

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 28 September 2017

**Public Authority:** Surrey Heath Borough Council  
**Address:** Surrey Heath House  
Knoll Road  
Camberley  
Surrey GU15 3HD

#### Decision (including any steps ordered)

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1. The complainant has requested information from Surrey Heath District Council ("SHDC") relating to the sums paid to a successful bidder in a recent tender. SHDC refused to provide the requested information citing section 43(2) (prejudice to commercial interests) as its basis for doing so. In correspondence with the Commissioner, it argued that it did not in fact hold the requested information.
2. The Commissioner's decision is that SHDC holds the requested information but that it is not obliged to provide it under the FOIA because it can rely on the exemption at section 43(2) as its basis for withholding it.
3. No steps are required.

#### Request and response

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4. On 25 August 2016, the complainant requested information of the following description:

"In your correspondence of the 15<sup>th</sup> August 2016 you state that:

'We (Surrey Heath Borough Council) can confirm that the offer from [the complainant and the amount per annum that they bid] was not the highest offer that Surrey Heath Borough Council received'.

In view of the fact that this contract will now have been operating for in excess of one year Surrey Heath Borough Council will have records to show that the league operator undertaking the Contract will have made

payment to Surrey Heath Borough Council in excess of [amount per annum in the complainant's own bid<sup>1</sup>] and we request evidence of this within 21 days of the date of this correspondence.

We believe that this information is in the public interest. This is because this relates to income from a commercial organisation to the Council following a submission of tenders.

In order to assist you, we confirm that we do not wish Surrey Heath Borough Council to provide us with the name of the league operator who offered in excess of [amount per annum in the complainant's own bid]. Further, Surrey Heath Borough Council can provide this information either in invoice records (with the league operator's name redacted if necessary), or incoming bank records from Surrey Heath Borough Council showing the amounts paid to Surrey Heath Borough Council by the league operator (again, if necessary, with relevant other information redacted)."

5. On 19 September 2016, SHBC responded and said that it needed further clarification. Specifically, it said that it had looked at its letter of 15 August 2016 and did not see the figure referred to in the request.
6. On 21 October 2016, the complainant sent clarification. They said, in summary, "Therefore, please confirm and provide evidence that the provider who won the tender has in fact paid Surrey Heath Borough Council more than [amount per annum in the complainant's own bid]."
7. On 17 November 2016, SHBC responded. It refused to provide the requested information and cited the FOIA exemption at section 43 (prejudice to commercial interests) as its basis for doing so.
8. In a letter to SHBC of 30 November 2016, the complainant disputed this position. It argued that contrary to SHBC's assertion that there were a limited number of bidders, there are 88 other organisations that could have submitted a tender submission for the contract in question.
9. SHBC explained to the Commissioner during the course of her investigation that it did not receive this letter when the Commissioner queried why it had not treated this letter as a request for internal review. The Commissioner has no reason to believe this is a false statement given that SHBC has responded to the complainant's other correspondence. Similarly, she does not dispute the complainant's

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<sup>1</sup> The Commissioner has redacted this sum because, in her view, it is commercial information pertaining to the detail of the complainant's own bid which is not widely available.

assertion that it sent this letter. On the balance of probabilities, she has concluded that the letter went astray at some point due to an oversight.

## Scope of the case

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10. The complainant contacted the Commissioner on 24 February 2017 to complain about the way their request for information had been handled. As alluded to above, the complainant and the Commissioner had an exchange of correspondence prior to this.
11. As noted above, in the course of the Commissioner's investigation, SHBC said that it did not receive the request for internal review but, had it done so, it would have argued that it did not hold information within the scope of the request. It explained why it did not hold this information. It submitted copies of information that, it explained, was not within scope, but which was, in its view, related generally to the information described in the request. This information, it submitted, was exempt under section 43(2) and it supplied arguments in support of this.
12. The Commissioner will first look at SHBC holds the information described in the request. She will consider whether the information supplied constitutes information within the scope of the request and, if it does, whether it was exempt from disclosure at the time of the request by virtue of section 43(2).

## Reasons for decision

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13. In correspondence with the Commissioner, SHDC explained that there was a misapprehension on the part of the complainant. Its request (dated 25 August 2016) says "this contract will now have been operating for in excess of one year"
14. SHDC said that, on the contrary, there were two separate contracts, one for April 2015 – March 2016 and one for April 2016 – March 2017 and that the complainant, a private company, was invited to tender for both of them. At the time of the request, the applicable contract had only been running for five months.
15. It also explained that the figure supplied by the complainant as part of the request was based on the expectation that payment would be according to a fixed formula: specific hourly rate x 3 hours x 52 weeks. The Commissioner will now refer to this as the "optimum figure". SHDC explained that this was not how the contract worked in practice. "The amount received in payments for such contract [sic] are subject to a

number of factors; weather, availability of players and bank holidays when use of pitches decreases". It also explained "figures quoted would have been intent offers and not guaranteed offers".

16. In the Commissioner's view, the complainant's fixation with the optimum figure in their initial request and in their request for internal review does not deliver a fatal blow to the effectiveness of the request. SHDC argued that it did.
17. SHDC holds the requested information even if the actual information differs in some way from the optimum figure. This is the case, in the Commissioner's view, even if the actual hours invoiced do not match the hours assumed when calculating the optimum figure. The complainant's request could be answered by the provision of invoices or anonymised invoiced sums (as specifically described in the request) and an explanation of how many hours each invoiced sum related to. The complainant could then determine the hourly rate that the successful bidder quoted, e.g. the invoice figure divided by the hours this applies to equals the figure paid per hour. This would provide the relevant information to the public which explains how public money is being used. The complainant would also be able to compare the hourly rate agreed to the hourly rate that they offered in their bid.
18. The Commissioner notes that the tender document brief states that this must be over £124.00 p/h: "Any offers less than £124.00 p/h for the running of a commercial league will not be considered." In other words, whatever the actual figure is shown in the requested invoices, it should be calculated at more than £124.00 per hour.
19. In summary, the Commissioner is satisfied that the information requested is held – this is the information showing the figures invoiced for each applicable month even if this spans two actual contracts. There is nothing in the FOIA to prevent SHDC from providing an explanation of how many hours each figure refers to where it is required to disclose those figures. A ready calculation would show what the hourly rate was. The complainant could use this to compare with its own figures. The general public could use this to learn more about how public money was being used in this case. Those familiar with the service could further consider whether the public was obtaining value for money.
20. Having concluded that the requested information is held, the Commissioner went on to consider whether it is exempt from disclosure under the FOIA by virtue of section 43(2) as argued by SHDC.
21. Section 43 (2) of the FOIA states:  
*"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)."*

22. In order to rely on section 43(2), 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.
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – e.g., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers 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. The anticipated prejudice must be more likely than not.

23. The Commissioner has looked at each criterion in turn. With regard to the first criterion, while the essential feature of commerce is trading, the information which falls within the exemption may relate only indirectly to the activity of buying and selling. Moreover, the involvement of private sector partners in the financing and delivering of public sector projects and services has become a common feature of public life.

24. In this case, the withheld information is the amount that one party invoiced for the service in question and how many hours work this relates to. The Commissioner is satisfied that this information relates to commercial activity.

25. With regard to the second criterion, SHDC explained the causal relationship between disclosure and prejudicial outcomes for the successful and unsuccessful bidders and for SHDC itself. SHDC drew attention to the fact that the second of the two contracts was live at the time of the request and disclosure would give information about a live contract. SHDC said "It is common knowledge [who was] the successful bidder as they use their name advertise the league". This would therefore provide information to the public about the rate agreed for this service. In the Commissioner's view, there is a causal relationship between disclosure and a prejudicial outcome for the successful bidder. In reaching this view, the Commissioner has taken into account the comments made by the successful bidder in respect of the withheld information. SHDC sought these and submitted them to the Commissioner.

26. It is less clear as to the causal relationship between disclosure and a prejudicial outcome for unsuccessful bidders. SHDC explained that disclosure would have a negative effect on the reputation of those who were not successful in their bid. The Commissioner does not agree with this. The withheld information does not identify the other bidders. It may be possible to attempt to deduce their identity from what is publically known – that is, the name of the successful bidder. However, deduction may be unsuccessful. In any event, SHDC, offered no evidence beyond speculation to support this assertion.
27. It argued that in respect of prejudice to its own commercial interests, disclosure of the withheld information could undermine the bidding process to the detriment of the public purse. It explained that when the request was made, there was to be a fresh tender of similar specification. It explained that it had a duty of trust and integrity towards service providers which could be undermined following disclosure.
28. The Commissioner is satisfied that there is a causal relationship and a prejudicial outcome in respect of the successful bidder and the bidding process (which would, in turn, prejudice SHDC's commercial interest in conducting the bidding process for maximum benefit to the public purse). She is satisfied that the prejudice is of substance. She is not satisfied, however, that there is a causal relationship between disclosure and alleged prejudice to the commercial interests of unsuccessful bidders. Firstly, they cannot be identified from the withheld information and secondly, any alleged prejudice to their commercial interests is purely speculative on SHDC's part.
29. With regard to the third criterion, SHDC sought to rely on the lower threshold of likelihood, that it disclosure "would be likely" to prejudice the commercial interests in question.
30. The key factor here, in the Commissioner's view, is timing. SHDC explained "[It is] important to note that the contract was only for a year and I knew that there would be a new tender within a few months which would have a similar specification." Anyone wishing to participate in the new tender would know what rate the previously successful bidder had used to win the contract. It went on to say that the current tender ends in March 2019 and there would be a tender process in advance of that which means that disclosure would create an unfair advantage for those wishing to bid for that contract.
31. The Commissioner accepts SHDC's assertion that prejudice to the successful bidder and to SHDC itself would be likely. The crucial details of the successful and recent bid would be known and subsequent bids from other companies could be submitted with this information to hand. The company that had been the successful bidder here would have to

amend their next bid, taking into account the fact that other bidders knew their previous rate. The successful bidder here would not have the same information about their competitors.

32. This would be likely also to put SHDC at a commercial disadvantage because the bidding process would be skewed by the unfair advantage given to some potential bidders. The Commissioner accepts that the rate charged would not be the only factor used to decide which bidder was going to be awarded the next contract. However, it would be a far from insignificant factor.
33. In light of the above, the Commissioner is satisfied that section 43(2) is engaged with respect to the withheld information. However, the exemption is however subject to the public interest test set out in section 2(2)(b) of the FOIA. SHDC cannot rely on this exemption as a basis for withholding the information unless the public interest in doing so outweighs the public interest in disclosure. The Commissioner must therefore consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosing the withheld information.

#### *The public interest test*

##### *Factors favouring disclosure*

34. SHDC acknowledged that there was a public interest in disclosure “[to] assist the challenge of decisions and to allow for transparency”.
35. The complainant argued that there were considerable inconsistencies in SHDC’s position and suggested that there may have been an inappropriate use of public money. There was a strong public interest in disclosure on that basis.

##### *Factors favouring reliance on the exemption*

36. For obvious reasons the complainant did not provide any arguments against disclosure nor did the Commissioner seek them. The complainant was content to have the information without disclosure of the name of the successful bidder (as evidenced by the wording of the request). However, the Commissioner notes that this information is already readily available.
37. SHDC disputed whether there was significant public interest in disclosure. It also disputed whether disclosure would further any debate. Finally it argued that both the successful bidder’s and its own commercial interests would suffer prejudice as a result of disclosure contrary to the public interest.

#### *The Commissioner’s view*

38. The Commissioner acknowledges that any company seeking to do business with a public authority must expect a greater degree of transparency about contractual details. However, the Commissioner accepts in the circumstances of this case that there would be considerable prejudice to the commercial interests of both the successful bidder and SHDC given that the information was, in effect, "live" at the time of the request. By "live" the Commissioner means that it is commercial information that related to an ongoing contract and which would be highly relevant and useful to any company preparing a bid for the next contract which is due to take place within the next couple of years.
39. In the Commissioner's view and in the circumstances of this case, there is a compelling public interest in protecting this information which outweighs the public interest in transparency and openness. In reaching this view, the Commissioner has had particular regard for the fact that the information is recent. She has also taken into account that, at the time of the request, there was to be a further tender for the provision of the same services. Other bidders could seek to outbid the current services provider using the withheld information. Creating a skewed bidding process would not be in the public interest or result in the best value for public money.
40. In summary, the Commissioner has concluded that the public interest in maintaining the exemption outweighs that in disclosing the information.



## Right of appeal

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41. 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)

42. 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.

43. 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** .....

**Elizabeth Hogan**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**