

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 26 June 2014

**Public Authority:** Cambridgeshire County Council

**Address:** Shire Hall  
Cambridge  
CB3 0AP

#### Decision (including any steps ordered)

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1. The complainant has requested a range of information from Cambridgeshire County Council (the Council) about the contracts it had awarded to Fenland Association for Community Transport (FACT). The Council provided the some of the requested information, withheld some information on the basis of sections 40(2) and 43(2) of FOIA, and also argued that some information was not held. The complainant disputed the application of these exemptions and argued that the Council held further information beyond that previously located.
2. The Commissioner's decision is as follows:
  - In relation to request 1, part (vi), the road names and postcodes of pickup addresses are exempt from disclosure on the basis of section 40(2).
  - In relation to request 1, part (ix), the number of passengers for each journey is exempt from disclosure on the basis of section 40(2).
  - In relation to request 1, part (xiii), the name of the second best bidder for each contract is exempt from disclosure on the basis of section 43(2) and in all the circumstances of the case the public interest favours maintaining the exemption.
  - In relation to request 3, the total value of the contracts paid to FACT is exempt from disclosure on the basis of section 43(2) and in all the circumstances of the case the public interest favours maintaining the exemption.

- In relation to request 7, the number of contracts and the contract reference numbers which FACT bid on but did not win are not exempt from disclosure on the basis of section 43(2).
  - The Council does not hold information falling within the scope of requests 5 and 6.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
- Provide the complainant with the information falling within the scope of request 7 that it has not previously disclosed, i.e. the number of contracts in 2011 and 2012 that FACT bid on but did not win along with the relevant reference numbers for each contract.
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

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5. On 21 January 2013 the complainant wrote to the Council and requested information in the following terms:

*'Please find below my freedom of information request regarding Fenland Association for Community Transport (FACT Ltd) and all current contracts they hold with the CCC [the Council]*

- (1) *Please list each contract*
  - (i) *Contract number*
  - (ii) *Contract type (Home to sch, Social services, bus hire)*
  - (iii) *With or without driver*
  - (iv) *Date tendering process started*
  - (v) *Date/Time tendering process closed*
  - (vi) *Pick up postcodes or road and town name, drop off postcode or road and town name (OR) round mileage from FACT offices back to FACT offices*
  - (vii) *Return journey Yes/No*
  - (viii) *Live mileage*
  - (ix) *Number of passengers*
  - (x) *Escort required (plus cost if itemised in bill)*
  - (xi) *Date/Time Fact entered bid*
  - (xii) *Wheel chair vehicle required*

- (xiii) *Next best quote name and price. Date/Time bid entered*
- (xiv) *Reason for winning bid*
  
- (2) *If a contract carries several children on a home to school contract, and one of was absent would the daily charge remain the same?*
  
- (3) *Value of all contracts issued to FACT Ltd in each of the following years 2007, 2008, 2009, 2010, 2011, 2012.*
  
- (4) *Value of all grants paid to FACT Ltd from the CCC for each of the following years 2007, 2008, 2009, 2010, 2011, 2012.*
  
- (5) *Total back to base mileage and total live mileage covered for all contracts, and total value of the contracts (bus or car hire with driver) for 2011*
  
- (6) *Total mileage used and total value of all (van or car hire no driver) contracts for 2011.*
  
- (7) *In each year of 2011 and 2012 how many contracts did FACT bid on, and supply Contract Numbers*
  
- (8) *In each year of 2011 and 2012 how many winning bids did FACT Ltd make, and please supply contract numbers.'*

6. The Council responded, under its reference number FOI 2544, on 18 February 2013 as follows:

- With regard to request 1 it provided a spreadsheet which included the following information:
  - (i) - Contract number
  - (ii)- Contract type
  - (iv) -Date tendering process started
  - (v) - Date tendering process closed (but not the time the process ended)
  - (xi)- Date FACT entered bid (but not the time the bid was entered)
  - (xii) - Wheel chair vehicle required
  - (xiii) – Price of next best quote and date entered (but not the name of the bidder for that particular contract or the time bid was entered)
  
- - Reason for winning bid

- The Council explained that it did not hold the information sought by (viii) - live mileage.
  - It explained that the information sought by (vi) and (xi) was exempt from disclosure on the basis of section 40(2) and the name of the next best bidder (xiii) for each contract was exempt from disclosure on the basis of section 43(2) of FOIA.
  - There did not appear to be any reference to points (iii), (vii) or (x) in the Council's response.
  - With regard to request 2 the Council explained that the daily charge remained the same whether or not all children travel, unless it was made aware of a long term absence.
  - The information sought by request 3 was withheld on the basis of section 43(2) of FOIA.
  - The information sought by request 4 was provided.
  - The Council explained that it did not hold the information sought by request 5 and for request 6 it explained that it did not hire cars or vans from FACT without drivers.
  - With regard to requests 7 and 8 the Council explained that details of contracts that FACT had made a winning bid on were in the spreadsheet provided in response to request 1. However, it explained that it was withholding details of the contracts that FACT bid on but did not win on the basis of section 43(2) of FOIA.
7. The Commissioner understands that the complainant contacted the Council on 20 February 2013 and on 4 March 2013 in to order express his dissatisfaction with the decision to withhold some information in response the requests. However, an internal review was not carried out.

## Scope of the case

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8. The complainant contacted the Commissioner on 22 August 2013 to complain about the way his requests for information had been handled.<sup>1</sup>
9. The complainant's grounds of complaint are as follows:

### Request 1 – part (vi)

10. With regard to request 1 the complainant disputes the application of section 40(2) to part (vi) of this request in order to withhold details of postcodes. He argued that as a registered taxi driver he has previously been provided with such postcodes. Furthermore, he noted that the Council did not make any reference to the alternative part of this request which suggested that simply road and town names could be provided instead.
11. He has indicated that in a response (dated 22 February 2013) from the Council to another request he was sent the schedules for five particular routes and included in this disclosed information were the road and town name of each pick up and drop off location. He also argued that such information was therefore clearly held by the Council and could be provided for all of the contracts falling within the scope of request 1.

### Request 1 – parts (viii) and (ix)

12. The complainant argued that the Council does hold the details of the live mileage sought by part (viii) of request 1 as this is detailed on the schedules for each of the routes that are held by the Council. Similarly, the complainant argued that the information regarding passenger numbers (ix) will be held by the Council as it is also recorded on the schedules of these routes.

### Request 1 – parts (xi) and (xiii)

13. In terms of part (xi) he argued that the Council will hold the time that FACT submitted its bid as all bids have to be submitted electronically and thus such information would be automatically recorded, e.g. the time of an email which attached a party's bid submissions. For the same

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<sup>1</sup> The complainant also submitted two linked complaints to the Commissioner about other related requests he had made to the Council. The Commissioner's findings in respect of those complaints are set out in decision notices FS50524922 and FS50510473.

reason he has argued that the Council will hold the time that the Council received the bid from the second best bidder (part xiii).<sup>2</sup>

#### Request 1 – part (xiii)

14. The complainant disputed the decision to withhold the name of the second best bidder for each contract on the basis of section 43(2) of FOIA.

#### Requests 3 and 7

15. With regard to requests 3 and 7 the complainant also disputed the decision to withhold the information falling within the scope of these requests on the basis of section 43(2).

#### Requests 5 and 6

16. Finally, with regard to requests 5 and 6 the complainant believed that the Council will hold the mileage sought by these requests for the reasons indicated above, i.e. they will be detailed on the schedule for particular routes.
17. The complainant was also dissatisfied with the Council's failure to complete an internal review.

### **Reasons for decision**

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#### **Request 1 – part (vi)**

18. The Council confirmed to the Commissioner that as part of its original response to the request it did in fact provide the town name as sought by this request, along with the name of the school where passengers were dropped off despite the complainant's suggestion that this information was not disclosed. The Commissioner has reviewed the Council's initial response and is satisfied that this information was indeed provided as part of the Council's initial response. The Commissioner has identified this information to the complainant.
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<sup>2</sup> During the course of the Commissioner's investigation the Council located information falling within the scope of this request and provided it to the complainant. The Commissioner has not therefore considered this particular point of complaint any further in the decision notice.

19. With regard to the road names and postcodes of the pickup address for each contract, the Council argued that such information was exempt from disclosure on the basis of section 40(2) of FOIA. It explained that the complainant had only previously been provided with road names in respect of the contracts as part of the tendering process. The information was not made publically available; rather it was provided to a potential supplier in order to fulfil a contract and was subject to confidentiality arrangements.
20. Section 40(2) of FOIA states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the Data Protection Act 1998 (DPA).

*Is the withheld information personal data?*

21. Clearly then for section 40(2) to be engaged the information being withheld has to constitute 'personal data' which is defined by the DPA as:

*'...data which relate to a living individual who can be identified*

*a) from those data, or*

*b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

*and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'*

22. The Council argued that both the road names and postcodes could be used along with other information available to the public - especially the local public – to identify exactly where vulnerable children and those with learning and/or physical disabilities live and where they attend school. The Council noted that the Commissioner has issued guidance in which he had accepted that full postcodes are sufficient to identify specific addresses.
23. The Commissioner is satisfied that disclosure of either the road names for pickup locations, or the postcodes of pickup locations, could allow members of the public, in particular those who live locally, to identify the addresses of children using FACT transport in order to attend school. As a consequence disclosure of these locations would also allow the public to identify which school a child attended in light of the information already disclosed by the Council (i.e. a breakdown by contract of the name of the pickup town and corresponding name of the destination school).

*Would disclosure breach any of the data protection principles?*

24. The Council argued that disclosure of the withheld information would be unfair and thus breach the first data protection principle which 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.'*

25. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
  - what the public authority may have told them about what would happen to their personal data;
  - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights (ECHR);
  - the nature or content of the information itself;
  - the circumstances in which the personal data was obtained;
  - particular circumstances of the case, e.g. established custom or practice within the public authority; and
  - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
- The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
  - whether information of the nature requested is already in the public domain;
  - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?



26. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
27. In considering 'legitimate interests' in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.
28. The Commissioner is satisfied that the service users of these contracts would not expect the Council to publically disclose information which would allow their home addresses to be identified. The Commissioner considers this to clearly be a reasonable expectation given the nature of withheld information. Furthermore, the Commissioner believes that disclosure of this withheld information would represent a significant infringement into the privacy of the service users given that not only would it reveal their home address, the school which they attended and by implication that they may have learning and/or physical disabilities. The Commissioner is therefore satisfied that disclosure of the postcodes and road names of the pickup addresses would be unfair and thus this information is exempt from disclosure on the basis of section 40(2) of FOIA.

### **Request 1 – parts (viii) and (ix)**

29. The complainant argued that the Council does hold the details of the live mileage sought by part (viii) of request 1 as this is detailed on the schedules for each of the routes that are held by the Council. Similarly, the complainant argued that the information regarding passenger numbers (ix) will be held by the Council as it is also recorded on the schedules of these routes. During the course of his investigation, the Commissioner established that the complainant had previously been provided with copies of the schedules for the some (but not all) of the routes and these schedules included the specific mileage for each route, which was in effect the live mileage sought by part (viii) of request 1. During the course of his investigation, the Council provided the complainant with copies of the remaining route schedules and thus the complainant has effectively been provided with all of the information falling within the scope of part (viii) of request 1.

30. With regard to information concerning passenger numbers, the Council confirmed to the Commissioner that it does hold precise passenger numbers for each journey. However, it explained that in the initial response such information was withheld on the basis of section 40(2) on the basis that releasing these details into the public domain would mean that individual users could be identified.
31. In order to support this position, the Council explained that it is common for these contracts, unlike conventional school transport, to provide a service to very small numbers of individuals; in some cases one or two pupils might share a vehicle. The Council argued that releasing actual passenger numbers, alongside town names and the names of schools which had been disclosed, would make it very easy for individuals to be identified.
32. The Commissioner accepts that the disclosure of specific passenger numbers – when aligned to town names and school destinations – may well lead those with local knowledge to establish the identity of the service users. The Commissioner therefore accepts that in this context the precise passenger numbers for each journey can be defined as personal data. Furthermore, for the reasons outlined above, the Commissioner is satisfied that disclosure of such information is exempt from disclosure on the basis of section 40(2) of FOIA.

### **Request 1 – part (xiii)**

33. In relation to this request the complainant disputed the Council's decision to withhold the name of the second best bidder for each contract on the basis of section 43(2) of FOIA.
34. This exemption states that:

*'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).'*
35. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner believes that three criteria must be met:
  - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
  - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant

prejudice which is alleged must be real, actual or of substance;  
and

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.
36. In relation to the commercial interests of third parties, the Commissioner does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, the Commissioner expects that arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns.
37. The Council argued that disclosure of the name of the second best bidders could harm the commercial interests of both the bidders and the Council. In the refusal notice, the Council argued that disclosure of the name of the bidders would be likely to prejudice the commercial interests of the individual bidders as it would aid an attempt by their competitors to build a detailed picture of how individual operators bid for contracts. This was particular the case given that as part of the response to the request the Council had already disclosed the daily rate proposed by the second best bidder for each contract.
38. In its submissions to the Commissioner, the Council emphasised that the bidders entered the tendering process with the expectation that their tender evaluation scores would not be disclosed if their bid was unsuccessful. The Council argued that disclosing the identity of the unsuccessful bidders would be likely to deter organisations from submitting tenders in the future because they would be worried about the Council disclosing information about their bids under FOIA. . This would make it more difficult for the Council to operate a competitive tendering process and thus also affect the Council's own commercial interests.
39. For his part, the complainant referenced the Council's own regulations regarding tendering, specifically paragraph 26.2:

*'During Tender processes, Bidders must be informed that they should state if any of the information supplied by them is confidential or*

*commercially sensitive or should not be disclosed in response to a request for information made to the Council. Bidders should state why they consider the information to be confidential or commercially sensitive. This will not guarantee that the information will not be disclosed but will be examined in the light of the exemptions provided in the Act [FOIA].'*

40. In light of this, the complainant argued that unless the Council could present documentation from each individual bidder regarding specific information that had been withheld, giving a valid reason for doing so, there were no grounds for withholding such information.
41. With regard to the first criterion, the Commissioner accepts that the nature of the harm envisaged by the Council to both it and the various second placed bidders is one that falls within the scope of the exception.
42. In terms of the second criterion, the Commissioner wishes to note that as a general position, he would expect the identity of unsuccessful bidders to be disclosed. This approach is line with guidance published by the Ministry of Justice in 2008 about working assumptions concerning the disclosure of procurement information under FOIA.<sup>3</sup> However, in the specific circumstances of this case the Commissioner appreciates that in response to this request the Council has already disclosed the daily rate that was proposed by the second best bidder for each contract. The Commissioner therefore accepts that disclosure of the names – when allied to the previously disclosed rates – would provide rivals of the bidders with a direct insight into their approach for tendering for such contracts. Consequently the Commissioner accepts that there is a causal relationship between the disclosure of the withheld information in relation to this request and the commercial interests of the second best placed bidders.
43. In theory, and as result of this prejudice, the Commissioner is also prepared to accept that it can be reasonably argued that disclosure of such information could potentially deter organisations from submitting future bids to the Council. Moreover, and as a consequence of this, the Commissioner also accepts that it is potentially possible for this reduction in bidders to have a knock on effect on the Council's commercial interest in the way that it envisages.

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<sup>3</sup> <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-assumption-procurement-annex-a.pdf> - see page 4.

44. In terms of the third criterion, the Commissioner notes that in the majority of cases, the Council offers a contract to the operator that submits the cheapest bid. Therefore, disclosure of the specific amount bid by a particular operator is likely to prove particularly valuable to that operator's rival bidders in any future contract tenders. As such, the Commissioner believes that disclosure of names of the second placed bidders represents a real and significant risk to their commercial interests in any future bid given the rate they had submitted is already in the public domain. The Commissioner therefore accepts that disclosure would be likely to prejudice the commercial interests of the second placed bidders for this reason. In reaching this finding the Commissioner acknowledges that he has not been provided with specific evidence from the Council which demonstrates that particular operators have specifically expressed concerns with this information being withheld. However, in the Commissioner's view given the nature of the information withheld – i.e. essentially the specific price bid by particular operators – it is self-evident that in a bid process such as this, operators would consider such information to be commercially sensitive. For such information the Commissioner does not consider it necessary for the Council to seek, or have received, specific submissions from individual operators.
45. In terms of the Council's further argument that as a result of such prejudice operators would be deterred from bidding for future contracts, the Commissioner considers this to be a somewhat speculative argument. Although disclosure would be likely to harm the operators' commercial interests in question, the contracts offered by the Council remain valuable ones. The Commissioner is therefore not persuaded that despite the prejudice to their interests, the operators would ultimately not submit any further bids. It follows that the Commissioner also believes that any potential prejudice to the Council's commercial interests as a result of the disclosure of the withheld information also only represents a hypothetical risk.

#### Public interest test

46. Section 43 is a qualified exemption and therefore the Commissioner must consider the public interest test contained at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the names of second best placed bidders.
47. With regard to the public interest in maintaining the exemption, the Council argued that it was in the public interest in companies being able to compete for public sector contracts without having their commercial interests prejudice through details being disclosed which would allow

competitors to gain an insight into their business plans and their strategies in respect of tendering for specific contracts.

48. The complainant submitted detailed submissions to the Commissioner to support his view that there was a compelling public interest in the disclosure of the information he had requested not just for this specific request but for all of his requests dealt with under Council reference number FOI 2544 along with the other related requests which are being dealt with under separate decision notices. The Commissioner has summarised these submissions at this juncture as this is the first appropriate place in the decision notice to do so. Whilst not all of the submissions relate directly to this specific request, a general understanding of the complainant's concerns is necessary to understand why he believes that there is a compelling public interest in disclosure not just of this specific information but also the remaining pieces of information that have also been withheld.
49. The complainant alleged that FACT was working outside its legal remit and thus illegally taking away business from the local taxi industry. The complainant suspected that the Home to School contracts awarded by the Council to FACT may have been subject to corruption. The complainant alleged that FACT had potentially been trying to hide information about its activities in inconsistent or potentially even false accounts. He argued that it was too much of a coincidence that much of the information that was being withheld by the Council in response to these requests would also likely to be the information that would shed light on these allegations. In such circumstances, the complainant argued that there was a compelling interest in the withheld information being disclosed so that the public could better understand and scrutinise FACT's (and its sister organisation, HACT's) relationship with the Council.
50. The Commissioner agrees with the Council that there is a very strong public interest in ensuring that organisations are able to undertake public sector contracts without their own commercial interests being undermined. Furthermore, in the Commissioner's opinion disclosure of this particular information – ie the names of the second placed bidders – would not obviously serve or meet the particular public interest arguments the complainant has identified in favour of disclosing the information given that the information does not relate directly to FACT. The Commissioner has therefore concluded that the public interest favours withholding the information falling within the scope of request 1 part (xiii).

### **Request 3**

51. This request sought the total value of contracts paid to FACT in years 2007 to 2012. The Council explained that the value of each contract is the rate paid per day to the operator. The Council argued that this information was exempt from disclosure on the basis of section 43(2). Its basis for citing this exemption effectively mirrored its rationale to support the decision to withhold the names of the second placed bidders (i.e. request 1 – part (xiii)) because disclosure of the information would reveal the price of FACT's winning bids and details of such information would provide an unfair advantage to its competitors. The Council explained that it had not communicated with FACT in relation to this specific request. However, it had discussed other similar requests and whilst FACT had been happy to release the majority of information sought, there had been certain information that they had identified could be used by competitors/organisations looking to set up a rival service, the disclosure of which would be likely to have a detrimental effect on their ability to participate effectively in a competitive environment. These details included information about set up costs, details that are used to predict business growth and revenues received.
52. For the reasons indicated in relation to request 1 – part (xiii), the Commissioner is satisfied that this information is exempt from disclosure on the basis of section 43(2) because its disclosure would be likely to prejudice the commercial interests of FACT when it bids for future contracts.

#### Public interest test

53. The Council's public interest arguments for maintaining the exemption in relation to this request mirror those for request 1 part (xiii); the complainant's position also mirrors that outlined above. In the circumstances of this request the Commissioner accepts that as the information directly concerns FACT – in contrast to the information withheld under request 1 – part (xiii) – its disclosure would provide the public with a greater insight into the nature of the contracts FACT has successfully bid. Disclosure of this information could therefore potentially be used to directly address some of the complainant's concerns. Furthermore, the Commissioner believes that disclosure of the information would also serve broader public interests regarding transparency and accountability in relation to the spending of public funds. For example, disclosure would inform the public as to the amount of money the Council had provided to one particular supplier for provision of transport services. Such arguments should not be dismissed lightly. However, the Commissioner has concluded that the public interest does favour withholding this information. He has reached this conclusion because despite the public interests in the disclosure of the information, he is not persuaded that there is a sufficiently compelling interest, even taking into account the arguments advanced by the

complainant, to justify the clear harm to FACT's commercial interests that would flow from the disclosure of this information.

### **Request 7**

54. This request sought the details of how many contracts FACT bid on in 2011 and 2012 and the relevant contract numbers. The Council provided details of the contracts which FACT had won but refused to disclose details of the contracts that FACT had bid for but had not won. The Council argued that this information was exempt from disclosure on the basis of section 43(2) because its disclosure would be likely to prejudice both the commercial interests of both FACT and the Council.
55. With regard to FACT, the Council argued that disclosure of the information would provide FACT's competitors with an insight into their business plans and their strategies in respect of tendering for contracts.
56. As a consequence, and in line with its logic in relation to request 1 – part (xiii) the Council argued that disclosure of this information would be likely to deter organisations from submitting tenders if they were worried that their unsuccessful information would be released into the public domain. This would make it more difficult for the Council to operate a competitive tendering process thus harming the Council's own commercial interests.
57. With regard to the three limb test referred to at paragraph 35, the Commissioner is satisfied that the nature of the prejudice envisaged by Council, both its own interests and those of FACT, is the type of harm section 43(2) is designed to protect. Consequently, the Commissioner accepts that the first criterion on this test is met.
58. With regard to the second criterion, the Commissioner accepts that there is some plausible causal relationship between disclosure of the withheld information and potential harm to FACT's commercial interests in the manner envisaged by the Council. Furthermore, the Commissioner is prepared to accept the possibility that as a result of such possible harm to FACT, disclosure of the withheld information could potentially see operators being reluctant to tender for contracts with the Council. Thus the Commissioner also accepts that there is casual relationship between disclosure of the information withheld in relation to request 7 and the Council's own commercial interests.
59. However, with regard to the third criterion the Commissioner is not persuaded that the likelihood of the prejudice occurring to FACT's commercial interests as a result of this information being disclosed is anything more than hypothetical. In the Commissioner's view disclosure of the information would not on its own, or indeed in conjunction with



other information disclosed by the Council under FOIA, provide a real and significant risk to FACT. In reaching this finding the Commissioner would re-iterate his position as stated above that as a general position he would expect the names of unsuccessful bidders to be disclosed. Furthermore, disclosure of this information in the format requested would, it should be noted, not reveal which place FACT's unsuccessful bid had been given (eg second place, third place etc). The Commissioner appreciates that the Council has corresponded with FACT in relation to similar requests in order ascertain whether disclosure of requested information is likely to have detrimental impact on their ability to participate in a competitive environment. The Commissioner notes that FACT has objected to the disclosure of information concerning set up costs, information used to predict business growth and revenues received. In the Commissioner's view the information in the scope of request 7 represents information of a more generic, less detailed nature. The Commissioner is therefore not convinced that the disclosure of this withheld information would be likely to prejudice FACT's commercial interests.

60. It follows that as result of this finding the Commissioner is also not persuaded that disclosure of the withheld information would be likely to put off organisations bidding for contracts with the Council in the future. Again, the Commissioner would re-iterate the point he made above regarding the value of such contracts and the inherent commercial interest operators have in bidding for them. Therefore, the Commissioner believes that the likelihood of the Council's own commercial interests being prejudiced by disclosure of this withheld information is one that is only hypothetical.
61. The information withheld under request 7 therefore needs to be disclosed as it is not exempt from disclosure on the basis of section 43(2).

### **Request 5 and request 6**

62. Under request 5 the complainant sought the total live mileage and total back to base mileage for each of FACT's contracts for 2011. As indicated above at paragraph 29, the Council has provided the complainant with the live daily mileage where that it is recorded on the contract specifications.
63. In relation to the total back to base mileage, the complainant has argued that this will also be held by the Council because it will be detailed on the schedules for the particular routes. The Council's position is that this information is not held.

64. In circumstances such as this where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of 'on the balance of probabilities'.
65. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request.
66. In applying this test the Commissioner will consider:
- The scope, quality, thoroughness and results of the searches; and/or
  - Other explanations offered as to why the information is not held.
67. In submissions to the Commissioner the Council explained that total back to base mileage was simply not required by the Council and as such is not provided by the operators. In light of this the Commissioner is satisfied that such information is not held by the Council.
68. Request 6 sought the total mileage used and total value of all van or car hire with no driver contracts for 2011. The Council has explained, both in its initial response to the complainant and again to the Commissioner that it does not hire cars or vans from FACT without drivers and thus in the absence of this type of contract, the Council does not hold information that is relevant to this request.
69. In light of this explanation the Commissioner is satisfied that on the balance of probabilities the Council does not hold information falling within the scope of request 6.

## **Other matters**

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70. FOIA does not contain any statutory requirements in relation to the timeframe in which a public authority should undertake an internal review. Therefore the Council's failure to complete an internal review in relation to these requests does not result in a breach of the legislation. However, the Commissioner would emphasise to the Council that in his view any expression of dissatisfaction expressed by a requestor in relation to a response - such as the complainant's emails to the Council of 20 February 2013 and 4 March 2013 - should be considered by a public authority as a request for an internal review.

## Right of appeal

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71. 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: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

72. 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.

73. 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** .....

**Alexander Ganotis**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**