question 2 and whether section 40 and section 43 apply in respect of question 4. He has also considered whether section 21 and section 41 apply in respect of question 4, these exemptions being initially cited by the council in correspondence to the Commissioner dated 19 February 2013.
13. The council informed the Commissioner that it had notified each of the 24 successful bidders that an FOI request had been received and asked whether they objected to their bids being disclosed. Eleven had indicated that they had no objections to their bid being disclosed in its entirety. Four had indicated that their bid should be withheld in its entirety. Two consented to disclosure on the removal of personal data. One consented to disclosure on the removal of financial information from question 23. The Commissioner has no information about the views expressed by the remaining six organisations, or indeed whether they expressed a view at all.
14. To assist the Commissioner's investigation, the council supplied copies of five of the successful bids for funding for which consent to disclose had been refused, either in whole or in part. Due to the voluminous nature of the bid documentation and its standardised format, the Commissioner did not consider it necessary to have sight of the remaining bids in order to reach a decision as to whether the FOIA has been complied with, and his decision is based on the representative five bids he has viewed.

Reasons for decision

Questions 1 and 3

15. The complainant alleged that the council had failed to provide all the information she requested in response to questions 1 and 3. Specifically, she expected to receive written feedback as to why her bid had been unsuccessful and any written notes or other records made about the bid for assessment purposes. The council stated that the only recorded information it held which was relevant to these questions was the electronic scoring sheets completed by the evaluation panel, which it had already provided to the complainant.

Section 1

16. Section 1 of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it

holds the information and, if so, to have that information communicated to him/her.

17. In cases where a dispute arises over the extent of the recorded information that is provided by a public authority in response to a request, the Commissioner will consider the complainant's arguments as to why he/she considers that further information should have been provided. He will also consider the reasons offered by the public authority to explain why the information is not held and any actions taken by the authority to check that the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held, he is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.
18. The Commissioner enquired, in relation to questions 1 and 3, as to whether any information in addition to what had already been disclosed was or had ever been held; the scope, quality, thoroughness and results of any searches carried out by the council; and whether copies of relevant information may have been made and held in other locations.
19. In response, the council confirmed that it had provided all the recorded information it held (namely, the electronic score cards) which was described in questions 1 and 3.
20. It explained that several assessors independently evaluate each bid, inputting their assessment directly into an electronic scoring sheet (a Word document). The assessors ascribe a value to various elements of the bid and record this on the scoring sheet. Where the variance of the average score awarded by the assessors is greater than 15 points, the bid is referred for moderation by senior managers.
21. The council stated that the average score for the complainant's application did not exceed 15 points and was therefore not referred for moderation. The only recorded information it held about its assessment of the complainant's bid was therefore contained on the electronic scoring sheets.
22. The council provided the scoring assessment forms to the complainant as part of its initial response to her request. It had also offered to meet the complainant to discuss the bid and to offer verbal feedback (an offer it extended to all unsuccessful bidders) but the complainant had declined to take up the offer.

23. The Commissioner considers that the council's explanations for why it has provided all the information that it holds that relates to questions 1 and 3 are reasonable, and in the circumstances it seems inherently unlikely that further information is held. He does not consider that there is any evidence that would justify refusing to accept the council's position that it does not hold any further information relevant to these parts of the request. The Commissioner is therefore satisfied that on the balance of probabilities no further recorded information is held by the council and that it has provided all relevant information that it does hold. Accordingly, he does not consider that there was any evidence of a breach of section 1 of the FOIA in respect of questions 1 and 3.
24. Where the Commissioner has established that a public authority does not hold information that has been requested, it is not required by the FOIA to create new recorded information purely for the purposes of responding to that FOI request.

Question 2

25. Question 2 of the request asks for the full names and departments of the evaluation panel assessors. The council refused to disclose names but disclosed the departments from which they were drawn.

Section 40(2)

26. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied. One of the conditions, listed in section 40(3)(a)(i), is where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act 1998 ("the DPA").

Is the requested information personal data?

27. Section 1 of the DPA defines personal data as data which relates to a living individual who can be identified from that data, or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
28. The relevant information here consists of the names and departments of individuals who assessed the successful bids for funding. The Commissioner considers that this is their personal data as they are easily identifiable by this information.

29. Having satisfied himself that the requested information is personal data, the Commissioner must next establish whether disclosure of that data would breach any of the data protection principles under the DPA. He considers the first principle to be the relevant one on this occasion. This states that:

*"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
(a) at least one of the conditions in schedule 2 is met, and
(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."*

30. The Commissioner considers that the primary issue is whether disclosure of the information would breach the first data protection principle by being unfair and/or unlawful.

Would disclosure be unfair?

31. The Commissioner's considerations have focused on the issue of fairness. In considering fairness, the Commissioner balances the reasonable expectations of the individual and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.
32. The Commissioner makes a general distinction between information relating to an individual's professional life and information which relates to his or her private life. (He generally considers the latter attracts more privacy and warrants more protection.) The information in this case consists of the employee's name and the department in which they work.
33. In considering whether disclosure of this information would contravene the requirements of the first data protection principle, the Commissioner has taken into consideration the following factors:

- the reasonable expectations of the panel members;
- the amount of personal data which would be disclosed by the information sought; and,
- the consequences to the panel members of disclosure.

Reasonable expectations

34. The council has referred the Commissioner to its disclosure policy on FOIA requests for employee information. This states that the council will not normally disclose personal information about junior officers. The council explained that in practice this means that it will not generally

disclose personal information of employees below Director level unless they have a very public facing role, and that its employees are aware of this. It does not consider that, in this case, any of the individuals meet these criteria.

35. The Commissioner has been provided with details of the evaluation panel members, including their job titles and grade and is satisfied that the information under consideration only relates to the employees in a 'professional' capacity. In all except three instances he agrees that they are not sufficiently senior to fall within the criteria for disclosure set out in the council's disclosure policy.
36. The three exceptions are more senior individuals, working for the council but employed by another public sector body. The Commissioner considers that they should have a reasonable expectation that the work they do might be subject to a greater degree of scrutiny than that of more junior members of staff. However, he also recognises that identifying them as having participated in the evaluation process may have consequences beyond their reasonable expectations, for the reasons set out in paragraphs 38-39, below.

The amount of personal data which would be disclosed

37. The information concerned would reveal the names (the departments in which they work already having been disclosed) of individual members of staff and the fact they were involved in the bid evaluation process. The Commissioner considers this to be significant for the reasons stated in paragraphs 38-39, below.

The consequences to the panel members of disclosure

38. The council is concerned that if the names of employees who were involved in the bid assessment process were revealed, this may leave them individually vulnerable to approaches from organisations wanting to pursue the reasons why their bid was not successful. Some of the panel members work directly with the sorts of voluntary sector organisations which are likely to submit bids for funding and disclosure of their role in the decision making process could make working relations very difficult.
39. By way of illustration, the council provided a detailed statement from a member of staff whose involvement with similar council procurement exercises had been disclosed and who subsequently suffered harassment from an organisation which had not received funding, which had caused both professional disruption and significant personal distress.

Would the disclosure be fair?

40. While the requested information is, on the face of it, innocuous, the Commissioner considers that the council has provided persuasive arguments as to why its disclosure would be unfair to the data subjects. He considers that the council has demonstrated that there could be significant adverse effects for the data subjects, and that the possibility that this might happen is real and more than mere conjecture.
41. The bid documentation makes it clear that there is no right of appeal against the council's funding decision, but that the council is willing to offer verbal feedback through certain structured channels. The application process also has a review mechanism in the shape of a review by moderators where assessors' scores are significantly at variance. There would therefore appear to be no significant public interest in revealing the identities of the assessment panel members.
42. Taking all this into account, the Commissioner therefore considers that disclosure of the names of evaluation panel members would be unfair to the data subjects and that section 40(2) is therefore engaged.

Question 4

43. Question 4 of the request asked for copies of the successful bids, their evaluation notes and scoring cards. The council said that this information was exempt from disclosure under section 41 and 43(2) in its entirety. It also argued that some information was also covered by section 40 and section 21 of the FOIA.
44. The Commissioner has already ascertained that there are no separate notes, and that evaluation is recorded on the score cards.
45. He has therefore considered whether the exemptions the council has cited entitle it to withhold copies of the successful bid applications and the score cards.

Section 43(2)

46. 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.

47. 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."³

48. In this instance, the council has applied section 43(2) to information relating to successful bids for funding (specifically the bids themselves and the council's evaluation of those bids in the form of the electronic scoring cards) to provide community based services that support the council's strategic priorities. The Commissioner is satisfied that this is information which relates to a commercial activity.
49. However, the information will only fall within the scope of the exemption at section 43(2) 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

50. 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.
51. Section 43(2) consists of two limbs, which clarify the probability of prejudice arising from disclosure. 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 stronger evidential burden on the public authority and must be at least more probable than not.

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http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.ashx

52. The council's position is that disclosure of the bid applications and score cards *would be likely* to prejudice the commercial interests of both the council and the successful bidders.

Bid application documents

53. Applications for funding were made using the Haringey VSIF application form.
54. The form comprises two parts. Stage 1 captures information about the bidding organisation. Stage 2 captures information about the project for which funding is requested.

The council's commercial interests

55. Firstly, the council explained that at the time the request was received, the invitation to bid for funding phase had ended, but contractual negotiations with the successful bidders were still underway (concluding mid-August 2012). The council reviewed the unit costs and performance outcomes proposed for each successful bid with a view to ensuring appropriate value for money. These negotiations resulted in some changes to the final contract value of some of the successful bids, and the final contract values are available on the council's website. In view of this the council considered that disclosure of the original bid price information would be likely to be detrimental to its negotiating position with similar organisations in the future.
56. Secondly, it advised that its own commercial interests would be likely to be prejudiced because full disclosure of the requested information would be likely to impact on the quality of future bids submitted for consideration for its VSIF funding.
57. The council argued that competition for funding within the voluntary sector is so fierce that if future applicants were able to see the content of previously successful bids, there would inevitably be a temptation to simply replicate those bids in the hope of being similarly successful.
58. Replication would allow an element of dishonesty (about what could be delivered) or unscrupulous undercutting to creep into the bidding process. This would be likely to impede the council's assessment of whether the bidder was truly in a position to deliver the project or services described in their bid, making it difficult for the council to distinguish between good and poor quality providers.
59. The replication or submission of generic bids would also be likely to result in a lack of diversity and innovation in the services being presented for consideration by the council. This would be likely to lead

to the council having a diminished choice in the market and to a lack of diversity in the services eventually provided back to the community, by means of council-funded projects.

60. Finally, the council argued that fear of disclosure would be likely to impact on its hitherto constructive working relationships with the voluntary sector. It considered that the possibility of onward disclosure might make bidders more circumspect in the information they were prepared to provide to the council in support of their applications. This would make the task of assessing the relative merits of each bid more difficult for the council.
61. It also considered that the possibility that bids could be disclosed might deter some organisations from bidding for funds. It cited an instance in which the details of a successful bid had been made public. Subsequently, the bidder had not submitted further bids for funding, even though there had been opportunities to do so. If enacted on a larger scale, this would have the effect of diminishing the choice available to the council for the provision of important services to the local community.

The Commissioner's view

62. Taking the council's first argument, although it has stated that disclosure of details of the original bid pricings would be likely to prejudice its negotiating position, the Commissioner notes that it has not explained how or why this would be the case. The final contract values do not reveal a breakdown of how they are comprised and so it would not be possible to identify exactly where changes to bid pricing have been negotiated.
63. Therefore, the Commissioner does not agree that this argument demonstrates that the council's commercial interests would be likely to be prejudiced by the disclosure of this information.
64. Turning to the council's second argument, that disclosure would be likely to result in a lack of diversity and innovation in the services bidding for funding, and also lead to difficulties with determining high quality providers from poor ones, the assumed risk from such disclosure would be if rival organisations believed that duplicating the presentation of successful bids would increase their own chances of success in future bids.
65. However, the Commissioner notes that in the 2012-2015 funding award, bids for funding were received from over 60 individual projects. The bidders represented very different areas of the community, with vastly different needs (for example, organisations proposing projects which

targeted the elderly, toddlers, particular ethnic groups, women's projects and health groups competed against each other for funding).

66. The procedure of VSIF is not to outline a service requirement and award funding to the most competitive bid to run it. Rather, bidders are invited to devise projects which would deliver value for money outcomes in pre-determined categories (in the 2012-2015 funding round, these categories were Health and Wellbeing or Community Support and activity).
67. The Commissioner considers that such is the diversity of the organisations likely to be competing for funding that direct replication will be of little benefit, and in many cases, not possible. For example, a bid to fund a drop-in facility to combat isolation in elderly members of a particular ethnic group will require completely different supporting information to a bid for health promotion services in young adults leaving care. The difference in service provision will often mean that bids cannot be transposed in any useful manner. Merely copying the presentation of another bidder's application will be insufficient to demonstrate to the council that the service is needed or that the bidder is capable of actually delivering the proposed project or service.
68. The Commissioner also considers that the council will have sufficient expertise to differentiate between a bidder that evidences the required need for a project and ability to deliver it, and one that simply copies another's presentational style.
69. The Commissioner has taken the council's final two arguments (the possibility of less detailed applications and a decreased willingness to apply for funding) together.
70. In terms of the example cited by the council of the organisation which was apparently deterred from submitting further bids, he notes that the council does not appear to have ascertained from the organisation its reasons for not submitting further bid applications. He considers it would be unwise to draw the conclusion that it was because of the disclosure without confirmation from the organisation. Such is the level of competition for voluntary sector funding, the Commissioner does not consider that the council has demonstrated that the chances of this happening are more than hypothetical. In reaching this view he is guided by the fact that a significant number of successful bidders have indicated to the council that they have no objection to their bids being released under FOI, a point which is considered in paragraphs 73-74, below. Similarly, the Commissioner considers that the same is also true in relation to organisations making less detailed applications. He considers that this would reduce an organisation's chances of winning

funding and, again, does not consider that the council has demonstrated that the chances of this happening are more than hypothetical.

71. Having considered the arguments put forward by the council the Commissioner has concluded that it has not demonstrated that disclosure of the information would be likely to prejudice its commercial interests. As he does not accept that the exemption at section 43(2) is engaged in respect of the council's commercial interests he has not proceeded to consider the public interest test in respect of the exemption.

The successful bidders' commercial interests

72. As set out above, the council argued that the publication of successful bids might lead to a problem of replication and the submission of generic bids, in the hope that these would be successful in winning funding. It considered that this would place the original bidders at a commercial disadvantage when bidding for further funding (the council indicated that a similar tender exercise is scheduled to take place over summer 2013). Some bidders had put significant time and effort into submitting innovative and detailed bids, the disclosure of which would give away pricing structures and methods of working which would be likely to be commercially useful to organisations wishing to bid to provide similar services.
73. The council stated that it had informed each of the 24 successful bidders that an FOI request had been received and asked whether they objected to their bids being disclosed. Eleven had indicated that they had no objections to their bid being disclosed in its entirety. Three consented to disclosure on the removal of personal data or with some other caveat. Four had declined to give consent. The Commissioner has no information about the views expressed by the remaining six organisations, or indeed whether they expressed a view at all.
74. The council gave considerable weight to the arguments submitted by the four bodies which declined to give consent, which centered round issues of intellectual property and commercial confidentiality. It expressed the view that the organisations which had consented to the disclosure (either in whole or in part) might not fully appreciate the implications for them of the disclosure of their bids and proposed that their bids also be withheld.

The Commissioner's view

75. The Commissioner has had sight of five of the 24 bids. Of these, four had objected to the disclosure of their bid information in its entirety,

while one ("the fifth objector") had asked for redactions in respect of financial information volunteered at Stage 2, question 23.

76. The Commissioner considers that a distinction can be drawn between the bulk of the bid information and the small amount of it which comprises information about finance and pricing structures, captured at Stage 2, questions 11 and 12, and in the case of the fifth objector, Stage 2 question 23.

Non-financial information

77. Taking the council's first argument, the Commissioner acknowledges that bidders will have spent significant time putting their bids together. However, aside from the pricing structure information referred to above, he does not consider that any of the bids he has viewed contain specific detailed information about a method of delivery which is unique to the bidder. Rather, he considers the bids contain broad outlines of the services that will be provided by the organisation.
78. Much of the bid information is material targeted to promote each organisation's declared abilities. Whilst the Commissioner recognises that self-marketing by a bidding organisation is intrinsic to such applications for funding, it is difficult to see how the disclosure of such information would result in commercial harm. In promoting itself, each organisation refers to its particular history and selective experiences in its sphere of work. In this regard the Commissioner does not accept that rival organisations would gain competitive advantage by replicating such material, as their own individual histories and experiences are likely to be different. The Commissioner considers this is particularly relevant given that bidders propose their own projects for funding, rather than bidding to provide a particular, pre-defined service.
79. The Commissioner also considers that the council has given disproportionate weight to the views of the objecting organisations. Eleven organisations offered no objection to the onward disclosure of their bids, and two requested relatively minor redactions to remove personal data. The council argued that these organisations probably did not have a clear understanding of how disclosure might negatively impact upon them. However, it presented no evidence to support this contention; in any event, the Commissioner has dismissed arguments of commercial harm.
80. The Commissioner has therefore concluded that the council has not demonstrated that disclosure of the non-financial information contained in the bids would be likely to prejudice the successful bidders' commercial interests.

Financial information

81. Stage 2, questions 11 and 12 of the bid documentation capture information about income and outgoings connected with the bid.
82. Question 11 asks bidders to list the items for which investment funding is requested, with costings for each item. This information includes details of staffing levels and costs. Question 12 asks for a breakdown of projected and confirmed income streams up to 2015-2016. The fifth objector had consented to the disclosure of this information, but had requested that financial information volunteered at question 23 be withheld.
83. The Commissioner accepts that knowledge of a competitor's pricing structure is likely to be commercially advantageous in a tendering situation, as it could enable competitors to undercut the organisation when bidding for funding for similar projects. The council has pointed to the fact that there is to be a similar tendering exercise in summer 2013, which is likely to place existing successful bidders in competition with other voluntary sector organisations. In the current economic climate, pricing structure information calculated in spring 2012 is still likely to have relevance a little over twelve months later.
84. The Commissioner therefore considers that, while disclosure of the majority of the bid documentation would not result in any significant prejudice to the commercial interests of the bidding organisations, the pricing information captured at Stage 2, questions 11 and 12 of the bid documentation of successful bidders constitutes information the disclosure of which would be likely to prejudice their commercial interests. His view is therefore that section 43(2) is engaged by the information captured at Stage 2, questions 11 and 12.
85. Turning to the fifth objector, the Commissioner notes that it gave consent to the disclosure of information at questions 11 and 12, but requested the redaction of information about its financial circumstances volunteered in question 23. It describes the information as setting out a key financial challenge facing the organisation, namely the long term liability arising from its closed final salary scheme.
86. The Commissioner notes that the information provided at question 23 is essentially an analysis of the 2009/10 and 2010/11 accounts. The organisation itself in its submission to the council admits that the information is "*not strictly confidential*".
87. Given that the information is already in the public domain, albeit in a slightly different format, the Commissioner does not consider that its disclosure here would be likely to prejudice the organisation's

commercial interests. His view is therefore that in respect of the fifth objector, section 43(2) is not engaged by the information captured at Stage 2, question 23.

88. As the Commissioner has determined that section 43(2) is engaged in respect of the financial information captured at Stage 2, questions 11 and 12, he has gone on to consider whether the public interest favours disclosing the information or maintaining the exemption.

Public interest in disclosure

89. The council has submitted only very broad arguments in support of disclosure, referring to the benefits of voluntary sector organisations sharing best practice between themselves.
90. The Commissioner considers that disclosure of information extracted from successful bids would be likely to drive up the standard of future bids, particularly amongst voluntary sector organisations which may be relatively inexperienced in constructing and submitting cogent and well-evidenced bids.
91. He also considers that there is a public interest in financial information being made public so that the public can scrutinise whether the services promised by bidding organisations represent value for money.

Public interest in maintaining the exemption

92. The council has argued that disclosure of financial information would leave voluntary sector bodies vulnerable to being undercut by rivals and that this would be prejudicial to their commercial interests. It would be in the public interest to prevent this happening so as to ensure productive working relationships with a wide variety of potential service providers.
93. The Commissioner acknowledges that it is in the public interest to have a voluntary sector which is able to compete fairly and confidently against similar bodies for public funding. Such an environment is likely to foster innovative and varied service provision which will benefit the local community.
94. Furthermore, the Commissioner recognises that public authorities are increasingly reliant upon the voluntary sector for provision of services to the community (the council stated that it must find savings of £81 million by March 2014). Often such bodies, by their very make-up, are better equipped to engage effectively with "hard to reach" members of the community than the council itself. They may have specialist knowledge and understanding of a particular community, or even just

more readily invite the trust of that community. It is therefore in the public interest that such bodies feel comfortable and confident in their dealings with the council, and that the construction of their bids is not unduly influenced by the possibility of their financial models being disclosed to rival bodies.

Balance of the public interest

95. The Commissioner has considered both sets of arguments. While he considers the principles of transparency and accountability in the spending of public money to be important ones, in this case he considers that the potential repercussions of disclosure to the future quality and range of bids for funding would be likely to have a significant impact on service provision for the local community. For this reason he considers that for the four organisations which have objected to the disclosure of their bids and those six which have not expressed a view either way, the balance of the public interest favours maintaining the exemption in respect of the financial information at Stage 2, questions 11 and 12.
96. However, he considers that it would not be in the public interest to maintain the exemption in respect of those 11 organisations that have consented to the disclosure of their bids or to the fifth objector, as it consented to the disclosure of the information at Stage 2, questions 11 and 12.

Score Cards

97. Assessment of bids for funding is conducted using a scoring assessment form which is held as a pro forma Word document.
98. Assessors score the extent to which each bid meets seven pre-determined key considerations using the range 0 (unacceptable) to 5 (excellent).

The council's commercial interests

99. The council argued that its commercial interests would be likely to be prejudiced by the disclosure of the score card information. It stated that within a standard procurement process such as that used in the VSIF, the council did not provide detailed scoring outcomes against evaluation criteria because subsequent bidders might then be in a position to compare bid information with the score given. There is a danger that by matching bid content with scoring, subsequent bidders could use this information to their advantage by designing their bids to score highly.

The Commissioner's view

100. The Commissioner accepts that knowledge of how the council scores the bids would be likely to undermine the future funding process. Some bidders would inevitably be tempted to construct bids around likelihood of success rather than designing them around local need and ability to deliver. This would be likely to lead to less variety and innovation in the nature of projects submitted for funding.
101. While the council did not raise it, the Commissioner also considers that the council's commercial interests would be likely to be prejudiced in terms of the damage to its relationship with bidding organisations. Placing into the public domain information which, in some instances, may be deemed as being critical of aspects of a bid (in that they are ascribed a low score) may cause embarrassment for both parties and create tensions in the working relationship.
102. The Commissioner's view is therefore that section 43(2) is engaged by the score card information. He has therefore gone on to consider whether the public interest favours disclosing the information or maintaining the exemption.

Public interest in disclosure

103. The council submitted no public interest arguments in support of the disclosure of the information.
104. The Commissioner has considered the public interest in information about the procurement process being made public to allow scrutiny of whether procurement procedures have been fairly and consistently applied.

Public interest in maintaining the exemption

105. The council has argued that disclosure would be likely to lead to the manipulation of the funding process. This would be detrimental to its ability to get best value for money in the services it procures for the local community, in terms of quality, innovation and diversity.
106. The Commissioner acknowledges that it is in the public interest for competition for public funding for local projects to be conducted fairly and for bids to be driven by local need and an organisation's ability to deliver, rather than what is likely to score highly. It is clearly in the public interest that the council be permitted to protect itself against manipulation of the checks and balances it has in place to ensure fair and careful assessment of submitted bids.

107. The Commissioner also considers that it is in the public interest for the council to maintain good working relationships with the voluntary sector, given its reliance on that sector for the delivery of certain services to the community.

Balance of the public interest

108. The Commissioner has considered both sets of arguments. While he considers the principle of transparency in the procurement process to be an important one, in this case he considers that the potential repercussions of disclosure to the future quality and range of bids for funding would be likely to have a significant impact on service provision for the local community, as would any adverse impact on the council's relationships with voluntary sector service providers. He believes that the council has in place reasonable measures to ensure fair and consistent assessment of bids and that the need for external scrutiny in this regard is minimal. He therefore considers that the balance of the public interest favours the maintenance of the exemption.

Section 41

109. Information is exempt under section 41(1) if it was obtained by a public authority from another person and the disclosure of the information outside of the Act would constitute an actionable breach of confidence.

110. In this case the Commissioner considers that the information in the bid documents was provided to the council by various voluntary sector bodies. However, the information in the score cards is information generated by the council itself, during the assessment process. Since section 41 only applies to information obtained from a third party, it does not apply to the score card information.

111. The council has argued that the information in the bid documents was provided with the expectation that it would be treated as confidential but it has provided no evidence in support of this, and the Commissioner notes that the bid application forms do not contain an assurance that the information will be treated in confidence. He also notes that the council has sought to argue elsewhere in its submissions that some of the information is exempt because it is reasonably accessible to the applicant, by way of being published by Companies House or the Charity Commission (dealt with at paragraphs 134-140, below).

112. The Commissioner considers that where commercial information is purported to have been imparted in confidence, there would have to be a detrimental impact to the commercial interests of the confider for the

exemption to be engaged. The Commissioner would refer to the arguments set out in relation to section 43(2) above which found that with the exception of limited financial information, disclosure would not be likely to cause commercial detriment to the successful bidders.

113. The Commissioner therefore does not consider that section 41 is engaged by the non-financial information contained in the bid. With regard to the financial information (captured at Stage 2, questions 11 and 12), since the Commissioner is satisfied that it is exempt under section 43(2), he has not gone on to consider whether it is also exempt under section 41. In respect of the fifth objector and the financial information at question 23, for the reasons set out at paragraphs 86 and 87 above, disclosure of this information would not constitute an actionable breach of confidence and section 41 is not, therefore, engaged.

Section 40(2)

114. The council contended that the bid application forms contained personal data the disclosure of which would breach the DPA. It identified this as information about people employed by "relevant" organisations.

115. The Commissioner considers the personal data within the bids to be the names of management board personnel (Stage 1, question 9), the names of CRB checked staff/volunteers (Stage 1, question 31) and contact names for partnership organisations (Stage 2, questions 13 and 14).

116. The council had argued that disclosure would be unfair because the individuals would not expect personal information about them provided in the context of an application for funding to be made available to the world at large.

117. The Commissioner has considered each category of personal data individually.

Management Board personnel

118. The personal data captured at Stage 1, question 9 consists of the names and positions of the organisation's Chair, Secretary, Treasurer, Trustee and so on. The Commissioner notes that this information is contained in each charity's published accounts and also on the publically available register of charities maintained by the Charity Commission.

Reasonable expectations

119. The Commissioner has conducted internet searches and has ascertained that the names of management board personnel captured at Stage 1, question 9 of the bid application documentation are already in the public domain. He therefore does not agree with the council's assertion that publication of the information would not be within those individuals' reasonable expectations. He does not consider it tenable that the individuals could have an expectation that the information about their roles would be confidential.

The amount of personal data which would be disclosed

120. The personal data reveals the names of management board members and their positions or roles on the boards. As stated above, this information is already in the public domain.

The consequences to the data subjects of disclosure

121. The information is already in the public domain. The council has not offered any arguments that the individuals would suffer adverse consequences as a result of its re-publication.

Would disclosure be fair?

122. The Commissioner considers that disclosure would be fair and that condition 6 of the Schedule 2 of the DPA provides a legitimate basis for processing. Therefore he considers that section 40(2) is not engaged in respect of the Management Board information collected at Stage 1, question 9 of the bid application documentation.

CRB checked staff

123. The information captured at Stage 1, question 31 comprises names, CRB check numbers and date of renewal. The Commissioner considers that this information is personal data.

Reasonable expectations

124. The council stated that disclosure of this information would not be within the expectation of the data subjects involved. The Commissioner accepts that information about CRB checks, while not constituting sensitive personal data as defined under the DPA, is nevertheless information which a data subject might reasonably expect would be handled with sensitivity and not disclosed except on a need-to-know basis.

The amount of personal data which would be disclosed

125. The information comprises names, CRB check numbers and dates of renewal of individuals who work for the bidding organisation.

The consequences to the data subjects of disclosure

126. The Commissioner considers that publishing information about an individual's CRB status and date of renewal could run the risk of any subsequent failure in them renewing being interpreted (correctly or incorrectly) as them having failed the CRB process. Such assumptions would be an unwarranted intrusion on the data subject's private life.
127. The Commissioner also considers that disclosure of the unique CRB reference number may also leave the data subject vulnerable to having their identity exploited by someone seeking access to a position requiring such clearance.

Would disclosure be fair?

128. The Commissioner considers that, for the reasons stated above, disclosure of the information requested at Stage 1, question 31 would be unfair to the data subjects and that section 40(2) is therefore engaged.

Contact names for partnership organisations

129. The information captured by Stage 2, questions 13 and 14 consists of contact names and contact details of organisations the bidders work with (or will endeavour to work with) in order to deliver the project outlined in the bid. The Commissioner considers that contact names constitute personal data.

Reasonable expectations

130. The council stated that disclosure of this information would not be within the expectation of the data subjects involved. However, the Commissioner considers that the information constitutes contact details for particular organisations, and that it should be within the reasonable expectations of the data subjects that this information might be disseminated. He considers that in many cases this information will already be in the public domain.

The amount of personal data which would be disclosed

131. The Commissioner considers that the amount of information is quite limited and that it discloses nothing about the personal life of the data subjects.

The consequences to the data subjects of disclosure

132. The Commissioner considers that the consequences to the data subjects are that they might be used as a contact point for their particular organisation. He is not aware of any potentially adverse consequences of disclosure.

Would disclosure be fair?

133. The Commissioner considers that disclosure would be fair and that condition 6 of the Schedule 2 of the DPA provides a legitimate basis for processing. Therefore, he considers that section 40(2) is not engaged in respect of the contact names and addresses for partnership organisations collected at Stage 2, questions 13 and 14.

Section 21

134. Section 21(1) of the FOIA states that:

"Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information".

135. The thinking behind the exemption is that if there is another route by which someone can obtain information, there is no need for the Act to provide the means of access. Public authorities are under a duty, set out in section 16 of the FOIA, to *"provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made requests for information"*. This means that there should be no possibility of applicants being left in any doubt as to how they can obtain the information which they want.

136. Where information is available elsewhere, it does not necessarily mean that it is 'reasonably accessible' to the applicant. The Commissioner accepts that information is reasonably accessible if the public authority:

- knows that the applicant has already found the information; or
- is able to precisely direct the applicant to the information – the public authority needs to be reasonably specific to ensure it is

found without difficulty and not hidden within a mass of other information.⁴

137. The council identified nine questions as capturing information which it says is reasonably accessible by virtue of being published by the Charity Commission and/or by Companies House. The questions capture annual turnover, organisation type, details of any affiliation with a larger organisation, company registration details, parent company name, year of commencement, existence of last two years' accounts, whether a reserves policy is operated and whether any County Court Judgements have been issued against the organisation.
138. However, the Commissioner notes that the council only introduced section 21 in its correspondence with the Commissioner. It has not informed the complainant of its intention to apply section 21, despite being advised in the Commissioner's letter of 18 December 2012 that it must notify the complainant of any change to its stated position. It does not know that the applicant has already found the information, nor has it directed the complainant where to find it.
139. The Commissioner is therefore unable to uphold the application of section 21(1) in this case.
140. He notes in passing that, given his decision that the bulk of the bid information must be disclosed, the upholding of section 21 is likely to involve more work for the council, in the form of redacting information from documents to be disclosed, than would merely disclosing it.

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<http://www.ico.org.uk/foikb/FOIPolicyIstheinformationreasonablyaccessibletotheapplicant.htm>

Right of appeal

141. 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

142. 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.

143. 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

Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
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SK9 5AF