

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

### **Decision notice**

**Date:** 12 January 2015

**Public Authority:** Hampshire County Council  
**Address:** The Castle  
Winchester  
Hampshire  
SO23 8UJ

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

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1. The complainant requested information from Hampshire County Council ("the council") relating to the consideration of a bid it had made. The council said that the information was exempt under section 43(2) of the Freedom of Information Act 2000 ("the FOIA") and the public interest did not favour disclosure. The Commissioner's decision is that the information was correctly withheld. He found that the council had breached section 17(1) for failing to issue a valid refusal notice within 20 working days. He does not require any steps to be taken.

#### **Request and response**

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2. On 10 June 2014, the complainant requested information from the council in the following terms:
  - *"Detailed feedback including comments in relation to the quality submission of our bid, together with notes taken in the scoring process"*
  - *"A copy of scoring matrix/criteria used for the scoring of each quality question"*.
3. The council responded on 12 June 2014 and said that it was not prepared to provide more feedback beyond what it had already given. It said that it would not release the score matrix/criteria and the scoring notes as to do so may prejudice fair competition in future tender opportunities.

4. On 18 June 2014, the complainant wrote to the council again and said that he wished to request the following information under the FOIA:
  - *"Copies of all notes taken and scoring applied in the evaluation of our bid for this service*
  - *Copy of the scoring matrix used in the evaluation of bids for this service – this should demonstrate basic criteria upon which the responses to the specific questions asked in this PQQ are judged"*.
5. The council responded on 18 July 2014. The council said that it wished to rely on the exemption under section 43(2), which relates to commercial interests, to withhold the information. It said that the public interest did not favour disclosure.
6. The complainant asked the council to conduct an internal review on 21 July 2014.
7. The council completed its review on 26 August 2014. It said that it wished to maintain its refusal.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 12 September 2014 to complain about the way his request for information had been handled. He asked the Commissioner to consider whether the council was correct to refuse to provide the information. He also complained that the council's response of 12 June 2014 was not a proper refusal notice, and the council's response of 18 July 2014 was outside the statutory 20 working day limit.

## **Reasons for decision**

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

9. The exemption under section 43(2) is engaged if disclosure of the information would or would be likely to prejudice the commercial interests of any person, including the public authority itself. The Commissioner has published detailed guidance on this exemption which may be accessed via the following link:

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

10. The Commissioner guidance explains 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. In this case, the council has explained that the information relates to a tender. The Commissioner therefore accepts that the information is commercial in nature.
11. For clarity, the specific withheld information in this case consists of hand written notes regarding the scoring awarded by different individuals for particular questions answered by the complainant in the council's pre-qualification questionnaire ("the PQQ"), and the criteria used for determining the score of each answer. The notes and the scoring criteria relate to questions 46 to 52 of the PQQ and are referred to as "additional questions". For ease of reference, the Commissioner will refer to this information from now on as the scoring notes and the model answers. The remaining questions were asked on a pass or fail basis except for the evaluation of references received. The score achieved for that has already been provided to the complainant.
12. The council told the Commissioner that it wished to argue that disclosure of the information described above would be likely to prejudice its own commercial interests. The First-Tier Tribunal (Information Rights) has established in previous cases that "would be likely to prejudice" means that there must be a real and significant risk of prejudice which is substantially more than a remote possibility but need not be more probable than not.
13. In its refusal notice and internal review, the council argued that disclosure of the information would be likely to prejudice its own commercial interests because it would be likely to prejudice its ability to carry out future tender exercises in a fair manner. It said that the disclosure would publicly reveal information that would be relevant to the evaluation of similar exercises in the future or other exercises even when not similar in the case of "core questions". The council argued that this would give some providers an advantage over others in the procurement process not privy to the information thereby prejudicing the council's ability to achieve "best value".
14. In its response to the Commissioner, the council elaborated further on the above argument. The council said that if certain providers were able to use the information to formulate their responses, this would be likely to prejudice the council's ability to assess the providers properly in order to determine that their responses accurately reflect the tenderers' previous experience in the relevant field or their ability to deliver specific processes and maintain the quality of service required. The council said the disclosure could ultimately expose it to the risk of entering into a contract with a provider who may not be able to sustain the service they

are contracted to provide, which would not provide the best value. It said that if the information was disclosed, the council would have to consider "re-framing" the criteria to ensure the quality of the providers.

15. The complainant argued that the service in question is very specific and therefore the information was not likely to be relevant to future procurement. The complainant also argued that the longevity of the contract means that any commercial sensitivity will have expired by the time of future procurement.
16. In response to the complainant's concerns, the council explained to the Commissioner that it had now entered into a contract for the provision of the service for a three year term from November 2014, with an option to extend for a further two years. It said that the contract was not one of unusual longevity and if the option to extend is not taken up, the re-procurement exercise could start as early as November 2016. The council said that it was likely that the existing evaluation criteria will remain relevant for a future procurement exercise.
17. The council explained that similar questions and evaluation criteria have, and are, in the process of being used for a number of procurement exercises. The council said it was not correct to say that the contract is so specific that the information is not likely to be relevant to other procurement activities in the future. As an example, the council said that questions on demonstrating an understanding of "personalisation" have been used numerous times, and specifically, those around working with service users and managing the quality of service provision have been asked in excess of thirty separate competitive procurement exercises. The council also provided a table to the Commissioner which it said provides a breakdown of which of the "additional questions" are relevant to past and future adult service procurement exercises.
18. The council also referred to comments in the High Court case of *Mears Limited v Leeds City Council No 2* [2011] EWHC 1031 (TCC)<sup>1</sup>, which the council said support its case that disclosure of this information would be likely to cause prejudice to its commercial interests. It said that this case involved, amongst other issues, the use of model answers which the claimant alleged should have been disclosed. It said that it is common practice for local authorities to use evaluation methodologies to brief evaluation panel members on the proper conduct of an evaluation

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<sup>1</sup> <http://www.bailii.org/ew/cases/EWHC/TCC/2011/1031.html>

and to ensure consistency. The council said that the conclusion in this case was that the Public Contract Regulations 2006 did not in general require disclosure of model answers. The following comments were made at paragraph 202:

*"Where, as is now common, the contracting authority provides those people who evaluate tenders with information such as model answers then, as shown in this case, there is generally no reason to disclose those. I accept that to have to do so would raise practical difficulties in being able to assess tenders when the tenderers had seen those model answers. However, the information such as model answers needs to be scrutinised to ensure that undisclosed criteria, sub-criteria and weightings are not introduced in this way"*

19. In view of the above, the Commissioner was satisfied that the council had persuasively argued that if the information was disclosed, there is a significant risk of commercial prejudice. The Commissioner accepts that disclosing the model answers (and the scoring notes that reveal information about the model answers) would be likely to reduce the level of competition between tenderers, thereby making it more difficult or impractical for the council to distinguish the merits of each provider and make a judgement about which provider may offer the best value and quality.
20. The council has clearly considered the nature of the criteria and has formed the view that it is general enough that it is likely to remain relevant to future procurement exercises. It has been able to identify specific examples of that. It has also had regard to the term of the specific contract in determining that the commercial sensitivity is likely to remain a factor in the future. The Commissioner agrees with the council that the term is a relatively short one and there is a real likelihood that the same or similar criteria will remain relevant in the near future.

### **Public interest in disclosing the information**

21. The scheme of the FOIA itself envisages that there is always some public interest in the disclosure of information. This is because it promotes the general aims of transparency and accountability and understanding of the decisions taken by public authorities.
22. In this particular case, the complainant has expressed concerns about the way in which the council scored his bid and he believes that he may have been treated unfairly. He argues that there is a public interest in disclosing the information, *"...in order to demonstrate genuine transparency of process and help to dispel any suspicions of favouritism displayed towards a particular tenderer"*.

23. The Commissioner accepts that disclosure of this information would allow for a greater level of public scrutiny on the issue of whether or not an appropriate tendering process had been followed with no maladministration or unfair treatment. As mentioned in the *Mears* case referenced by the public authority, there is the possibility of undisclosed sub-criteria, weightings or different or new criteria which could not have been reasonably anticipated by a tenderer. If a public authority is going to make a fair decision about which tender is the best value, it is important that tenderers are aware of how they will be assessed so far as possible.
24. Disclosure would also allow the public to scrutinise the methodology used by the public authority to try to ensure it achieves the best value for public money when conducting procurement exercises. There is particular value in this where the contract concerned involves a large amount of public expenditure. In this case, the Commissioner understands that the contract value of a five year period would be up to a total of £1,302,100.
25. Disclosure of this information could also help tenderers in the future to understand the bidding process. The Commissioner's published guidance referred to in paragraph 11 above states on page 9 the following:

*"Increasing the amount of information about the tendering process may in fact encourage more potential suppliers to the market. A better understanding of the process, the award criteria, knowledge of how successful bids have been put together, could also lead to improved bids being submitted in the future. This will lead to more competition and so decrease the costs to the public authority. Indeed where a contract comes up for renewal, limiting this kind of information may well favour the current contractor and reduce competition".*

### **Public interest in maintaining the exemption**

26. The council has been able to persuade the Commissioner that if this information had been disclosed, it is likely that it would have caused prejudice to the council's own commercial interests.
27. The FOIA recognises that there is a public interest in ensuring that undue harm is not done to the commercial interests of public authorities through the disclosure of information. It is clear that in this case, the details of the council's internal evaluative processes sought by the complainant play an integral role in ensuring that the public authority contracts with the best possible provider. There is a public interest in ensuring that this occurs in terms of quality of service and value for money. It is also important to ensure that a public authority is able to

evaluate properly a tenderer's likely performance in comparison to others.

28. The Commissioner accepts that the disclosure of this information would make it much more difficult to draw meaningful distinctions between different providers because it would reduce the natural competition that arises when no party is privy to an "ideal answer". The success of contracts that the council may enter into in the future ultimately depends on being able to assess the independent understanding and experience of individual providers. This is particularly important in cases where the council proposes to commit a substantial amount of public money to a contract that could potentially last for a term of five years.

### **Balance of the public interest**

29. Firstly, it is worth setting out some general background information and also some particular details concerning what happened in this case. This information is relevant to the Commissioner's analysis of the public interest.
30. Public procurement law regulates the purchasing by public sector bodies of contracts for goods, works or services. The law is designed to open up the EU's public procurement market. When the contracting authority is based in England, the relevant regulations are the Public Contracts Regulations 2006 ("the PCR"). These regulations implement into UK law the European Commission's Consolidated Directive on public procurement (2004/18/EC) which was adopted in March 2004.
31. In early 2014, the council advertised for a partner to provide a "Personal Planning and Direct Payment Service", focusing on delivering information, advice and support to people with assessed eligible needs for adult and disabled children's social care choosing to take a "Direct Payment" to buy non-commissioned services or to employ their own support.
32. Eleven organisations entered into the first stage of the tender, including the complainant. The council explained that the purpose of this stage is to identify a short-list of tenderers who will be invited to submit a tender at the next stage known as "invitation to tender". The criteria at the PQQ stage are restricted to personal standing, economic and financial standing, and technical and professional ability known as "selection criteria". It includes questions relating to the organisation's current status or past performance or experience.
33. The council told the Commissioner that a copy of its guidance notes are provided to all tenderers prior to the submission of the PQQ. It provided a copy of this guidance to the Commissioner. The guidance includes

detailed explanations about the scoring process, weighing, evaluation and detailed comments about specific questions except that it does not provide any specific comments in respect of the "additional questions" that formed the final part of the PQQ. There is only reference to a word limit. It said that general information about the procurement process is available on its website.

34. Three organisations were shortlisted. The council explained that the complainant was not selected for the shortlist and was notified by a "notice of exclusion" on 29 May 2014 in accordance with the PCR. PQQ scorings and a summary of the notes made by the evaluation officers were attached to the notice. Following this, there was a further exchange of correspondence between the council and the complainant during which the complainant challenged the exclusion and the council provided further specific feedback. The council explained that the complainant had not achieved a satisfactory score in respect of two particular questions which formed part of the final group of questions in the PQQ known as "additional questions", and it made specific comments to outline why.

35. The complainant remained dissatisfied, which resulted in the requests forming the subject of this particular complaint. However, in a response dated 12 June 2014, the council said:

*"The feedback provided by the Council is designed to help organisation [sic] understand where they have failed to achieve a satisfactory mark and/or to achieve the next mark available. It also aims to give some recognition of the areas that the tenderer has addressed well in their response. The feedback provided to an organisation is compiled from notes of the evaluation process. This feedback exceeds what we are expected to provide".*

36. As mentioned above, the complainant has argued that there is a public interest in ensuring that the council has acted properly and fairly when conducting this procurement exercise. He has specifically alleged that he was treated unfairly because he disputes the appropriateness of awarding no marks to two of the additional questions. He has argued that he cannot understand clearly the grounds upon which his bid was excluded without access to the information requested.

37. The Commissioner acknowledges that there is a strong public interest in ensuring that public authorities conduct fair procurement processes. Indeed, this is specifically regulated by the law as mentioned above. However, while there is always some public interest in transparency and accountability, it is a question of degree and reference must be had to the particular circumstances of the case and the withheld information in question. Having carefully considered the evidence and the withheld



information, it was not apparent to the Commissioner that any factors were present relating to this area that could tip the balance of the public interest in favour of disclosure.

38. In the Commissioner's view, there are no manifestly obvious errors or misuses of power that would be brought to light by disclosure and the council has been transparent to a reasonable extent. The Commissioner has seen all of the guidance and feedback provided to the complainant and he agrees with the council that this information is sufficiently comprehensive to allow the complainant to understand the reasons why the bid was rejected and how he can improve in future. There are also additional legal routes of challenge available if a tenderer believes that they have been treated unfairly.
39. As mentioned above, disclosure would have the additional benefit of allowing the public and tenderers to understand more about the bidding and evaluation process. The Commissioner has noted that the public authority does make some information available to the general public already and it also provides specific feedback to contractors, albeit on a more individual basis. The level of detail provided by this disclosure would increase understanding of the process and allow for some greater scrutiny but as always, there is the question of proportionality. The risk to the council's commercial interests must be weighed against the possible benefits that could accrue to the general public and tenderers.
40. The Commissioner has accepted that if the information was disclosed, it is likely that there would be prejudice to the council's interest. It is clear that the information represents a core component of the council's decision-making processes. The council clearly places a high value on its ability to assess properly the responses provided by potential contractors, so much so that the council informed the Commissioner that if the information was disclosed, it would be likely that the council would need to try to "re-frame" the questions. It envisages further requests for information and further re-writes and points out that ultimately, there are only so many ways it could seek information to help it to assess the central skills and qualities it requires from a contractor. The council considers that this would be necessary to protect itself from entering into a contract with an unsuitable candidate.
41. As acknowledged in the *Mears* case, it is apparent that disclosure of information relating to model answers would pose clear practical difficulties. It is important that the council is able to conduct its processes in a way that is fair and focuses on the main skills and qualities it needs. The questions it has posed are no doubt designed to extract that information. In the case of some of the questions, it would render the exercise almost pointless if for example the council asks a provider "What is your understanding of personalisation and how do you

incorporate this into your working practice?" and then provides a bullet pointed answer. What is being sought is clearly a demonstration that an individual contractor has carefully considered the brief, understands that brief and can draw on relevant experience. Not being privy to everything that the council is looking for in an ideal response allows for the necessary element of competition.

42. Attempting to "re-frame" the questions to protect the value of future contracts would not only be time-consuming but may also increase the risk of introducing more tangential points. The difficulties encountered by the authority in the *Mears* case are a good example of how important it is for public authorities to ask questions in a clear and focused manner, so that tenderers are able to present themselves fairly and the authority is able to comply with its legal requirements under the PCR. A high value should be placed on preserving this ability against this background in the Commissioner's view.
43. The Commissioner has also accepted that the council has used, and intends to use, the same or similar questions in future tender exercises. The timing of the request and the nature of the information does not therefore reduce the harm that is likely to result from the disclosure. On the contrary, the council has made a reasonable case to show that there would be wider-reaching consequences of disclosure that would go beyond this particular contract.
44. The Commissioner considers that the prejudice that would be likely to occur would be less in the case of the notes themselves because these are limited to the complainant's individual bid. Nonetheless, they do have wider relevance because the comments are revealing of the nature of the criteria against which the bid was assessed and could still be used by tenderers in the future seeking to understand more about what the council is seeking in the answers. If this type of information was routinely disclosed under the legislation, it may become possible for tenderers to build up a detailed picture of useful criteria over time.
45. In view of the above, the Commissioner accepts that there is the likelihood that the prejudice would be sufficiently extensive, frequent and severe to outweigh the possible benefits arising from the increased transparency if the information was disclosed. The information already made available strikes a fair balance in the circumstances and there are no pressing factors apparent to the Commissioner that tip the balance in favour of disclosure in this case. The Commissioner therefore considers that the public interest in maintaining the exemption outweighed the public interest in disclosure.

## **Procedural issues**

### **Section 17(1)**

46. Section 17(1) of the FOIA sets out obligations concerning refusals of requests for information. The complainant has complained that the council's response of 12 June 2014 was not a proper refusal notice. The Commissioner considered the council's response and he notes that it did not state that the exemption under section 43(2) applied and did not explain why it applied. The council did subsequently provide this information prompted by another request from the complainant but it was outside of the statutory 20 working day limit. The Commissioner therefore finds that the council breached section 17(1) for failing to provide a refusal notice complying with the provisions of that section within 20 working days.

## Right of appeal

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47. 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)

48. 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.
49. 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**  
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