

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 27 April 2017

**Public Authority:** Epping Forest District Council

**Address:** Civic Offices  
High Street  
Epping  
Essex  
CM16 4BZ

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to health and safety at Gracelands CMS Ltd. The Commissioner's decision is that Epping Forest District Council has incorrectly applied the exemption for commercial interests at section 43(2) of the FOIA. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the following documents:
    - Construction Phase Health and Safety Plan (New Heating Installations and Electrical Wiring)
    - Delivering the Contract Safely (Mitigating Risk)
    - Delivering the Contract Safely (Suspected Carbon Monoxide Poisoning)
    - Confirmation of insurance cover from BQI insurance dated 19 April 2016
  - Issue a fresh response in relation to the health and safety documents, that fall within the scope of the request, associated with the remaining nine contracts with Gracelands CMS Ltd (identified in the Annex) providing appropriate advice and assistance to the complainant.

2. The Commissioner has also decided that Epping Forest District Council did not respond to the request within the statutory time limit in breach of section 10(1).
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

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4. On 1 September 2016 the complainant made the following request for information:

“Please post to my home address a Full Copy of Gracelands Health and Safety Company Policy Statement, and a copy of the Gracelands documentation (from a. to i.)”
5. The council responded on 8 September 2016 as follows:

“This documentation is not produced or owned by the Council and as such is not the Council’s responsibility to provide. You may contact Gracelands CMS directly if you wish to request the information from them”.
6. On 8 September 2016 the complainant requested an internal review relating to these, and other, requests.
7. The council provided its internal review response on 29 September 2016. It detailed the documentation from a to i as follows:
  - a) A safety policy document which demonstrates the organisation and the control of risk, which contains;
  - b) A declaration of commitment to health and safety, dated and signed by the senior executive responsible for health and safety;
  - c) The organisation of health and safety: specific management responsibilities;
  - d) Health and safety arrangements e.g. copies of all safe working procedures;
  - e) Risk Assessments, which identify any significant risks, presented by the work activity, evaluate the extent of the risks and outline any safe working procedures, training, etc., to reduce the risks to an acceptable level. (Risk assessments may form part of the safety policy);

- f) Control of Substances Hazardous to Health (COSHH) assessments for any hazardous substances that will be used or may be encountered during the Contract;
- g) Contractor's liability (compulsory insurance) for at least two (2) million pounds (copy of certificate);
- h) Details of any prosecutions, improvement or prohibition notices served upon the company or named individuals within the company under the Health and Safety at work (Etc.) Act 1974 in the last three years;
- i) No lone visit properties"

The council said that the requested information is exempt from disclosure under the exemption at section 43(2) of the FOIA as disclosure would prejudice Graceland's, and the council's, commercial interests.

8. The Commissioner is aware that the complainant has made numerous requests for information, and complaints, to the council within the above, and additional correspondence. However, for clarity, only correspondence which is most relevant to this particular complaint is detailed above.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 12 October 2016 to complain about the way these, and other, requests for information had been handled.
10. The Commissioner has only dealt with the requests relating to health and safety at Gracelands CMS Ltd ('Gracelands') in this decision notice. The complainant's requests relating to gender equality are being dealt with separately under case reference FS50650568.
11. The complainant said that he considers that information should be provided. Therefore the Commissioner has considered the application of the exemption for commercial interests at section 43(2) of the FOIA.
12. The council informed the Commissioner that it has 10 separate works contracts with Gracelands which have been entered into at different times and each has a variety of health and safety related documents associated with them. It said that it would not have been practical to provide copies of all the documents requested for each of the contracts held.
13. The council then explained that in consideration of this matter it looked carefully at the documents submitted by Gracelands as part of their

contract with the council for 'Gas Servicing'. It said that as the documents have been produced by Gracelands for their own purposes and not specifically for the purpose of contracting with the council, they do not correspond exactly in terms of title and content with the documents listed as a) to i).

14. The council has limited the information it reviewed in consideration of this matter to the 'Gas Servicing' contract, rather than all 10 contracts it has with Gracelands. However, as the request was not limited in such a manner, the council has not given full consideration to the scope of the request. Therefore, as stated in paragraph 1, the council needs to issue a fresh response in relation to the health and safety documents associated with the remaining nine contracts with Gracelands which fall within the scope of the request. In doing so, the council should note that it is not a valid response under the FOIA to state that it is not practical to provide copies of all the documents requested for each of the contracts held and it should provide appropriate advice and assistance to the complainant if necessary.
15. The complainant also asked whether he should have received the information and documentation within 20 working days. Therefore the Commissioner has also considered whether the council breached the statutory time for compliance at section 10(1) of the FOIA.

## **Reasons for decision**

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### **Section 43(2) – Commercial interests**

16. Section 43(2) of the FOIA provides an exemption from disclosure of information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.
17. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered her awareness guidance on the application of section 43<sup>1</sup>. This comments that:

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[http://ico.org.uk/for\\_organisations/guidance\\_index/~/\\_media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/AWARENESS\\_GUIDANCE\\_5\\_V3\\_07\\_03\\_08.ashx](http://ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.ashx)

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."

18. In this instance the council has applied section 43(2) to documents submitted by Gracelands as part of their contract with the council for 'Gas Servicing'. The Commissioner considers that this relates to the commercial activity of bidding for a contract and therefore the requested information does fall within the remit of section 43(2) FOIA.
19. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.
20. In this case the council considers that the prejudice to commercial interests 'would' occur'.
21. The Commissioner needs to consider how any prejudice to commercial interests would be likely to be caused by the disclosure of the withheld information. This includes consideration of whether the prejudice claimed is "real, actual or of substance" and whether there is a causal link between disclosure and the prejudice occurring.
22. The council said that contractors have to submit numbers of documents to the council in order to be successful in tendering for council contracts and that some of these documents are very costly and a high standard of documentary evidence is required to prove the contractor's ability to carry out the work specified. It said that there would be prejudice to Gracelands' commercial interests if these documents were to be made available 'to the world' as this commercial property could then be used by other companies that they would be in competition with. It explained that contractors with well thought out health and safety policies would be less likely to want to tender for council contracts if the risk assessments and other documents submitted in support of their tender application could be made available and used by anyone else. It said that only poorer quality contractors, with less robust health and safety policies, would then want to tender for council work and that when considering matters like gas servicing, the severity of the impact could be very high if a company did not have robust health and safety arrangements in place but had gained work with the council on the basis of health and safety documents it had obtained from another company.
23. The council also said that disclosure would be prejudicial to the interests of residents of the District because suitable contractors would be less

willing to tender for council work if they knew that their commercial property could be made freely available to anyone asking for it. It said that as well as potentially having a negative effect on the quality of the work carried out for the council, this would also drive up costs which would impact on council tax and rent payers.

24. When claiming that disclosure would prejudice the commercial interests of a third party, the Commissioner expects a public authority to obtain arguments from the third parties themselves. In her enquiries to the council, the Commissioner asked the council to clarify on what basis it has established that disclosure of a third party's interests may occur and to provide copies of any correspondence the council has had with third parties in relation to this request.
25. The council said that when it carried out the internal review, it telephoned the Managing Director of Gracelands to discuss his views on disclosure and it subsequently received an email from him stating the following:

"To confirm, I am not prepared to have Gracelands' documentation forwarded to third parties. It is my view that our contractual obligations are to Epping Forest District Council and not to individual council tenants."

The council acknowledged that the email response was brief but said that in further discussions with the Managing Director it was clear that he was aware, and concerned, that if the information was released his commercial property would become available to a wider audience.

26. The Commissioner notes that the above communications with Gracelands do not provide details or evidence of why or how disclosure would prejudice their commercial interests. The Commissioner's aforementioned guidance on section 43 states the following:

"It is important to note that in claiming the exemption on the basis of prejudice to the commercial interests of a third party, the public authority must have evidence that this does in fact represent or reflect the view of the third party. The public authority cannot speculate in this respect; the prejudice must be based on evidence provided by the third party, whether during the time for compliance with a specific request or as a result of prior consultation. This approach has been confirmed by the Information Tribunal<sup>2</sup>."

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<sup>2</sup> Derry City Council v Information Commissioner (EA/2006/0014; 11 December 2006)

27. The Commissioner's guidance on 'The Prejudice Test'<sup>3</sup> states that;

"If an authority claims that prejudice would be likely to occur they need to establish that

- there is a plausible causal link between the disclosure of the information in question and the argued prejudice; and
- there is a real possibility that the circumstances giving rise to prejudice would occur, ie the causal link must not be purely hypothetical; and
- the opportunity for prejudice to arise is not so limited that the chance of prejudice is in fact remote."

28. The Commissioner does not consider that the explanation given by the council (at paragraphs 22-23) sufficiently demonstrates a causal link between the disclosure of the withheld information and the prejudice to commercial interests. The explanations are couched in very general terms and no link is made between the information that has actually been withheld and the prejudice to commercial interests. This was despite the council being informed by the Commissioner that it must justify its position and being provided with the Commissioner's guidance on how he deals with complaints<sup>4</sup> which clearly states that it is the public authorities' responsibility to satisfy the Commissioner that information should not be disclosed and that it has complied with the law.

29. It is not for the Commissioner to speculate as to how the prejudice would be likely to occur. In relation to the argument that quality would be reduced as only poorer quality contractors would want to tender for council work, the Commissioner considers that councils could still insist on quality in the standards of tenders and that disclosure could have the opposite effect in that it could drive up standards of tenders submitted to it. In relation to the argument that disclosure would be prejudicial to the interests of the residents of the District, the Commissioner does not

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<sup>3</sup> [https://ico.org.uk/media/for-organisations/documents/1214/the\\_prejudice\\_test.pdf](https://ico.org.uk/media/for-organisations/documents/1214/the_prejudice_test.pdf)

<sup>4</sup> [http://www.ico.org.uk/for\\_organisations/freedom\\_of\\_information/guide.aspx](http://www.ico.org.uk/for_organisations/freedom_of_information/guide.aspx)

consider that this relates to the commercial interests with which this exemption is concerned.

30. Having viewed the withheld information, the Commissioner considers it difficult to envisage how disclosure of some of the information, for example, the 'Introduction' and list of legislation from the 'Construction Phase Health and Safety Plan (New Heating Installations and Electrical Wiring)' document and the Confirmation of insurance cover from BQI insurance dated 19 April 2016, would prejudice commercial interests.
31. The lack of sufficient arguments from the council, coupled with the lack of clear argument as to how Gracelands consider disclosure would be prejudicial to its commercial interests, has led the Commissioner to the conclusion that section 43(2) of the FOIA is not correctly engaged in this case.

### **Section 10 – Time for compliance with request**

32. Section 10(1) states:

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

33. The council received the request on 1 September 2016 but has not provided the information to date. Therefore, the council did not respond to the request within the statutory time limit in breach of section 10(1).



## Right of appeal

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34. 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)

35. 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.
36. 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**

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The remaining nine contracts with Gracelands CMS Ltd are as follows:

- Water tank replacements
- Gas Heating replacements
- Electrical Heating replacements
- Kitchen replacements
- Disabled Adaptations
- Block electrical testing and upgrading
- Domestic electrical testing and upgrading
- Bathroom replacements
- Void properties