

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

### **Decision notice**

**Date:** 27 April 2015

**Public Authority:** London Borough of Southwark  
**Address:** PO Box 64529  
London  
SE1P 5LX

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

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1. The complainant requested from the London Borough of Southwark ("the Council") information about work undertaken by a contractor on a particular Travellers' site. The Council provided some information but withheld details of variations to the costings for the work under section 43(2).
2. The Commissioner's decision is that the Council has incorrectly applied section 43(2) to the withheld information.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
  - To disclose to the complainant the information that it withheld under section 43(2).
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 4 November 2014 the complainant requested the following information under FOIA:

*"Please provide all documentation regarding Springtide Travellers site Project including the Practical Completion Certificate and the NICEIC Certificate."*

6. The Council clarified with the complainant that the request was for:

*"A copy of the Electrical Certificate, a copy of the Practical Completion Certificate and a copy of the variation costings."*

7. The Council responded on 10 December 2014. It provided copies of the Electrical Certificates and of the Practical Completion Certificate. It stated that it held information on the variation of costs for this work but that it believed that this was exempt from disclosure under section 43(2) of FOIA.
8. The complainant requested an internal review on 11 December 2014. On 5 January 2015, the Council provided the outcome of its internal review in which it maintained its original position.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 5 February 2015 to complain about the way his request for information had been handled. In particular he complained about the Council's refusal to disclose information on the variation of costs under the relevant contract.
10. During the course of the Commissioner's investigation the Council clarified that the only information held falling within the scope of the request was two 'Change Instructions' both dated 19 November 2014. Although this information did not exist at the time the request was made section 1(4) enables public authorities to consider the information held at the point it actually starts to deal with the request, providing that is within the statutory time for compliance. In light of this the Commissioner considers the Council were right to consider this information as falling within the scope of this request.
11. The Commissioner considered whether the Council handled the complainant's request in accordance with FOIA. Specifically, he looked at whether it was entitled to withhold information under the exemption in section 43(2).

## **Reasons for decision**

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### **Section 43(2) – Prejudice to commercial interests**

12. Section 43(2) provides that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person.
13. The Council has argued that disclosure of the information withheld under section 43(2) would be likely to prejudice its commercial interests and those of the contractor carrying out the work. The Commissioner notes that the Council consulted the contractor about the disclosure of this information and the Council's arguments reflect the views of the contractor in terms of the likely prejudice to its commercial interests.
14. The information that was withheld was two change instructions in respect of the contract for work on the relevant site dated November 2014. This contains details of additional work and some reductions in work, to be undertaken by the contractor and details of how much the contractor is to be paid for each additional piece of work or, where relevant, how much the cost of the work is being reduced.

### **Engagement of section 43**

15. The Commissioner initially considered whether the relevant criteria for the engagement of section 43(2) were satisfied.

### **The Council's arguments**

16. The Council argued that disclosure of the withheld information would be likely to prejudice its own commercial interests and also those of its contractor. It explained that it undertakes tendering processes for commissioning work. Paramount in this process was that the companies tendering for works were unaware of each other's rates so that the tenders were competitive. This was to ensure that it obtained value for money in its spending of public funds.
17. The Council informed the Commissioner that it believed that if the rates used by any of its tenderers, especially the successful ones, were made public this could easily give competitors an unfair advantage when any future works were opened up to tender. This would make it difficult for them to compete fairly against other companies whose rates were not known. It could also damage the reputation of the Council's tendering process and influence its ability to deliver value for money in public sector contracts.
18. The Council went to explain that it had found it difficult to attract tenders for travellers' sites as they could be complicated environments

to work in. It informed the Commissioner that in this particular case only three out of six companies invited to tender for the work on the site returned a completed bid. It believed that if the rates that these companies quoted for works were released to the public it would be likely to discourage companies from tendering for future works. This could make it difficult for the Council to carry out future works if it was unable to attract companies to carry out works and could lead to the costs for future works being considerably higher.

19. The Council also provided the Commissioner with a copy of a letter from its contractor following a consultation about the information request. The contractor pointed out that as part of a tendering process; it was absolutely paramount in that process that the companies tendering for work were unaware of each other's rates. This ensured the competitive nature of the process and ensured value for money, especially where public funds were involved. It went on to explain that if the rates used by successful tenderers were made public, this could easily give competitors an unfair advantage when any future works were being tendered for.
20. As far as the contractor was concerned, it believed that, if the information were disclosed, it would be difficult for it to compete fairly against other companies whose rates were not known. This would effectively influence the tender process in a negative way. It was of the view that many companies would not commit to a tender if their rates were subsequently made public. It explained that these rates were carefully arrived at using a supply chain process built up after many years of trading and that disclosure could result in that competitive relationship being lost.
21. It also believed that disclosure would skew the tender rates submitted by companies who had an unfair advantage over the contractor. This could also damage its reputation, undermine the Council's tendering process and influence its ability to deliver value for money in public sector contracts.

## **The Commissioner's view**

### **(i) Applicable interest within the exemption**

22. The Commissioner considered whether the prejudice claimed by the Council is relevant to section 43(2). The Commissioner is satisfied, in light of the Council's arguments, that the potential prejudice that it has identified relates to its commercial interests and those of its contractor.

**(ii) The nature of the prejudice**

23. The Commissioner next went on to consider whether the prejudice being claimed was “real, actual or of substance” ie not trivial and whether there was a causal link between disclosure and the prejudice claimed. The Commissioner is satisfied that the prejudice being claimed is not trivial or insignificant and that there is the relevant causal link.

**(iii) The likelihood of prejudice**

24. The Council argued that the disclosure of the withheld information would be likely to prejudice its own commercial interests and those of its contractor. In the case of *John Connor Press Associates Limited v The Information Commissioner* the Tribunal confirmed that, when determining whether prejudice would be likely to occur, the test to apply is that “*the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.*” (para 15). In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote.
25. The Commissioner, having examined the withheld information, notes that it concerns the demolition and rebuild of amenity blocks on a specific Travellers’ site. As previously noted, it contains details of additional work, and some reductions in work, to be undertaken by the contractor and details of how much the contractor is to be paid for this additional work or, where relevant, how much the cost of the work is to be reduced.
26. In relation to a significant number of additional items of work being charged for which are detailed in the withheld information, it is not obvious to the Commissioner how disclosure of the withheld information would allow the contractor’s rate of charging for particular types of work to be determined, and, consequently, how disclosure would be likely to prejudice its commercial interests. For example, descriptions such as “change in the tiles and electrics”, “extra over build cost” and “change to [name removed]’s shower” contain no indication of what exactly is being done for the price being paid. For some items there is no indication of the amount of work being undertaken for the price being paid, for example, a description such as “extra tiling” does not give any indication as to area of wall to be tiled. Consequently, the Commissioner is not satisfied that the disclosure of this information would be likely to prejudice the commercial interests of the contractor or the Council.
27. The Commissioner also notes that the withheld information contains details of the fees of two companies involved in the redesign of the amenity. He is not clear as to how disclosure of this information would

be likely to prejudice the commercial interests of the contractor or the Council.

28. The Commissioner does accept that where the description in the withheld information is sufficiently specific to draw conclusions about the contractor's rates for specific types of work, disclosure would be likely to prejudice the commercial interests of the contractor. This is because for a period of time whilst any indications as to the contractor's rates for particular types of work provided by the withheld information were still current, the disclosure of this information might make it more difficult for contractor to be successful in a future tendering exercise for the same type of work in the same type environment. This in turn might have some detrimental impact on the Council's tendering processes.
29. In light of the above, the Commissioner, accepts that section 43(2) is engaged in respect of the contractor's and Council's commercial interests in relation to some of the withheld information from which it might be possible to ascertain the contractor's rates for particular types of work. As it is a qualified exemption, he went on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

### **Public interest test**

#### **Public interest arguments in favour of maintaining the exemption**

30. The Council explained to the Commissioner that it believed that the public interest favoured withholding the information because the effect on the commercial relationship between the Council and its contractors from disclosure and the resulting substantial costs that could arise to the authority could not be in the overriding public interest to achieve best value and cost effectiveness for the residents of Southwark as a whole. Furthermore, disclosing the information could also damage the reputation of the Council's tendering process and influence its ability to deliver value for money in public sector contracts.
31. The Council considered that the risk of prejudice to its ability to carry out works necessary to maintain Council stock and deliver value for money contracts of any size, not only on this specific scheme (which is a specialised area), but potentially other multi million pound contracts, outweighed the public interest in disclosure. The Council also believed that disclosure would inhibit small and medium enterprises from being able to tender effectively.
32. The Commissioner has agreed with the Council that section 43(2) is engaged but only in respect of parts of the withheld information. Those parts are the limited number of work items which if disclosed are

sufficiently detailed to allow conclusions to be drawn about the contractor's rates for specific types of work.

33. The Commissioner's acceptance that section 43(2) is engaged in respect of parts of the withheld information means that he accepts that prejudice would be likely to happen. However, he also needs to consider the severity of any prejudice that might occur.
34. The Commissioner initially notes that the contract concerns a very specific piece of work, the demolition and rebuild of amenity blocks on a Travellers' site. If the contractor were tendering for a very similar contract, then the limited number of work items for which the contractor's rates might be ascertained from the withheld information might be of value to competitors in respect of trying to predict what price the contractor might include in its tender for some parts of the work but certainly not all of it.
35. However, the Commissioner is aware that when tendering for contracts, contractors may change price rates, even within a relatively short timeframe, for a wide range of reasons such as changes in market prices for goods or materials, the availability of relevant skilled workers, the contractor's willingness to reduce profit margins, differences in geographical areas and specific factors related to a particular contract.
36. The Council informed the Commissioner that Travellers' sites, understandably, are complicated environments to work in and that it had found it difficult to attract tenders for such work. In light of this, the Commissioner presumes that the contractor's rates for this specific contract might be different to those for other contracts. Consequently, any indication of the rates that the contractor charged for particular work for this contract would be specific to this contract and possibly, one of a very similar nature, and not necessarily applicable to other types of contracts for which it might wish to tender.
37. Finally, the Commissioner would also note that, whilst price is a very important factor to be considered in a public authority's tendering exercise, it is not the sole determinant of the outcome. Other factors such as the quality of what is being offered and the previous experience of the contractor will also normally be taken into account in any decision that is taken. These other factors, particularly factors such as previous experience, may be of great significance in contracts such as this one which involve a contractor working in what might be regarded as a non-standard environment.
38. In light of the above, the Commissioner, whilst accepting that there would be likely to be some prejudice to the contractor's and the Council's commercial interests from the disclosure of some of the

withheld information, is not convinced that it would be particularly severe.

### **Public interest arguments in favour of disclosing the information**

39. The Commissioner recognises that there a general public interest in accountability and transparency in relation to the activities of public authorities. In this case, disclosure of the withheld information would increase the Council's accountability and transparency in the awarding of additional work to the contractor under this contract. This would help the public to satisfy itself that public money was being spent appropriately and wisely. This is particularly important in the current economic climate where significant reductions in funding for local authorities means that there is great public concern about spending priorities and local authorities obtaining value for money.
40. The Commissioner notes that the withheld change instruction contains a significant amount of additional work to be undertaken by the contractor in addition to that originally contracted for, which is inevitably reflected in a significant increase in the overall price. Given that the amounts of money involved are likely to be regarded by the public as significant amounts, there is a very clear public interest in the disclosure of details of what further work was undertaken and what prices were paid for different parts of the work.
41. The Commissioner also believes that there is a valid argument that the disclosure of details of the contractor's rates would be in the public interest as it would help to enhance competition for public sector contracts. If the rates being paid to a contractor under a contract are made public this may stimulate interest from other contractors when the opportunity to tender for similar contracts arises in future. These contractors may be willing tender at lower rates than the existing contractor and so lead to a reduction in spending on such contracts.
42. The complainant argued in his submission to the Commissioner that there was a public interest in the disclosure of the information that he had requested as he believed that it would reveal that variation costings for this contract were being inflated. This is not a matter on which the Commissioner is able to form any view based on the evidence contained in the withheld information and so it is not a factor which he has taken into account in assessing the public interest in disclosure.

### **Balance of public interest arguments**

43. After weighing the public interest arguments, the Commissioner has determined that, in relation to the withheld information from which it is possible to ascertain the contractor's rates for particular types of work,

the public interest factors in not prejudicing the commercial interests of the contractor and the Council, given the likely limited severity of any prejudice, do not outweigh the public interest factors in favour of disclosure. Consequently, he has decided that section 43(2) does not apply to these parts of the withheld information.

44. The Commissioner has therefore concluded that none of the withheld information is exempt from disclosure under section 43(2) and that it should be disclosed to the complainant.

## Right of appeal

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45. 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)

46. 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.
47. 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 .....**

**Rachael Cragg**  
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