

## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Date: 25 July 2011**

**Public Authority:** London Borough of Lewisham  
**Address:** Town Hall  
Catford Road  
London  
SE6 4RU

### **Summary**

---

The complainant asked the Council to release information relating to the organisations which were awarded the Nursing, Care and Befriending (Preferred Provider Framework) contracts. The Council responded releasing some of the requested information to the complainant. The Council informed the complainant that it considered the pricing structure and Method Statement submitted by each organisation and the score allocated to each organisation during the tender evaluation process to be exempt from disclosure under sections 41(1) and 43(2) of the Act. As the complainant remained dissatisfied, he approached the Commissioner. During the Commissioner's investigation the complainant decided to withdraw his complaint concerning the non disclosure of the pricing structure submitted by each organisation. The Commissioner has considered the application of sections 41(1) and 43(2) of the Act to the remaining information. He has concluded that neither of the exemptions cited is engaged in this case. He has therefore ordered the Council to release the remaining information to the complainant within 35 days of the Notice.

### **The Commissioner's Role**

---

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

## The Request

---

2. The complainant contacted the Council on 9 April 2010 to request the following information:

"It concerns the contracts for Nursing, Care & Befriending (Preferred Provider Framework), which I understand were recently let.

In each case my request is restricted to the five largest contracts. I would like the following:

- i) The contracts themselves
- ii) The contracting companies' bid documents
- iii) The evaluation criteria that were used in respect of the bids
- iv) The scores given on each of the evaluation criteria
- v) Copies of any internal evaluations of any of the contracts that have been carried out by the Council."

On 16 April 2010 the complainant sent a further email to the Council to clarify that his request concerns the tender for the provision of paediatric nurses to look after sick or terminally ill children in the community.

3. The Council responded on 14 May 2010. It provided the complainant with the information he requested in bullet point iii) of his request but refused to release all other information citing section 43 of the Act.
4. The complainant requested an internal review on 17 May 2010.
5. The Council responded in part on 6 August 2010. It advised the complainant that his request for an internal review would be carried out in two parts. The Council confirmed this letter detailed the outcome of the internal review it had carried out for elements ii), iv) and v) of his request and that it upheld its application of section 43 of the Act. This letter then advised the complainant that an internal review was still ongoing for part i) of his request and he would receive a further response in due course.
6. The complainant reminded the Council on 20 August 2010 that a response was still outstanding for element i) of his request but he heard nothing further.

## The Investigation

---

### Scope of the case

7. On 20 September 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the Council's decision to withhold the information he requested in elements i), ii), iv) and v) of his request under section 43 of the Act.
8. During the course of the Commissioner's investigation the Council released a copy of the contracts to the complainant with the exception of the pricing structures submitted by each company. On receipt of this information the complainant confirmed that he was happy to accept the Council's assessment that the pricing structures submitted by each company are exempt from disclosure under section 43 of the Act.
9. As the Council released the majority of information requested in element i) of the initial request and the complainant then confirmed that he was happy to accept that the pricing structures attached to each contract are exempt, the Commissioner will not be addressing element i) of the complainant's request any further in this Notice.
10. This Notice will concentrate on the remaining three elements of the initial request which are parts ii), iv) and v) of paragraph 2 above and the information the Council holds addressing these three elements which is:
  - a. the Method Statements submitted by the successful bidders; and
  - b. the scoring for each successful bidder against each of the assessment criteria.

The Commissioner noted that some of the Method Statements contain the personal data (i.e. names) of the bidder's employees. During the Commissioner's investigation the complainant confirmed that he was happy to accept the personal data of the bidder's employees (i.e. their names) should not be released under the Act.

11. The Council clarified that it was unable to provide the requested information for the five largest contracts, as the successful bidders were not awarded specific volumes of service or budget amounts. It advised that seven organisations were successful and it has considered the scope of the complainant's request to encompass the requested information for all seven organisations.

12. In respect of the scoring for each successful bidder, the Council confirmed that it does not hold the individual scores each successful bidder received against each of the criteria. The only scores it does hold are the total scores given to each of the seven successful bidders during the evaluation process. The Council has provided the Commissioner with a copy of these scores and these will be considered in the Analysis section of this Notice.
13. During the Commissioner's investigation the Council claimed a late reliance on section 41 of the Act in respect of the Method Statements submitted by each of the successful bidders. This Notice will therefore address the remaining withheld information identified in paragraph 10 above and the application of sections 41(1) and 43(2) of the Act.

### **Chronology**

14. The Commissioner wrote to the Council on 20 October 2010 to inform it that he had received a complaint from the complainant and to request a copy of the remaining withheld information.
15. The Council responded on 29 November 2010. It confirmed that it wished to rely on sections 41(1) and 43(2) of the Act for the non disclosure of the remaining information. Concerning the Commissioner's request for a copy of the withheld information, the Council requested the contact details of the case officer who will be investigating this matter so it could direct copies of the withheld information directly to them.
16. The Commissioner responded on 13 December 2010 providing the contact details of the relevant case officer and requested that copies of the withheld information be provided as soon as possible.
17. The Council responded on 20 December 2010 providing copies of the remaining withheld information.
18. The Commissioner reviewed the withheld information and wrote to the Council on 17 January 2011 to request some additional information.
19. The Council responded on 11 February 2011 providing the additional information requested.
20. The Commissioner considered the matter further and felt further information was required from the Council before he was able to make a decision. This additional information was requested on 29 March 2011.
21. The Council responded on 11 May 2011 providing the additional information the Commissioner requested.

## Analysis

---

22. The Council applied section 41(1) and 43(2) to each of the Method Statements it received from the seven successful bidders. In respect of the score awarded to each of these bidders, the Council applied section 43(2) of the Act. The Commissioner will consider each of the exemptions in turn addressing the withheld information as necessary.

## Exemptions

### Section 43(2) – commercial interests

23. For the Commissioner to agree that section 43(2) of the Act is engaged, the Council must first demonstrate that prejudice would or would be likely to occur to the commercial interests of the Council and/or the seven successful bidders. In the Information Tribunal hearing of *Hogan v The Information Commissioner and Oxford City Council (EA/2005/0030)* ('Hogan') the Tribunal stated that:

"The application of the 'prejudice test' should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption... Second, the nature of 'prejudice' being claimed must be considered... A third step for the decision-maker concerns the likelihood of occurrence of prejudice."

24. When considering the nature of the prejudice, the Tribunal stated in the hearing of Hogan that:

"An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thoroton has stated "real, actual or of substance" (Hansard HL (VOL. 162, April 20, 2000, col.827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected."

25. As stated above in paragraph 23, the third step of the prejudice test is to consider the likelihood of occurrence of the prejudice claimed. The Commissioner notes that there are two limbs to this test; "would be likely to prejudice" and "would prejudice". The first limb of the test places a lesser evidential burden on the public authority to discharge. "Would be likely to prejudice" was considered in the Information Tribunal hearing of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*. The Tribunal stated that:

"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk".

26. The second limb of the test "would prejudice" places a much stronger evidential burden on the public authority to discharge. Whilst it would not be possible to prove that prejudice would occur beyond any doubt whatsoever, it is the Commissioner's view that prejudice must be at least more probable than not.
27. The Council has not explicitly stated which limb of the prejudice test it considers applies. The Commissioner will therefore proceed to consider the lesser threshold of "would be likely to". If this threshold is not met, it follows that the higher threshold of "would" does not also apply.
28. He will first consider the Method Statements submitted by each of the seven successful bidders and then consider the scores awarded to these organisations during the tender evaluation process.

#### Method Statements

29. The Council submitted arguments to the Commissioner detailing why it considered the disclosure of this information would be likely to prejudice the commercial interests of each of the organisations concerned. The Commissioner noted that these arguments were speculative and had not originated from the organisations concerned. He therefore provided the Council with a final opportunity to contact these organisations to obtain their views on disclosure and whether they considered disclosure would be likely to prejudice their commercial interests.
30. The Council confirmed that six of the seven organisations had responded and each of these agreed with the Council, for the reasons it had previously explained to the Commissioner, that disclosure would be likely to prejudice their commercial interests. Although the six organisations agreed retrospectively, the Commissioner is satisfied that the previous views expressed by the Council are representative of the concerns of the six organisations that responded regarding disclosure. He will now go on to consider these arguments for the Method Statements submitted by these six organisations. In respect of the organisation that did not respond, the Commissioner will consider the application of section 43(2) of the Act separately below.

#### *The six organisations that did respond*

31. The Council argued that each Method Statement gives a detailed breakdown of the organisation's business practices and in detail includes information relating to the following areas:

- Management and operational structure
  - Sufficiency of staff
  - Quality & performance standards
  - Client focus, privacy & dignity
  - Every Child Matters Outcomes
  - Training
  - Accuracy & communication
  - Working methods and codes of practice
  - Safeguarding / child protection
  - Health & Safety
  - Continuous improvement
  - Equality & Diversity
32. The Council stated that each statement therefore contains detailed information on how that organisation's business operates. It confirmed that the six organisations that did respond felt that the information contained in their Method Statement could be used by its competitors to gain advantage in future tender exercises, which would in turn have a detrimental impact on their ongoing commercial activities. The six organisations also considered that disclosure could possibly lead to uncompetitive practices at future tender exercises.
33. The Commissioner requested the Council and each of the organisations to expand on these arguments and to demonstrate exactly how disclosure of this information would be likely to have these effects. They failed to do so. The six organisations that did respond referred to the Council's previous submissions to the Commissioner and confirmed that they agreed with them. None of these organisations explained in any detail how it considered disclosure would be likely to have the effects described above. The Commissioner notes that one of the six organisations made specific reference to certain sections of its statement being commercially sensitive. However, again, it failed to explain in any detail why.
34. It is not for the Commissioner to argue on a public authority's behalf or to find his own reasons to demonstrate that section 43(2) of the Act applies to the requested information. The onus is on the public authority itself to provide the necessary arguments and evidence to the Commissioner to consider. This view is supported by the Information Tribunal in the hearing of *Elmbridge v Information Commissioner EA/2010/0106* ("*Elmbridge*"). At paragraph 22 and 23 the Tribunal stated the following:
- "This Tribunal accepts that the Respondent [Information Commissioner] was correct in his assessment of the particular facts of this case as presented by the Appellants [Elmbridge Borough Council]

in that they have failed to provide sufficient evidence that disclosure of the disputed information would adversely affect the interests of the Additional Party at the time of the request... The onus of proof remains at all times with the Appellant. The Tribunal finds as a fact that the Appellant has failed to establish, on the balance of probabilities, through evidence provided to the Respondent or before this Tribunal, that any harm or prejudice would result to interested parties."

35. Although the Tribunal was considering the application of the Environmental Information Regulations and certain exceptions detailed within this legislation in the *Elmbridge* case, the Commissioner considers this view is applicable to the exemptions detailed in the FOIA and that it remains the burden of the public authority concerned to provide sufficient evidence to demonstrate that a particular exception or exemption is engaged.
36. As the Council failed to explain exactly how disclosure of this information would be likely to be prejudicial to the commercial interests of the six organisations that responded and it is not obvious to the Commissioner from a simple review of the information itself, the Commissioner cannot agree that section 43(2) of the Act is engaged in this case.
37. As the Commissioner does not agree that section 43(2) of the Act applies to this information, there is no need for him to go on to consider the public interest test.

*The one organisation that did not respond*

38. As this organisation did not respond to the Council's request for its views on disclosure, the arguments previously presented by the Council can only be considered to be speculative.
39. In the Information Tribunal hearing of *Derry City Council v Information Commissioner EA/2006/0016* ('Derry case') the Tribunal stated that it is not sufficient for a public authority to speculate on a third party's behalf that disclosure would or would be likely to be prejudicial to its commercial interests. The Tribunal stated that such speculation should be disregarded unless the public authority can provide convincing evidence to demonstrate that these arguments at least originated from that third party.
40. As the organisation did not respond to the Council's correspondence relating to the potential disclosure of its Method Statement, the Commissioner has no evidence which originates from the organisation itself which suggests that it considers disclosure of this information would be likely to be prejudicial to its commercial interests. The



Commissioner can therefore only conclude that section 43(2) is not engaged for this information.

The total score awarded to seven organisations during the tender evaluation process.

41. The Council argued that disclosure of the total score awarded to each of the seven organisations would be likely to prejudice each of the organisations' commercial interests. It stated that it felt disclosure would give competitors the opportunity to study the scores given and the assessment criteria and tailor any future tender to the Council.
42. As stated above in paragraph 29, as part of his investigation the Commissioner asked the Council to contact the organisations concerned regarding the potential disclosure of this information, as he was unwilling to accept mere speculation of possible prejudice to each organisation's commercial interests from the Council when it was clear that the arguments had not originated from these third parties.
43. The Commissioner has received copies of the objections the Council received from six of the seven organisations. He notes that none make any reference to these scores or any concerns about these being disclosed in response to this request.
44. As the Information Tribunal highlighted in the *Derry case* it is not sufficient for a public authority to speculate on a third party's behalf that disclosure would or would be likely to be prejudicial to its commercial interests. It stated that such speculation should be disregarded unless the public authority can provide convincing evidence to demonstrate that these arguments at least originated from that third party.
45. Albeit retrospectively, despite being given the opportunity to obtain the views of the seven organisations concerned, the Council has failed to do so. The only objections regarding disclosure the Commissioner has received are those from the six organisations that did respond relating to their Method Statements.
46. In line with the *Derry* decision the Commissioner cannot consider the Council's speculative arguments concerning prejudice and he has therefore concluded that section 43(2) of the Act is not engaged for this information.

**Section 41(1) – information provided in confidence**

47. As stated above, section 41(1) of the Act has only been applied to the Method Statements submitted by the seven organisations.

48. Section 41(1) of the Act provides that information is exempt from disclosure if it was obtained by the Council from any other person and the disclosure would constitute an actionable breach of confidence. The exemption is absolute and therefore not qualified by the public interest test set out in section 2 of the Act.

Was the information obtained from another person?

49. The Commissioner has reviewed the each of the seven Method Statements and he is satisfied that this information was obtained by the Council from each of the seven successful organisations. These statements are each company's written response to the tender detailing how it would meet the requirements of the contract. The documents do not contain any information generated by the Council itself. The Commissioner is therefore satisfied that the requested information satisfies this element of the exemption.
50. The Commissioner will now go on to consider whether disclosure of this information would constitute an actionable breach of confidence.

Would constitute an actionable breach of confidence?

51. The Commissioner considers the test set out in *Coco v A N Clark (Engineers) [1968] FSR 415* is the most appropriate test to apply in this case. This test states that a breach will be actionable if:
- the information has the necessary quality of confidence;
  - the information was imparted in circumstances importing an obligation of confidence;
  - there was an unauthorised use of the information to the detriment of the confider; and
  - there is no successful public interest defence against the breach of confidence on which the public authority can rely.
52. When considering the first element of the *Coco v Clark* test he must consider whether the information has the necessary quality of confidence. Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial. Information which is known only to a limited number of individuals will not be regarded as generally accessible although information that has been disseminated to the general public clearly will be. Information which was important to the confider cannot be considered to be trivial.
53. The Council argued that the contents of each Method Statement being considered here are not trivial or publicly available and therefore have the necessary quality of confidence.

54. The Commissioner has considered each statement. Firstly he notes that a blanket approach to non disclosure has been taken by each organisation and the Council. The Commissioner accepts that the statements are essentially documents selling the company and its services to the Council. While some of these statements contain factual information about the company and its structure, which could be argued to be similar to the information some of these companies have placed on their website, he notes that it is not identical and that the statements have been specifically written, adapted and tailored to address the requirements of the tender. He is therefore satisfied that the contents of these statements cannot be regarded to be publicly available.
55. The Commissioner also accepts that the contents of these statements are not trivial information; it is information which contains the specific services offered by each company and details from its own knowledge and expertise exactly how it would meet the specifics of the contract up for tender.
56. For the reasons explained above, the Commissioner is willing to accept the Council's submissions that the requested information has the necessary quality of confidence. He now needs to consider whether the information was imparted in circumstances importing an obligation of confidence.
57. While the Commissioner notes that there is no evidence available to suggest there is an explicit obligation of confidence, he accepts that in this case there is evidence to suggest that an implicit obligation of confidence is owed to the organisations concerned. The Commissioner accepts that six of the seven organisations have stated in their objections to the Council against disclosure that they had the expectation that this information would remain confidential and would not be released into the public domain. He acknowledges that this expectation will have come from the Council's own practices and viewpoint to date that such information remain confidential during and after a tendering exercise. For these reasons the Commissioner accepts that the information meets the first two stages of the *Coco* test.
58. It is now necessary to consider whether disclosure would cause any detriment to seven organisations concerned. The Commissioner considers that there is a distinction between information relating to an individual's personal and private life and information which is commercial information. Following the Information Tribunal hearing of *Pauline Bluck v IC & Epsom & St Helier University NHS Trust*, EA/2006/0090 it is the Commissioner's view that detriment is not a prerequisite of an actionable breach when information relating to an individual's personal and private life is being considered. This is because it can be argued in the alternative that the real consequence of

disclosing personal and private information is the infringement of the confider's privacy.

59. However, the Commissioner does not agree that the same approach should be taken where commercial information is concerned. In a more recent Information Tribunal hearing, *The Higher Education Funding Council for England v Guardian News & Media Ltd*, EA/2009/0036, it was stated that:

"...for the time being, this Tribunal, when dealing with the type of information in question in this Appeal [commercial confidence] should not depart from the line of authority from the higher courts leading from *Coco v Clark*" (paragraph 43).

60. The requested information in this case is commercial information relating to the seven successful organisations. It is therefore the Commissioner's view that for disclosure to constitute a breach of confidence in this case there has to be a detrimental impact on the confider i.e. the seven successful organisations.
61. The arguments presented earlier in this Notice at paragraph 31 to 40 are of relevance here. The Commissioner did not consider the six organisations concerned had demonstrated that disclosure would be likely to prejudice their commercial interests. It therefore follows that the Commissioner does not consider the organisations have demonstrated that disclosure would cause any them detriment.
62. As stated in paragraph 58 above, the Commissioner does accept that there may be cases where disclosure would be detrimental to the confider, where the requested information is commercially sensitive. However, in this case the Council has not presented any arguments to the Commissioner which originate from the organisations concerned to demonstrate exactly how the contents of the requested information are commercially sensitive and he cannot see from viewing the contents himself exactly how the information, if it were disclosed, would cause any detriment to these organisations.
63. As the Commissioner is not satisfied that the third element of the *Coco v Clark* test is met in this case he has concluded that section 41 of the Act does not apply to the requested information.

### **Procedural Requirements**

64. The Commissioner notes that the Council failed to issue a refusal notice to the complainant within 20 working days of his request. He has therefore found the Council in breach of section 17(1) of the Act in this case.

65. The Commissioner also notes that the Council failed to cite an exemption on which it later relied (section 41(1)) in its refusal notice. He has therefore found the Council in breach of section 17(1)(b) of the Act.
66. The Council failed to provide the complainant with a copy of the sections of the contracts it was willing to release (recorded information addressing part 1 of the complainant's request) within 20 working days of his request. He therefore finds the Council in breach of section 1(1)(b) and section 10(1) of the Act in this case.

## **The Decision**

---

67. The Commissioner's decision is that the Council did not deal with the request for information in accordance with the Act. The Council:
- incorrectly relied upon sections 41(1) and 43(2) of the Act for the non disclosure of the remaining withheld information;
  - breached section 17(1) by failing to issue a refusal notice within 20 workings days of the complainant request;
  - breached section 17(1)(b) by failing to cite in its refusal notice an exemption on which it later relief; and
  - breached section 1(1)(b) by failing to release information to which the complainant is entitled to him, and breached section 10(1) by failing to do this within 20 working days of his request.

## **Steps Required**

---

68. The Commissioner requires the Council to take the following steps to ensure compliance with the Act:
- it should release the seven Method Statements it received from the seven successful organisations to the complainant with the names of any staff of these organisations redacted; and
  - release the total scores allocated to the seven organisations during the tender evaluation process to the complainant.
69. The Council must take the steps required by this notice within 35 calendar days of the date of this notice.

## **Failure to comply**

---

70. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Other matters**

---

71. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. The Council failed to complete an internal review for part 1 of the complainant's request for 8 months; the complainant requested an internal review on 17 May 2010 and this was not completed for this element of his request until 31 January 2011.
72. There is no timescale laid down in the Act for a public authority to complete an internal review but the Commissioner has since issued guidance which recommends 20 working days from the date of request as a reasonable time for completing an internal review and (in exceptional circumstances) no later than 40 working days. Also, Part VI of the Code of Practice issued under section 45 of the Act states in this regard:
- "41. In all cases, complaints should be acknowledged promptly and the complainant should be informed of an authority's target date for determining the complaint. Where it is apparent that determination of the complaint will take longer than the target time (for example because of the complexity of the particular case), the authority should inform the complainant and explain the reason for the delay."
73. The Commissioner notes that, in failing to advise the complainant of the estimated date for completion of the internal review and in failing to complete the internal review within a reasonable timescale the Council failed to conform to Part VI of the section 45 Code of Practice.

## Right of Appeal

---

74. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

75. 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.
76. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 25<sup>th</sup> day of July 2011**

**Signed .....**

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

## Legal Annex

---

### General Right of Access

#### Section 1(1)

Provides that -

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

### Refusal of Request

#### Section 17(1)

Provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

### Information provided in confidence.

#### Section 41(1)

Provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person(including another public authority), and



- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

## **Commercial interests**

### Section 43(1)

Provides that –

“Information is exempt information if it constitutes a trade secret.”

### Section 43(2)

Provides 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).”