

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 June 2016

Public Authority: Gateshead Metropolitan Borough Council

Address: Civic Centre
Regent Street
Gateshead
NE8 1HH

Decision (including any steps ordered)

1. The complainant has requested information relating to domiciliary care services. Gateshead Metropolitan Borough Council disclosed some information, withheld other information under the exemptions for prejudice to commercial interests (section 43(2)) and applied section 12(1) to some of the request because it considered that compliance would exceed the cost limit.
2. The Commissioner's decision is that Gateshead Metropolitan Borough Council:
 - Correctly applied section 12(1) but did not provide advice and assistance and breached section 16;
 - Correctly engaged the exemption in section 43(2) but failed to show that the public interest favoured maintaining the exemption;
 - Failed to demonstrate that section 44(1)(a) 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) and,
 - contact the complainant and provide advice and assistance in compliance with section 16 in respect of information in parts 1(ii), 2(ii) and 3(ii) of the request.

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

5. On 27 October 2015, the complainant wrote to Gateshead Metropolitan Borough Council (the "council") and requested a range of information relating to contractors' provision of domiciliary care services. The full text of the request is reproduced at the annex to this decision notice.
6. The council responded on 26 November 2015. In relation to request parts 1(ii) and 2(ii) and, (in relation to CQC safeguarding alerts), parts 1(vii) and 3(vii), the council stated that the information was not held. The council provided information in response to request parts 1(iii), 2(iii), 3(iii). The council confirmed that the remaining information was being withheld under the exemption for prejudice to commercial interests, section 43(2) of the FOIA.
7. Following an internal review the council wrote to the complainant on 5 February 2016. It stated that it was maintaining its position.

Scope of the case

8. Following the internal review on 5 February 2016 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. During the course of the Commissioner's investigation the council confirmed that it was additionally applying the exemption for prohibitions on disclosure (section 44(1)(a)) to the information withheld under section 43(2). In relation to request parts 1(ii), 2(ii) and 3(ii), the council also revised its position from stating that the information was not held to confirming that the cost of compliance would exceed the appropriate limit (section 12(1)).

Reasons for decision

Section 43(2) – prejudice to commercial interests

10. The council has withheld the information in request parts (1)(i), 1(iv), 1(v), 1(vi), 1(vii) in respect of safeguarding alerts to the council, 1(viii), 2(i), 2(iv), 2(v), 2(vi), 2(vii), 2(viii), 3(i), 3(ii), 3(iv), 3(v), 3(vi), 3(vii) in respect of safeguarding alerts to the council and 3(viii) under section 43(2) of the FOIA.
11. Section 43(2) provides an exemption from disclosure for 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.
12. "Commercial interests" in the context of this exemption encapsulates a wide variety of activities. In this case, the withheld information relates to the provision of domiciliary care services by third party companies. As the information relates to the provision of a service in a competitive market the Commissioner is satisfied that it is commercial in nature and that it falls within the scope of the exemption.
13. In order for the exemption to be engaged it is necessary for it to be demonstrated that disclosure of information would result in some identifiable commercial prejudice which would or would be likely to be affect one or more parties.
14. The ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; i.e. either prejudice 'would' occur or prejudice 'would be likely to' occur.
15. With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15).
16. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).

The nature of the prejudice

17. The council has stated that disclosure would prejudice its domiciliary care contractors' commercial interests.
18. The council has stated that disclosure of the information would allow potential competitors of the contractors to know whether the companies had experienced problems performing contracts and what action, if any had been taken against them.
19. In accordance with the code of practice issued under section 45 of the FOIA (the "code"), the council contacted the parties potentially affected by the request (the contractors) and sought their views.¹ The Commissioner has had sight of the relevant correspondence and has considered the views of these third parties and the arguments provided by the council.
20. The council has argued that disclosure would result in adverse press coverage for the contractors which may impact on their reputation and could result in loss of business. Essentially, the council has argued that knowledge of contractors' poor performance would prejudice their ability to bid for future contracts.
21. In relation to the interests of the service providers, having considered the relevant arguments, the Commissioner accepts that disclosure of the information would place information about providers' performance in the public domain that would not otherwise be available. He accepts that, as competitors might not be subject to similar disclosures, this would unfairly impact on providers' ability to compete in negotiations for other service contracts. The Commissioner has concluded, therefore, that in relation to the commercial interests of the service providers, the exemption is engaged. He has gone on to consider the public interest.

Public interest in disclosing the information

22. In cases where the Commissioner accepts that section 43(2) was engaged, he must go on to consider the application of the public interest test associated with this exemption. This provides that even when the exemption is engaged, information can only be withheld if in all the

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<http://webarchive.nationalarchives.gov.uk/20150730125042/http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.

23. The Commissioner considers that 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 aims of transparency and accountability, which in turn promotes greater public engagement and understanding of the decisions taken by public authorities.
24. The council has acknowledged that disclosure of the withheld information would increase its accountability and transparency with regard to the contracts it has awarded to existing care providers. It has argued that this would help to satisfy the public that public money was being spent appropriately and wisely. The council has also suggested that the latter is particularly important in the current economic climate, where significant reductions in funding for local authorities have enhanced the need for responsible and accountable public spending.
25. The Commissioner considers that the provision of care to vulnerable individuals is a particularly important and sensitive aspect of a local authority's duties. It is an area that will always attract strong public concern and the Commissioner considers that this provides a specific and strong public interest rationale for disclosure.

Public interest in maintaining the exemption

26. The Commissioner acknowledges that disclosure of the information would expose potential weaknesses in the ability of a contractor to provide care services. Public knowledge of this could result in contractors being overlooked in future tendering rounds, thus damaging their commercial interests.
27. The Commissioner accepts that the disclosure of the information would prejudice the commercial interests of the contractors because it would be likely to cause reputational damage. This, in turn, would place contractors at a disadvantage in comparison with other providers which would be likely to result in financial loss.
28. The legislation recognises that there is a legitimate public interest in ensuring that undue harm is not done to the commercial interests of third parties through the disclosure of information under the FOIA. There is also a public interest in protecting the relationship of trade between the council and third party businesses and ensuring that businesses are not discouraged unnecessarily from entering into arrangements with public authorities that contribute to public services.

Balance of the public interest

29. In weighing the balance of the public interest, the Commissioner has given due weighting to the public interest in shielding commercial interests from harm, something which the exemption is designed to protect.
30. However, the Commissioner considers that, since the FOIA came into force some 10 years ago, third parties entering into contracts with public authorities should either be aware of or should be advised by the authority in question of, the potential for information disclosure. Whilst he accepts that section 43(2) is designed to protect commercial interests this must always be balanced with the broader public interest in transparency and accountability.
31. Contractors are paid from the public purse and making information regarding their performance available would assist the public in determining whether they are providing value for money. The Commissioner considers that nature of the service is such, relating as it does to the provision of care, that the need for transparency and accountability is particularly acute.
32. The Commissioner also considers that transparency in this instance would enhance competition in the public care provision market since contractors would be encouraged to improve the service and value for money they offer in order to be successful in tender exercises. The nature of commerce is such that successful parties are those which are able to offer something which a competitor does not. Knowledge of a contractor's failings and their strengths would enhance the competitive tendering process.
33. The Commissioner also considers that widespread cuts to local authority funding which are a feature of the current public spending climate intensifies the duty of public authorities to obtain value for money when outsourcing services. There is a strong public interest in authorities doing this and being seen to be doing this to reassure the public that limited funds are being wisely allocated.
34. Having weighed the relevant arguments, whilst he acknowledges that disclosure would impact on service providers' commercial interests, the Commissioner considers that such an effect is counterbalanced by the stronger public interest arguments in favour of disclosure.
35. The Commissioner has concluded that, on the facts of this case, the public interest favours disclosing the withheld information.

Section 44(1)(a) – prohibitions on disclosure

36. Information is exempt under section 44(1)(a) if disclosure is prohibited by other legislation. The exemption is not subject to a public interest test.
37. In this case the council has argued that section 21 of the Public Contracts Regulations 2015 provides the relevant statutory prohibition.
38. Section 21 of the Public Contracts Regulations 2015 (PCR) states:
- "21.—(1)** *A contracting authority shall not disclose information which has been forwarded to it by an economic operator and designated by that economic operator as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.*
- (2) Paragraph (1) is without prejudice to—*
- (a) any other provision of this Part, including the obligations relating to the advertising of*
- awarded contracts and the provision of information to candidates and tenderers set out in regulations 50 and 55 respectively;*
- (b) the Freedom of Information Act 2000(a);*
- (c) any other requirement, or permission, for the disclosure of information that is applicable under the law of England and Wales or, as the case may be, Northern Ireland.*
- (3) Contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure."*²
39. The Commissioner notes that section 21(1) of the PCR appears to provide a statutory prohibition on the disclosure of information forwarded to a public authority by an economic operator which has been designated as confidential.
40. However, the Commissioner further notes that section 21(1) is qualified later on in section 21(2). In relation to this qualification, paragraph 65 of the Commissioner's guidance 'Outsourcing and freedom of information - guidance document' states the following:

² http://www.legislation.gov.uk/ukxi/2015/102/pdfs/ukxi_20150102_en.pdf

*"The provision that the prohibition is without prejudice to FOIA (or other disclosure requirements or permissions) means that if information that the contractor has designated as confidential is requested under FOIA, the PCR themselves do not act as a statutory bar that would prevent disclosure under section 44 of FOIA. This appears to be a move towards greater transparency, since it is a change from the previous version of the Public Contracts Regulations from 2006. The previous version did not contain an equivalent reference to FOIA, and so they did provide a statutory bar. Although the statutory bar has been removed, the information may still be withheld under other FOIA exemptions discussed in this section, if they are engaged."*³

41. Having considered the council's arguments and referred to his own guidance on this matter, the Commissioner has concluded that section 21 of the PCR does not constitute a statutory prohibition on the disclosure of information under the FOIA. He, therefore, finds that section 44(1)(a) is not engaged in this case.

Section 12 – cost exceeds appropriate limit

42. In this case the council has applied section 12(1) of the FOIA to parts 1(ii), 2(ii) and 3(ii) of the request.
43. Section 12(1) provides that a public authority is not obliged to comply with a request where it estimates that the cost of doing so would exceed the appropriate limit, which for the council is £450. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "fees regulations") provide that the cost of a request must be calculated at the rate of £25 per hour, providing an effective time limit of 24 hours. The fees regulations also specify the tasks that can be taken into account when forming a cost estimate as follows:
 - Determining whether the requested information is held.
 - Locating the information, or a document which may contain the information.
 - Retrieving the information, or a document which may contain the information.
 - Extracting the information from a document containing it.

³ <https://ico.org.uk/media/for-organisations/documents/1043530/outsourcing-and-freedom-of-information.pdf>

44. A public authority is required to estimate the cost of a request, rather than form an exact calculation. The task for the Commissioner here is to reach a conclusion as to whether the cost estimate made by the council was reasonable; if it estimated reasonably that the cost of compliance with the request would exceed the limit of £450, section 12(1) applied and it was not obliged to comply with the request.
45. In relation to request parts 1(ii), 2(ii) and 3(ii) the council has explained that it receives an electronic report from care providers which shows clocking ins and outs but that this report is not complete as not all clients allow care providers to clock in and out from their property.
46. The council has stated that the report in question has over 12,000 entries per week and that, in order to answer questions 1(ii), 2(ii) and 3(ii), it would be necessary to scrutinise that information and extract it. The council has explained that it does not routinely scrutinise the information received as it does not have the resources to do that.
47. The council has explained that identifying and extracting the information required to answer questions 1(ii), 2(ii) and 3(ii) would exceed the appropriate limit. The council confirmed that, on the basis of a conservative estimate of 5 minutes scrutiny per entry, the time taken would exceed 1000 hours.
48. Having considered the council's explanations, the Commissioner is satisfied that the cost of complying with the request parts would exceed the appropriate limit and he finds that the council correctly applied section 12(1) in this case.
49. The Commissioner notes that, in this case, the council has stated that, even if it were able to comply with the request parts within the confines of the appropriate limit, the information would, in any event, be exempt under section 43(2).
50. The fees regulations clearly set out what tasks public authorities are able to include in their estimate of the cost of complying with a request. The Commissioner's own guidance explicitly confirms that:

"...a public authority cannot include the staff time taken, or likely to be taken, in considering whether any exemptions apply in the costs

*estimate as this activity does not fall within the list of permitted activities.*⁴

51. In view of this, the Commissioner has not considered the council's application of section 43(2) to these parts of the request further.

Section 16 – Advice and Assistance

52. Section 16 of the FOIA states:

"(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to person who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice issued under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case."

53. In relation to the provision of advice and assistance in cases where section 12(1) is being applied, paragraph 14 of the code of practice issued under section 45 of the FOIA (the "code") states:

"Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying would exceed the "appropriate limit" (i.e. cost threshold) the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee."⁵

54. The value of providing advice and assistance is, for example, that it enables an applicant to understand what information they may be able to obtain within the cost limit and to make a refined request which focusses on the information they most want. In this case the complainant has been denied that opportunity.

⁴ https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

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<http://webarchive.nationalarchives.gov.uk/20150730125042/http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

55. As the Commissioner has found that the council did not, in this case, provide advice and assistance in conformity with the code, he has concluded that it breached section 16. The council should now contact the complainant and provide appropriate advice and assistance in relation to parts 1(ii), 2(ii) and 3(ii) of their request.

Right of appeal

56. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

57. 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.
58. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex – request for information of 27 October 2015

“ I would be grateful if you could kindly supply the following information in relation to Home Care Services in Zones 1, 2 & 3 if held by the Council:

(1) With regards to Home Care Services in Zone 1, from the contract commencement dates (i.e. the relevant dates of transfer) to date, in relation to the allocated packages to Clece Care Limited -

- (i) the number of missed visits by Clece Care Limited;*
- (ii) the number of late visits by Clece Care Limited outside the agreed ratings;*
- (iii) the number of packages unable to be covered by Clece Care Limited including by whom the package was covered;*
- (iv) the number of complaints received by the Council with regards to (i) - (iii) above;*
- (v) the nature of such complaints with regards to (iv) above;*
- (vi) the response and/or action taken by the Council with regards to (i) - (v) above;*
- (vii) the number of Safeguarding Alerts made either to the Council or the Care Quality Commission; and*
- (viii) the response/action taken by the Council with regards to (vii) above.*

(2) With regards to Home Care Services in Zone 2, from the contract commencement date (i.e. the relevant date of transfer) to date, in relation to the allocated packages to Comfort Call Limited -

- (i) the number of missed visits by Comfort Call Limited;*
- (ii) the number of late visits by Comfort Call Limited outside the agreed ratings;*
- (iii) the number of packages unable to be covered by Comfort Call Limited including by whom the package was covered;*
- (iv) the number of complaints received by the Council with regards to (i) - (iii) above;*
- (v) the nature of such complaints with regards to (iv) above;*
- (vi) the response and/or action taken by the Council with regards to (i) - (v) above.*
- (vii) the number of Safeguarding Alerts made either to the Council or the Care Quality Commission; and*
- (viii) the response/action taken by the Council with regards to (vii) above.*

(3) With regards to Home Care Services in Zone 3, from the contract commencement date (i.e. the relevant transfer date) to date, in relation to the allocated packages to Dale Care Limited -

- (i) the number of missed visits by Dale Care Limited;*
- (ii) the number of late visits by Dale Care limited outside the agreed ratings;*
- (iii) the number of packages unable to be covered by Dale Care Limited including by whom the package was covered;*
- (iv) the number of complaints received by the Council with regards to (i) - (iii) above;*
- (v) the nature of such complaints with regards to (iv) above;*
- (vi) the response and/or action taken by the Council with regards to (i) - (v) above.*
- (vii) the number of Safeguarding Alerts made either to the Council or the Care Quality Commission; and*
- (viii) the response/action taken by the Council with regards to (vii) above."*