

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

### **Decision notice**

**Date:** 5 August 2014

**Public Authority:** Newcastle City Council  
**Address:** Civic Centre  
Newcastle upon Tyne  
NE1 8QH

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

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1. The complainant has requested a range of information relating to care provision for handicapped adults. Newcastle City Council provided some of the requested information but withheld other information, citing the FOIA exemptions for personal data (section 40), information provided in confidence (section 41) and prejudice to commercial interests (section 43).
2. The Commissioner's decision is that Newcastle City Council:
  - Disclosed all the information it holds in relation to request parts 1 and 4 and complied with section 1(1) of the FOIA;
  - Correctly applied section 40(2) of the FOIA to withhold personal data;
  - failed to demonstrate that section 43(2) of the FOIA was engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information withheld under section 43(2) of the FOIA (identified in the confidential annex).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 18 December 2013, the complainant wrote to Newcastle City Council (the "council") and requested information in the following terms:

*"1 Documentation relating to the termination of the "Contract for the provision of specialist care in the home, day care, independent supported living and community enabling services" in late 2012. Including certification that At Home in the Community Ltd. were included in the circulation of this documentation.*

*2 Documentation related to the request for tenders for Contract 002823, including Instructions for Tendering.*

*3 Documentation related to the assessment of Contract 002823 and the withdrawal of approval for AHITC's tender to be considered.*

*4 Documentation relevant to the withdrawal of AHITC's "Kite Mark" approval status.*

*5 Documentation relating to the allocation of work packages to individual Care Providers listed on the City Council's web site.*

*6 Details of work packages covered in 1 above not allocated in 5 above.*

*7 Documentation relevant to the continued employment of AHITC and/or other service providers (please list) to provide care services, financed by Newcastle City Council, not included in Contract 002823. These should include contract documentation, purchase orders, compliance with Newcastle City Council Procurement Procedure Rules and EU Procurement Procedures.*

*8 The value of the work to date, carried out by each care provider under the Contract(s) listed in 7 above .*

*9 The total budget for works to be undertaken by each care provider listed in 7 above for the financial year 2013/14.*

*10 In May and June 2013 Mrs Bull wrote to me implying the arrangements with AHITC post April 2013 were "transitional" pending the appointment of a new care provider to take over the services previously operated by AHITC. A further 6 months have elapsed and no signs of a transition are apparent. Please supply documentation relating to the transfer of these services to another care provider including the name of the new provider(s) and the proposed date for the transfer to take effect.*

*11 Will you confirm that AHITC clients are continuing to pay charges for non-residential services since April 2013 even though th (sic) care provider is not "Kite Marked" by Newcastle City Council Adult Services."*

6. The council responded on 20 January 2014, confirming that some of the information was not held. The council disclosed some information and withheld other information, citing the FOIA exemptions for personal data (section 40), information provided in confidence (section 41) and prejudice to commercial interests (section 43).
7. Following an internal review the council wrote to the complainant on 30 May 2014. It stated that it was maintaining its position.

## **Scope of the case**

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8. On 28 February 2014 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that his investigation would consider whether the council had provided all the relevant it holds and whether it had correctly applied exemptions to withhold some of the requested information.
10. During the course of the Commissioner's investigation the council withdrew its reliance on the exemption provided by section 41, confirming that it was satisfied that the relevant information was entitled to be withheld under section 43(2) of the FOIA.

## **Reasons for decision**

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### **Section 1 – duty to provide held information**

11. Section 1 of the FOIA requires public authorities to confirm or deny whether information specified in a request is held and, where it is, to provide it to a requester.
12. The complainant has stated that he considers the council has not provided all the information it holds in relation to parts 1 and 4 of his request, namely:

*"1 Documentation relating to the termination of the "Contract for the provision of specialist care in the home, day care, independent supported living and community enabling services" in late 2012. Including certification that At Home in the Community Ltd. were in included in the circulation of this documentation.*

*4 Documentation relevant to the withdrawal of AHITC's "Kite Mark" approval status."*

13. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
14. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
15. In order to assist with this determination the Commissioner approached the council with a number of questions.
16. The council stated that, generally, it is not obliged to hold the specified information and nor would it necessarily be given such information. It acknowledged that the complainant may not accept this but confirmed that it would not necessarily receive such information as it would be irrelevant to the conduct of its affairs or to the tender process and it would not actively seek the information out.
17. More specifically, the council confirmed that, in order to be assured that the information had not been received from an external source, searches of the following were conducted:
  - Email search of the officers involved from legal and procurement. Emails are only held within a relevant journal for 12 months prior to automatic deletion;
  - the legal case management system;
  - the tendering and invoice system.
18. The council confirmed that the above are the only systems where such information would be likely to be found.
19. The Commissioner has considered the searches conducted by the council and its explanation of why it would not need to hold the relevant information. In the absence of any direct evidence which contradicts the council's position, the Commissioner has concluded that, on the balance of probabilities, it is likely that the council does not hold the requested information.
20. The Commissioner finds that, in relation to parts 1 and 4 of the request, the council complied with section 1 of the FOIA.

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

21. 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.
22. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43. This comments that:  
  
*"...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."*<sup>1</sup>
23. The council has explained that the withheld information relates to At Home in the Community (AHITC), a provider of care services. The council has stated that AHITC were originally on the council's framework for provision of "specialist care in the home, day care, independent supported living and community services" and provided independent supported living in a number of properties.
24. The council confirmed that a tender exercise was undertaken for a new framework for the provision of independent supported living but AHITC's application was unsuccessful.
25. Having viewed the withheld information, which forms part of AHITC's tender submission, the Commissioner is satisfied that the information relates to a commercial interest. However, it will only fall within the scope of the exemption if its disclosure would, or would be likely to prejudice a commercial interest. The Commissioner has gone on to consider the nature of the prejudice which the council has argued that disclosure would create.

#### *Relevant interests*

26. The council has stated that disclosure would be prejudicial to AHITC's and to its own commercial interests.

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

27. The council has not provided any evidence that it consulted with AHITC during its consideration of the request although it has confirmed that AHITC is of the view that, despite losing the tender, their submission should not be made public.

*Likelihood of prejudice*

28. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. "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.
29. In this case the council's responses have indicated that it is relying upon the "would prejudice" limb of the exemption.

*Nature of the prejudice*

30. The Commissioner considers that an evidential burden rests with public authorities to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, real, actual or of substance. In the Commissioner's view, if a public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected.
31. The Commissioner's view is that "prejudice" means not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some real way. If a "trivial or insignificant" prejudice is claimed, such that it cannot be said to have any real detrimental or prejudicial effect, then the exemption should not be accepted.
32. In this instance the council has stated that to disclose the information would be prejudicial to the commercial interests of both the council and to AHITC. The council has argued that disclosure of the information, which is only provided to it as part of a tendering process, would be considered unfair and would damage the council's ability to deal with other such entities. In other words, disclosure of the information would deter other organisations from engaging with the council in tender exercises.
33. The Commissioner considers that the council has not explained what specific form the prejudice would take; namely, it has not clarified what form the jeopardy to its relationship with AHITC would take and how disclosure of the information would produce this effect.

34. The Commissioner understands the generic point that disclosure of information relating to negotiations while such negotiations are "live" might have an impact. However, as noted above, the burden is on public authorities to demonstrate that any such impact is prejudicial within the terms of the exemption and to link disclosure of withheld information with specific prejudicial effects. It is not enough to simply define information, as the Commissioner considers the council has done in this case, using the terms which appear in the exemption. In addition, the council's reference to the confidential nature of the information are not relevant to the engagement of this exemption.
35. In cases where an authority has failed to explain the nature of an implied prejudice and failed to demonstrate the causal link between any such prejudice and the disclosure of information, the Commissioner is not obliged to generate relevant arguments on an authority's behalf.
36. Having considered the council's submissions, the Commissioner considers that its arguments are generic and do not explain the specific nature of the prejudice or make the necessary connection between the withheld information and any prejudice which disclosure is likely to cause.
37. In this instance, the Commissioner considers that the council has failed to explain the nature of the prejudice which would result from disclosure of the requested information. He has, therefore, concluded that the council has failed to demonstrate that the exemption is engaged. As he does not consider that the exemption applies, the Commissioner has not gone on to consider the public interest arguments.

### **Section 40(2) – third party personal data**

38. Section 40(2) of the FOIA provides that information which is the personal data of a third party (i.e. not the applicant) is exempt if a disclosure of the information would breach any of the data protection principles.
39. The first question which the Commissioner needs to consider is whether the information is personal data for the purposes of the Data Protection Act 1998 (DPA) or not. Personal data is defined in the DPA as information which

*"data which relate to a living individual who can be identified-*

*a) from those data, or*

*b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.*

*and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual"*

40. The council has explained that the information relates to service users of Independent Supported Living (ISL) and includes individual care packages. The withheld information constitutes individual service contracts for each of a number of service users and consists of names and addresses and the type of service received.

*Is the withheld information personal data*

41. Having considered its content the Commissioner is satisfied that the withheld information constitutes the personal data of service users.

*Is any of the information sensitive personal data?*

42. Section 2 of the DPA defines sensitive personal data as personal data which consists of information on the following:

- an individual's mental or physical health,
- their political opinions,
- their sex life,
- their racial or ethnic origin
- their religious beliefs
- whether they are a member of a trade union
- the commission or alleged commission of an offence by them, or any proceedings for any offence they have committed or are alleged to have committed.

43. The Commissioner accepts that much of the personal data falls into one or more of the above categories, and therefore constitutes sensitive personal data about the parties.

*Would disclosure of the information contravene any of the data protection principles?*

44. The council considers that the disclosure of the information would contravene the first data protection principle. This states that:



*"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –*

*(a) at least one of the conditions in Schedule 2 is met, and*

*(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met".*

45. In considering whether disclosure would be unfair, and thus contravene the first data protection principle, the Commissioner takes into account the expectations of the individuals concerned and the possible effects of disclosure.

*Nature of the information and reasonable expectations of the data subjects*

46. When considering whether a disclosure of personal data is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the individual. However, their expectations do not necessarily determine the issue of whether the disclosure would be fair.
47. Public authorities need to decide objectively what would be a reasonable expectation in the circumstances. In this case, the council has explained that the information relates solely to the provision of care services and that the individuals concerned would have had no reasonable expectation of their personal data being publically disclosed.

*Consequences of disclosure*

48. The council has explained to the Commissioner that it perceives there to be a substantial risk of harm to the individuals should their personal data be disclosed. In view of the nature of the information, which constitutes the most private variety of personal data, the Commissioner has concluded that the council was correct to identify the risk of harm.

*Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure*

49. There is always some legitimate public interest in the disclosure of any information held by public authorities. This is because disclosure of information helps to promote transparency and accountability amongst public authorities. This in turn may assist members of the public in understanding decisions taken by public authorities and perhaps even to participate more in decision-making processes.
50. Having considered the circumstances of this case and the withheld information itself, the Commissioner's view is that the right to privacy outweighs the legitimate public interest in disclosure. It is clear to the

Commissioner that the disclosure of the information would be outside the reasonable expectations of the individuals in question.

51. Additionally, the Commissioner considers that disclosure may limit the extent to which other individuals might be willing to share personal data with the council in the future, which could impede the council from undertaking its care duties. The Commissioner therefore considers that the council was correct to withhold the information about service users under the exemption provided by section 40(2).

## Right of appeal

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52. 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: 0116 249 4253

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)

53. 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.
54. 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**