

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 3 July 2017

**Public Authority:** South Yorkshire Fire and Rescue  
**Address:** 18 Regent Street  
Barnsley  
South Yorkshire  
S70 2HG

#### Decision (including any steps ordered)

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1. The complainant requested information from South Yorkshire Fire and Rescue ('SYFR') for "*all the recorded information held*" in relation to SYFR's expenditure with Wirral Cladding and Roofing ('WCR'). SYFR initially refused to provide the requested information on the basis of section 22 (information intended for future publication); however, during the Commissioner's investigation, it disclosed the majority of the information to the complainant, with the remainder withheld under section 43(2) of FOIA, commercial interests.
2. The Commissioner's decision is that section 43(2) is not engaged.
3. The Commissioner requires SYFR to take the following steps to ensure compliance with the legislation:
  - disclose the information, in the scope of the request, previously withheld under section 43(2).
4. SYFR 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

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5. SYFR appointed WCR to carry out remedial works on premises in its ownership. From the case correspondence, the Commissioner understands that WCR worked with SYFR from September 2012 to November 2015 on roofing projects, emergency maintenance and reactive call-out duties. Concerns were raised about the way in which work had been procured from WCR as SYFR's contract procedures had allegedly not been fully complied with, specifically in that the work had not been offered via a competitive tender process.
6. As a result of these issues, an internal audit investigation was commissioned by SYFR's Committee of elected members resulting in a report which was presented to the Committee on 16 May 2016.
7. The internal audit investigation concluded that there had been no impropriety in the way that works with WCR had been commissioned, nor were there any inappropriate relationships between any officer of SYFR and WCR. However, it made a number of recommendations.
8. Following the internal audit report of 16 May 2016, there were further reports to the Committee about the progress of both the investigation and the associated recommendations contained in the first report. These reports were submitted to the Committee in July, September and November 2016.
9. The complainant, who is a journalist, has made a number of FOIA requests for information in connection to the relationship between SYFR and WCR and ensuing spend.
10. In addition, in May 2016, the complainant published two articles on the commissioning of work by SYFR with WCR and the associated internal audit investigation in a newspaper; both articles named an individual employed by WCR who is a roofing specialist. In January 2017 WCR became aware of the above newspaper articles. It wrote to SYFR and expressed its' concerns about the potential for reputational and commercial damage as a result of both the adverse press and of what WCR described as SYFR's procurement "*inadequacies*."
11. Background papers to the May 2016 audit report are available for inspection at Barnsley MBC Westgate Plaza One office, Barnsley. From the report itself, the Commissioner has noted the following expenditure by SYFR with WCR:

| Financial Year | Total Purchase Order Value | Total Invoice Value (excl. VAT) |
|----------------|----------------------------|---------------------------------|
| 2012/13        | 60,143.00                  | 62,404.00                       |
| 2013/14        | 74,367.00                  | 78,657.00                       |
| 2014/15        | 137,825.00                 | 133,521.40                      |
| 2015/16        | 118,246.50                 | 122,844.00                      |
| <b>TOTAL</b>   | <b>390,581.50</b>          | <b>397,426.40</b>               |

12. The total number of Purchase Orders raised and issued to WCR during the period 3 August 2012 to 25 November 2015 was 59. This was a combination of seven Capital and 52 Revenue funded works on the Service's properties.
13. As set out later in this notice, the complainant has already been given the opportunity to inspect all the information in scope of the request at a meeting arranged by SYFR. The complainant was permitted to inspect this information in its unredacted form.

## Request and response

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14. On 19 October 2016 the complainant wrote to SYFR and requested information in the following terms:

*"I would like to make a fresh request for information held in relation to the fire authority/fire service's commercial relationship with Wirral Cladding and Roofing ['WCR'].*

*Specifically, I would be grateful if you would provide all the recorded information held in relation to individual spends with WCR.*

*This would include the specific orders, receipts, invoices, tenders and communications between the fire authority/fire service and WCR in relation to individual spends with WCR."*

15. SYFR responded on 15 November 2016. It refused to provide the requested information citing section 22 (information intended for future publication) of FOIA. It said that as a review into the relationship was ongoing, the public interest favoured withholding the requested information but offered the complainant inspection of the background information by appointment.
16. The complainant requested an internal review on 15 November 2016. SYFR provided the outcome of its internal review, late, on 4 January 2017. It maintained that section 22 applied and advised the complainant

who he should contact to arrange to inspect the requested information; it advised him that some of the information would first need redacting on the basis that it was commercially sensitive.

## Scope of the case

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17. The complainant contacted the Commissioner on 19 October 2016 to complain about the way his request for information had been handled. He raised concerns about SYFR's offer to inspect the information *in situ* and the restrictions that would place on the public interest in this matter.
18. The Commissioner formed a view that SYFR could not rely on section 22 if it intended to redact some of the information, ie not all the requested information was destined to be published at a future date. Although inspection can be a legitimate means under section 22, in this case the information was not 'readily available' for inspection as further work was necessary to redact (and thereby withhold) some of the material.
19. SYFR responded and agreed with the Commissioner's position. It explained that as progress reports were at that time ongoing, and as a further audit report was due to be submitted to its Committee on 28 November 2016, it did not consider it would be in the public interest to disclose anything contained in the background information in advance of the elected members having had sight of and the opportunity to discuss it.
20. SYFR also said its senior management had formed the view that "*for the purposes of promoting maximum transparency and confidence both [the complainant], [two named Councillors] [and a former independent co-opted member of the Committee [name redacted] should be given the opportunity to examine all of the internal audit papers at a meeting convened by the Head of Internal Audit*".
21. As SYFR intended to make all the information available to these individuals for inspection, it said the fact that some of the information was identified as needing to be redacted for the purposes of proving a 'physical' copy was not considered to preclude its reliance on section 22. On reflection, however, SYFR conceded that as the opportunity to inspect all the available information was being extended to identified individuals rather than to the public at large (which is the effect of disclosure under FOIA), it could not rely on section 22.
22. Instead SYFR said that some of the requested information could not be disclosed as it is commercially sensitive (section 43(2) of FOIA). At the Commissioner's request, SYFR wrote to advise the complainant of its revised position on 20 February 2017.

23. Within this letter, SYFR reiterated the offer for the complainant to attend a meeting to inspect all the information in scope of the request. The complainant subsequently agreed to attend such a meeting with the other identified individuals on 14 March 2017.
24. The Commissioner contacted both parties following that meeting. She understands from SYFR that the complainant was given a copy of the requested information with redactions under section 43(2) to take away, but that he was able to 'inspect' the unredacted information in its entirety *in situ*.
25. In support of his view that the remaining withheld information should be disclosed, the complainant submitted further comments to the Commissioner including:

*"Having looked through the redacted dossier I think it is reasonable that the fire authority provides the unredacted information.*

*Information relating to costs/spending is historical (it goes back five years) and the records provided by Wirral Cladding and Roofing often state their own quotes are time sensitive to when they were made.*

*In addition, some of the quotes refer to rates being time sensitive to a particular date - typically close to the date of the quote.*

*Further, the authority has published spend information with Wirral C&R on its own website as part of the general publication of spending data. This includes reference to which job.*

*Without actual the [sic] figures being provided in the dossier it is impossible to carry out any kind of reconciliation or look at, for example, which jobs were actually paid at a higher amount than that originally quoted."*
26. The Commissioner has been provided with an unredacted copy of the requested information for her investigation. Within that content there are some insurance policy documents. As these relate to levels of cover rather than 'spends' she considers these to fall outside the scope of the request so she has not further considered their disclosure.
27. The Commissioner contacted the complainant about some of the information SYFR had withheld under section 43(2); specifically a bank account number, sort code and insurance policy reference numbers. He confirmed that he is not interested in disclosure of this information, so the Commissioner has not considered these aspects any further.
28. Part of the withheld information includes a Solar PV System financial projection; however, as this company is not WCR, the Commissioner considers it to fall outside the scope of the request.

29. The Commissioner has considered the complainant's points set out above; and whether the requested information falls under the remit of the EIR. She has then determined whether SYFR is entitled to rely on section 43(2) in respect of the information it has withheld.

## **Reasons for decision**

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30. The Commissioner has first considered whether the requested information constitutes environmental information.

### **Regulation 2 - Is any of the information environmental?**

31. Information is environmental if it meets the definition set out in regulation 2 of the EIR. Briefly, subparagraph 2(1)(a) of the EIR defines environmental information as material on the state of the elements of the environment including the land and landscape. Subparagraph 2(1)(c) extends this definition to include information on measures such as policies, legislation, plans and activities affecting or likely to affect the elements described in paragraph 2(1)(a) as well as measures and activities designed to protect those elements. Regulation 2(1) states environmental information is 'any information...on' the matters listed later in regulation 2(1). This means regulation 2(1)(c) covers:
- documents setting out the measures themselves;
  - any information on the way they have been developed and are applied; and
  - any information about the results of that application.
32. The Commissioner would expect that 'measures' were put in place by SYFR to repair the leaking fire station roofs. In both the Commissioner's and SYFR's view, WCR carried out works which fall under the EIR in that it made repairs to leaking roofs. However, SYFR does not consider that the specific information requested by the complainant constitutes environmental information because it relates to WCR's expenditure and costings in its commercial relationship with SYFR.
33. The Commissioner agrees with this view and has concluded that the requested information is not environmental and that SYFR properly handled the request under the FOIA.

### **The requested information**

34. SYFR provided the Commissioner with a copy of all the information it considers to be in scope of this request. The vast majority of this information has been disclosed, both to the complainant and to the

public at large through FOIA. All remaining redactions have been made in reliance on section 43(2), commercial interests, of FOIA.

35. Having reviewed the contents of this file, the information is made up of the following:

- Invoices for works carried out
- Quotations from WCR and other suppliers (where the value required more than one quote)
- Request for quotation/tender return from WCR
- Purchase orders and purchase order acknowledgements
- Valuation from WCR, interim and final
- SYFR financial and other IT system screenshots and reports of purchase orders raised
- Supplier questionnaire from WCR
- Specifications details (property location and works required, including description, photos, regulations and standards to be met).

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

36. Section 43(2) of FOIA states that information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any party (including the public authority holding it). Section 43(2) is a qualified exemption which means that, if a public authority is able to satisfy the test of prejudice, it must then go on to consider the balance of the public interest in disclosure.

37. The successful application of section 43(2) is dependent on a public authority's ability to demonstrate a clear link between disclosure and the commercial interests of a party. The test of prejudice is not a weak test; there must be a significant risk of the prejudice described in the exemption occurring and the prejudice must be real, actual or of substance and therefore capable of harming the interest.

38. SYFR said it has its own concerns: *"... which have been essentially corroborated by Wirral Cladding that the unrestricted disclosure of the information within the scope of the request will be prejudicial to the commercial interests of Wirral Cladding. It does need to be recognised that press coverage has already been generated by the [named newspaper] with regard to the issues of the commissioning by the Authority [ie SYFR] of work from the company. Whether or not this was*

*intended this has the effect, at least by implication of questioning the bone fides of Wirral Cladding and in particular one of its employees who is referred to in person”.*

39. In addition SYFR stated it: *“... would argue strongly that where an independent audit report has identified there is no basis for wider concern then that should be seen as a proper discharge of the public interest in the matter without there being any need to disclose all the detailed information which the investigator had in their possession where to do so would be prejudicial to the commercial interests of a third party to whom that information relates”.*
40. SYFR has claimed that WCR’s commercial interests would be prejudiced by disclosure of this information. It said that disclosure of what is essentially pricing and related commercial information could allow it to be used to make comparisons between the prices and costs quoted by WCR and those which may be obtained from other providers. SYFR argued that this would be to invite a misleading comparison rather than raise any serious ‘value for money’ considerations.
41. SYFR said: *“On the contrary there is the significant potential to create a misunderstanding as to the value for money which may be forthcoming from WCR. The company has stressed that they provide a highly specialist product and to compare the prices of others may result in a false comparison being made albeit unintentionally which would be damaging to their commercial position. In particular its commercial interests could be compromised by the potential for other customers to be discouraged by further publicity and comment in seeking to do business with WCR.”*
42. SYFR highlighted the letter it had received from WCR on 11 January 2017 in which it had expressed its concerns about SYFR’s handling of the procurement process and the associated press articles, and the potential resulting reputational and commercial damage to WCR. However, this letter was not submitted by WCR in connection with the potential disclosure of the information requested in this case; instead it was sent in response to SYFR advising WCR of the issues around the procurement process and WCR becoming aware of the press articles.
43. The Commissioner is aware that SYFR copied its investigation response letter of 20 February 2017 to WCR in the event that WCR may have wanted to make representations. However, WCR has not contacted the Commissioner; she notes that WCR has not objected specifically to the potential for disclosure in connection with this FOIA request.
44. In line with Tribunal decisions, the Commissioner will not consider claims that a third party’s commercial interests would be harmed without some



evidence that these reflect genuine concerns expressed by the third party involved. As SYFR has not provided the Commissioner with such evidence the Commissioner will not consider this aspect any further.

45. Having reviewed the withheld information, the Commissioner notes that SYFR has applied section 43(2) in a 'blanket' fashion to all pricing information even where this includes what appears to be the standard call-out rate for a company dealing with drainage issues. She also notes that the daily rates have been withheld when it is assumed these would be given to any prospective client.
46. It is also of significance that the pricing information is now five years old and that the figures are mainly 'ballpark' figures with no detailed breakdown. The Commissioner is not satisfied that information of this age can still be considered commercially sensitive. If SYFR had provided evidence that WCR themselves still considered that disclosing this information would undermine their position when tendering for other contracts the Commissioner may have given SYFR's arguments greater weight. However in the absence of such evidence the Commissioner is not prepared to accept this information is still commercially sensitive.
47. In allowing the complainant (and others) to view the information in its entirety, the Commissioner accepts that SYFR was seeking to promote maximum transparency and to diffuse the politicisation of the issue; however, SYFR has disclosed information, (albeit by inspection only), which it considers to be commercially sensitive to a journalist and other aggrieved councillors without any apparent undertaking or restriction.
48. While the Commissioner acknowledges that there is a difference in SYFR wanting to be as transparent as possible, and it refraining from providing physical copies of the unredacted information which would allow a more in-depth analysis of prices and other related financial information, nevertheless the information has been disclosed, albeit to a small number of individuals.
49. As a result, the Commissioner finds that section 43(2) is not engaged in relation to the information in scope of this request. She therefore requires SYFR to disclose all the remaining information other than that identified in paragraphs 26 to 28 above.

## **Other matters**

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50. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As she has made clear in her '*Good Practice Guidance No 5*', the

Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 34 working days for an internal review to be completed, despite the publication of her guidance on the matter.

## Right of appeal

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51. 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)

52. 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.
53. 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** .....

**Carolyn Howes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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