

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

### **Decision notice**

**Date:** 23 June 2016

**Public Authority:** Gateshead Metropolitan Borough Council

**Address:** Civic Centre,  
Regent Street  
Gateshead  
NE8 1HH

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

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1. The complainant has requested information relating to the performance of Domiciliary Care Service providers. Gateshead Metropolitan Borough Council disclosed some information and withheld other information under the exemptions for commercial interests (section 43(2)), prohibitions on disclosure (section 44) and applied section 12 to some of the information because it considered that the cost of complying with the request would exceed the costs limit.
2. The Commissioner's decision is that Gateshead Council:
  - Failed to demonstrate that section 44(1)(a) is engaged and,
  - in relation to section 43(2), failed to demonstrate that the public interest favoured maintaining the exemption.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the withheld information to the complainant.
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 27 November 2015, the complainant submitted their request for information to Gateshead Metropolitan Borough Council (the "council"). The request is reproduced at the annex to this decision notice.
6. The council responded on 4 January 2016. It provided the information in parts 1, 2, 5, 7, 8, and 11 of the request and withheld the information in parts 6 and 12 under the exemption for commercial interests section 43(2) and prohibitions on disclosure (section 44(1)(a)). In relation to request parts 3 and 9, the council determined that the cost of compliance would exceed the cost limit and withheld the information under section 12(1).
7. Following an internal review the council wrote to the complainant on 5 February 2016. It stated that it was maintaining its position.

## **Scope of the case**

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8. On 21 April 2016 the complainant contacted the Commissioner the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that his investigation would solely consider whether the council had correctly withheld the information in parts 6 and 12 of the request under section 43(2) and section 44(1)(a) of the FOIA.

## **Reasons for decision**

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### **Section 43(2) – prejudice to commercial interests**

10. The council has withheld the information requested in parts 6 and 12 of the request under section 43(2) of the FOIA. For the avoidance of doubt, those parts are reproduced below.

*"(6) Whether any of the home care providers who were successful in being awarded a Block Contract for Domiciliary Care Services in Zones 1 - 4 had their contract suspended by the Council during the contract period? If the answer to this question is in the affirmative, please supply the name of the home care provider(s), the date the contract was suspended and the reason for the suspension of the individual contract for Domiciliary Care Services. Further, please confirm the nature of the provisions implemented by the Council to cover the relevant care*

*packages relating to any domiciliary care provider that had their Block Contract with the Council suspended as well as the benchmark (i.e. the reason) which will lead the Council to suspend such a contract.*

*(12) Whether any of the home care providers who were successful in being awarded a Spot Contract for Domiciliary Care Services in Zones 1 - 4 had their contract suspended by the Council during the contract period? If the answer to this question is in the affirmative, please supply the name of the home care provider(s), the date the contract was suspended and the reason for the suspension of the individual contract for Domiciliary Care Services. Further, please confirm the nature of the provisions implemented by the Council to cover the relevant care packages relating to any domiciliary care provider that had their Spot Contract with the Council suspended as well as the benchmark (i.e. the reason) which will lead the Council to suspend such a contract."*

11. Section 43(2) provides an exemption from disclosure for 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.
12. "Commercial interests" in the context of this exemption encapsulates a wide variety of activities. In this case, the withheld information relates to
13. In order for the exemption to be engaged it is necessary for it to be demonstrated that disclosure of information would result in some identifiable commercial prejudice which would or would be likely to be affect one or more parties.
14. The ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; i.e. either prejudice 'would' occur or prejudice 'would be likely to' occur.
15. With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15).
16. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).

*The nature of the prejudice*

17. The council has argued that disclosure of the information would prejudice the commercial interests of the third parties contracted to deliver care services and prejudice its own commercial interests.
18. The council has stated that disclosure of the information would "...allow potential competitors to know whether the companies had any problems performing contracts and what action if any had been taken against them." The council considers that disclosure would result in adverse press coverage for the contractors which may impact on their reputation and could result in loss of business. Essentially, the council has argued that knowledge of contractors' poor performance would prejudice their ability to bid for future contracts.
19. In relation to the prejudice to its own commercial interests, the council has argued that disclosure "*may also detrimentally affect the Council's commercial interests as it could place an additional burden on the Council to find new providers.*"
20. In relation to its own commercial interests, the Commissioner considers that the council's submissions in this regard do not begin to approach the evidential burden required in order to engage the exemption. No explanation of why disclosure would require the council would need to find new providers or why indeed this would damage the council's commercial interests is given.
21. The Commissioner accepts that it could be argued that the potential impact of disclosure on the contractors could lead to such an effect but it is not the Commissioner's role to assume or otherwise generate arguments on behalf of public authorities. The Commissioner notes that the terminology utilised by the council further suggests that the putative effects of disclosure and the likelihood of prejudice occurring are highly speculative.
22. The Commissioner considers that, on this level of discourse, it could equally be argued that disclosure would result in benefits to the council's commercial interests. With the disclosure of the performance of providers under contracts, and the risk of damage to reputation this might bring, future tendering exercises might conceivably prompt submissions from better performing contractors, thus boosting the council's ability to provide value for money in its commercial endeavours.
23. For the reasons set out above, the Commissioner does not consider that the council has demonstrated that disclosure of the information would

prejudice its own commercial and interests. He has, therefore, concluded that the exemption is not engaged.

24. In relation to the interests of the service providers, having considered the relevant arguments, the Commissioner accepts that disclosure of the information would place information about providers' performance in the public domain that would not otherwise be available. He accepts that, as competitors might not be subject to similar disclosures, this would unfairly impact on providers' ability to compete in negotiations for other service contracts. The Commissioner has concluded, therefore, that in relation to the commercial interests of the service providers, the exemption is engaged. He has gone on to consider the public interest.

*Public interest in disclosing the information*

25. In cases where the Commissioner accepts that section 43(2) was engaged, he must go on to consider the application of the public interest test associated with this exemption. This provides that even when the exemption is engaged, information can only be withheld if in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.
26. The Commissioner considers that the scheme of the FOIA itself envisages that there is always some public interest in the disclosure of information. This is because it promotes the aims of transparency and accountability, which in turn promotes greater public engagement and understanding of the decisions taken by public authorities.
27. The council has acknowledged that disclosure of the withheld information would increase its accountability and transparency with regard to the contracts it has awarded to existing care providers. It has argued that this would help to satisfy the public that public money was being spent appropriately and wisely. The council has also suggested that the latter is particularly important in the current economic climate, where significant reductions in funding for local authorities have enhanced the need for responsible and accountable public spending.
28. The Commissioner considers that the provision of care to vulnerable individuals is a particularly important and sensitive aspect of a local authority's duties. It is an area that will always attract strong public concern and the Commissioner considers that this provides a specific and strong public interest rationale for disclosure.

*Public interest in maintaining the exemption*

29. The Commissioner acknowledges that disclosure of the information would expose potential weaknesses in the ability of a contractor to provide care services. Public knowledge of this could result in

contractors being overlooked in future tendering rounds, thus damaging their commercial interests.

30. The Commissioner accepts that the disclosure of the information would be likely to prejudice the commercial interests of the contractors because it would be likely to cause reputational damage. This, in turn, would place contractors at a disadvantage in comparison with other providers which would be likely to result in financial loss.
31. The legislation recognises that there is a legitimate public interest in ensuring that undue harm is not done to the commercial interests of third parties through the disclosure of information under the FOIA. There is also a public interest in protecting the relationship of trade between the council and third party businesses and ensuring that businesses are not discouraged unnecessarily from entering into arrangements with public authorities that contribute to public services.

*Balance of the public interest*

32. In weighing the balance of the public interest, the Commissioner has given due weighting to the public interest in shielding commercial interests from harm, something which the exemption is designed to protect.
33. However, the Commissioner considers that, since the coming into force of the FOIA some 10 years ago, third parties entering into contracts with public authorities should either be aware of or should be advised by the authority in question of, the potential for information disclosure. Whilst he accepts that section 43(2) is designed to protect commercial interests this must always be balanced with the broader public interest in transparency and accountability.
34. Contractors are paid from the public purse and making information regarding their performance available would assist the public in determining whether they are providing value for money. The Commissioner considers that nature of the service is such, relating as it does to the provision of care, that the need for transparency and accountability is particularly acute.
35. The Commissioner also considers that transparency in this instance would enhance competition in the public care provision market since contractors would be encouraged to improve the service and value for money they offer in order to be successful in tender exercises. The nature of commerce is such that successful parties are those which are able to offer something which a competitor does not. Knowledge of a contractor's failings and their strengths would enhance the competitive tendering process.

36. The Commissioner also considers that widespread cuts to local authority funding which are a feature of the current public spending climate intensifies the duty of public authorities to obtain value for money when outsourcing services. There is a strong public interest in authorities doing this and being seen to be doing this to reassure the public that limited funds are being wisely allocated.
37. Having weighed the relevant arguments, whilst he acknowledges that disclosure would impact on service providers' commercial interests, the Commissioner considers that such an effect is counterbalanced by the stronger public interest arguments in favour of disclosure.
38. The Commissioner has concluded that, on the facts of this case, the public interest favours disclosing the withheld information.

#### **Section 44(1)(a) – prohibitions on disclosure**

39. Information is exempt under section 44(1)(a) if disclosure is prohibited by other legislation. The exemption is not subject to a public interest test.
40. In this case the council has argued that section 21 of the Public Contracts Regulations 2015 provides the relevant statutory prohibition.
41. Section 21 of the Public Contracts Regulations 2015 (PCR) states:

**"21.—(1)** *A contracting authority shall not disclose information which has been forwarded to it by an economic operator and designated by that economic operator as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.*

*(2) Paragraph (1) is without prejudice to—*

*(a) any other provision of this Part, including the obligations relating to the advertising of*

*awarded contracts and the provision of information to candidates and tenderers set out in*

*regulations 50 and 55 respectively;*

*(b) the Freedom of Information Act 2000(a);*

*(c) any other requirement, or permission, for the disclosure of information that is applicable*

*under the law of England and Wales or, as the case may be, Northern Ireland.*

*(3) Contracting authorities may impose on economic operators requirements aimed at protecting*

*the confidential nature of information which the contracting authorities make available throughout*

*the procurement procedure.”<sup>1</sup>*

42. The Commissioner notes that section 21(1) of the PCR appears to provide a statutory prohibition on the disclosure of information forwarded to a public authority by an economic operator which has been designated as confidential.

43. However, the Commissioner further notes that section 21(1) is qualified later on in section 21(2). In relation to this qualification, paragraph 65 of the Commissioner’s guidance ‘Outsourcing and freedom of information - guidance document’ states the following:

*“The provision that the prohibition is without prejudice to FOIA (or other disclosure requirements or permissions) means that if information that the contractor has designated as confidential is requested under FOIA, the PCR themselves do not act as a statutory bar that would prevent disclosure under section 44 of FOIA. This appears to be a move towards greater transparency, since it is a change from the previous version of the Public Contracts Regulations from 2006. The previous version did not contain an equivalent reference to FOIA, and so they did provide a statutory bar. Although the statutory bar has been removed, the information may still be withheld under other FOIA exemptions discussed in this section, if they are engaged.”<sup>2</sup>*

44. Having considered the council’s arguments and referred to his own guidance on this matter, the Commissioner has concluded that section 21 of the PCR does not constitute a statutory prohibition on the disclosure of information under the FOIA. He, therefore, finds that section 44(1)(a) is not engaged in this case.

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<sup>1</sup> [http://www.legislation.gov.uk/ukxi/2015/102/pdfs/ukxi\\_20150102\\_en.pdf](http://www.legislation.gov.uk/ukxi/2015/102/pdfs/ukxi_20150102_en.pdf)

<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1043530/outsourcing-and-freedom-of-information.pdf>



## Right of appeal

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45. 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: 0870 739 5836

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)

46. 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.
47. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

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

## **Annex – Request for Information**

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*"I would be grateful if the Council could kindly supply the following information in relation to the Domiciliary Care Services Contract entered into by the Council with home care providers following the procurement exercise commencing in 2010, and the subsequent contracts entered into by the Council with the home care providers in 2011, if such information is held by the Council:*

*(1) The name of the home care providers who were successful in being awarded a Block Contract for Domiciliary Care Services in Zones 1 - 4.*

*(2) The number of care hours per week that each of the successful home care providers awarded a Block Contract for Domiciliary Care Services in Zones 1 - 4 were expected, at the contract commencement date, to undertake (i.e. the number of hours anticipated to be awarded as set out in the relevant PQQ and ITT documents in 2010).*

*(3) The number of care hours per week that were actually transferred on the relevant transfer date to each of the successful home care providers awarded a Block Contract for Domiciliary Care Services in Zones 1 - 4.*

*(4) The number of care hours per week that were actually being delivered by each of the successful home care providers awarded a Block Contract for Domiciliary Care Services in Zones 1 - 4 at the conclusion of the contract life i.e. up to the 16 March, 17 August & 28 September 2015.*

*(5) Whether any of the home care providers who were successful in being awarded a Block Contract for Domiciliary Care Services in Zones 1 - 4 had their contract terminated prematurely by the Council? If the answer to this question is in the affirmative, please supply the name of the home care provider(s), the date the contract was terminated and the reason for the termination of the individual contract for Domiciliary Care Services. Further, please confirm the nature of the provisions implemented by the Council to cover the relevant care packages relating to any domiciliary care provider that had their Block Contract with the Council terminated prematurely.*

*(6) Whether any of the home care providers who were successful in being awarded a Block Contract for Domiciliary Care Services in Zones 1 - 4 had their contract suspended by the Council during the contract period? If the answer to this question is in the affirmative, please supply the name of the home care provider(s), the date the contract was suspended and the reason for the suspension of the individual contract for Domiciliary Care Services. Further, please confirm the nature of the provisions implemented by the*

*Council to cover the relevant care packages relating to any domiciliary care provider that had their Block Contract with the Council suspended as well as the benchmark (i.e. the reason) which will lead the Council to suspend such a contract.*

*(7) The name of the home care providers who were successful in being awarded a Spot Contract for Domiciliary Care Services in Zones 1 - 4.*

*(8) The number of care hours per week that each of the successful home care providers awarded a Spot Contract for Domiciliary Care Services in Zones 1 - 4 were expected, at the contract commencement date, to undertake (i.e. the number of hours anticipated to be awarded as set out in the relevant PQQ and ITT documents in 2010).*

*(9) The number of care hours per week that were actually transferred on the relevant transfer date to each of the successful home care providers awarded a Spot Contract for Domiciliary Care Services in Zones 1 - 4.*

*(10) The number of care hours per week that were actually being delivered by each of the successful home care providers awarded a Spot Contract for Domiciliary Care Services in Zones 1 - 4 at the conclusion of the contract life i.e. up to the 16 March, 17 August & 28 September 2015.*

*(11) Whether any of the home care providers who were successful in being awarded a Spot Contract for Domiciliary Care Services in Zones 1 - 4 had their contract terminated prematurely by the Council? If the answer to this question is in the affirmative, please supply the name of the home care provider(s), the date the contract was terminated and the reason for the termination of their individual contract for Domiciliary Care Services. Further, please confirm the nature of the provisions implemented by the Council to cover the relevant care packages relating to any domiciliary care provider that had their Spot Contract with the Council terminated prematurely.*

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