

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 March 2017

Public Authority: Surrey County Council
Address: County Hall
Penrhyn Road
Kingston upon Thames
Surrey
KT1 2DW

Decision (including any steps ordered)

1. The complainant has requested average care package cost information regarding Leonard Cheshire Disability ("LCD"). Surrey County Council (the "Council") provided some detail but refused to provide much of the information citing section 43(2) (prejudice to commercial interests) as its basis for doing so. Following correspondence with the Commissioner, the Council disclosed the requested information to the complainant.
2. The Commissioner's decision is that the Council was not entitled to rely on section 43(2) as its basis for withholding the requested information. In failing to provide the information within 20 working days following the request, the Council contravened the requirements of section 1 and section 10 of the Act.
3. Given that the Council has already disclosed the information, no steps are required.

Request and response

4. On 14 February 2016, the complainant requested information of the following description:

"In January 2015, I sent Freedom of Information requests to all bodies with social care responsibility throughout the UK to ask them about their contracts with Leonard Cheshire. You refused, citing the exemption afforded in S43 of the Freedom of Information Act. A key reason for your reliance on that exemption was that you were "currently identifying particular care packages for review across providers"; an aspect you

later relied upon with the ICO, to whom you stated "The Council noted that it was currently undertaking a review of some of its care packages. The review may lead to further commercial discussions".

You were the only body with social services responsibility, of the 172 throughout the country, to refuse to provide the information concerned.

I am hoping that your potential negotiations have now occurred and thus that the S43 exemption is now no longer relevant. To that end, I should be grateful if you could tell me the following for your situation as of the end of January 2015:

Leonard Cheshire Disability (LCD) claim that they would like to pay their carers the Living Wage but that they are not paid enough by social care funders such as yourself to do so.

I wonder if you could please tell me:

1) what representations Leonard Cheshire Disability (LCD) had made prior to the end of January 2015 to the Council asking for increases in the fees paid for social care provided by them, in order to pay their carers the Living Wage.

2) Some idea as to the fees being paid by the Council to LCD for residential care at the end of January 2015, per resident per week. A range of fees or a set of anonymised figures of the fees perhaps. Other councils have opted to supply statistical median and range as they were concerned that individual fees could make it possible for people to have a guess at which residents had which fees.

3) Equivalent information for fees paid to other providers for residential care in care homes for people with physical impairments under the age of 65.

[4] Further, I should be grateful if you could inform me if Leonard Cheshire have made any representations to you since January 2015 asking for you to increase the fees paid to them to enable them to pay the Living Wage (the version that was around before the Autumn statement, that is the amount set by the Living Wage Foundation, not the "living wage" invented by Osborne for his autumn statement)."

5. For ease of future reference, the Commissioner has added numbering to the fourth request.
6. The complainant chased a response from the Council on 14 March 2016.

7. On 19 April 2016, the Council responded, apologising for its delay in doing so. It said that it held no representations with respect to request 1 and said that it held two representations with respect to request 4.
8. As regards, requests 2 and 3, it explained that the information it held within the scope of these requests was exempt under section 43(2) (prejudice to commercial interests).
9. The complainant requested an internal review of its use of section 43(2) on 25 April 2016. The Council sent him the outcome of its internal review following the intervention of the Commissioner on 21 July 2016. It upheld its original position with regard to section 43(2).
10. After the Commissioner contacted the Council to ask for its arguments, it revised its position and, on 19 October 2016, disclosed a range of fees as at January 2015 for all suppliers and confirmed that payments to LCD were within that range. This satisfied request 3.
11. The complainant remained dissatisfied with that and insisted that the Council should disclose a range of fees that specifically related to LCD as per request 2.
12. The Commissioner wrote to the Council on 12 January 2017 to explain that the complainant remained dissatisfied and sought access to a range of fees that specifically related to LCD. The Commissioner asked the Council whether, given the passage of time, it was prepared to disclose that information.
13. On 6 February 2017, the Council disclosed to the complainant the range of fees that specifically related to LCD.
14. In the light of that further disclosure, the Commissioner invited the complainant to withdraw his complaint now that the matter had been informally resolved. The complainant said that he did not agree to informal resolution of this matter.

Scope of the case

15. The complainant initially contacted the Commissioner on 29 June 2016. He was concerned about the delays he had already experienced following his request to the Council. As noted above, the Council did not conduct an internal review until the Commissioner wrote to it on 9 July 2016 asking it to do so. When it responded to the Commissioner about this delay, it explained that there had been an administrative error which meant that it did not conduct an internal review despite receiving the complainant's request for review. It did not log the correspondence properly. It has, as a consequence, revised its systems to avoid similar

delays. More comment is made about this in the Other Matters section of this notice.

16. As noted above, the Council eventually disclosed information it held within the scope of requests 2 and 3 which had hitherto been withheld.
17. The complainant wrote to the Commissioner on 6 February 2017 to explain that he was not prepared to withdraw his complaint despite the disclosure.
18. In the particular circumstances of this case, the decision notice will address not only the delays which occurred in the Council's handling of this request but also whether the Council was entitled to rely on section 43(2) as its basis for withholding the information described in requests 2 and 3 at the time of the request.

Reasons for decision

19. Section 43(2) of FOIA states that

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).'

20. As section 43(2) is a prejudice based exemption, in order for it to be engaged, the three criteria have to be met.
 - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance;
and
 - thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the

Commissioner's view this places a stronger evidential burden on the public authority to discharge.

21. The Council has explained that disclosure at the time of the request would prejudice negotiations that were ongoing with LCD about the provision of care packages. It explained that this was under review at the time. It would also have a prejudicial impact on its discussions with other suppliers "if we were to disclose fee rates for this supplier".
22. The Commissioner is satisfied that the first limb is met because the prejudice envisaged relates to a commercial interest, namely the Council's and that of third parties, including LCD. The Commissioner's position on the first limb does not mean the Commissioner is also satisfied that the exemption is engaged. It merely means that the first limb of the prejudice test described above is met.
23. With regard to the second limb, the Commissioner accepts that there is a theoretical causal link between disclosure of the withheld information and harm occurring to the Council's and LCD's commercial interests. However, the Commissioner does not see a prejudice that is real, actual or of substance with respect to the information described in request 3. The Commissioner cannot see how the rates given to individual contractors (other than LCD) could be determined from the information described in request 3. The Commissioner also notes that this information was provided by other councils to the complainant without any reported prejudicial outcome. Had there been reported prejudicial outcome, the Commissioner would have taken it into consideration.
24. The Commissioner accepts that the information described in request 2 provides slightly more specific detail about the rates paid to LCD and that, consequently, there could, theoretically, be prejudice to LCD's commercial interest which is real, actual or of substance if the information were disclosed. The Commissioner accepts there could be prejudice of a similar nature to the Council's negotiating position with other contractors for the same services provided by LCD where slightly more information about its position with regard to LCD were disclosed.
25. In light of the above, the Commissioner has concluded that the Council was not entitled to rely on section 43(2) in respect of the information described in request 3, namely "Equivalent¹ information for fees paid to

¹ This means equivalent to the information described in request 2 namely, "fees being paid by the Council to LCD for residential care at the end of January 2015, per resident per week. A range of fees or a set of anonymised figures of the fees perhaps".

other providers for residential care in care homes for people with physical impairments under the age of 65”.

26. The Commissioner has gone on to consider further the application of section 43(2) to the information described in request 2.
27. With regard to the third limb, the Commissioner is not satisfied that the likelihood of prejudice occurring to either the Council's or LCD's commercial interests was much more than a hypothetical possibility. She is not convinced that, at the time of the request, there was a real and significant risk of this prejudice arising.
28. She has reached this view having considered the arguments provided by both parties.
29. The complainant provided numerous examples of how he had received this information from other councils without any prejudicial outcome arising to the commercial interests of either the council in question or LCD. When the complainant originally made a request of a similar nature to the Council in January 2015, the Commissioner accepted (in an earlier case about the earlier request) that disclosure would be likely to give rise to prejudice to the commercial interests of both parties in reported ongoing negotiations.
30. When the complainant made a fresh request in this case for information of a similar nature, over a year had passed and the Council still argued it was entitled to rely on section 43(2) because the negotiations were live.
31. The Commissioner pressed the Council to explain more about whether it was still in negotiations with LCD at the time of the request under consideration in this case.
32. It explained that, due to its strategic relationship with LCD, it was always discussing individual packages of care with it. In the circumstances of this case, the Commissioner finds this unconvincing as a description of a scenario where disclosure of the requested information would give rise to likely prejudice to either party's commercial interests. The Commissioner assumes that both parties are aware of the amounts involved in each care package in which they are involved together. She cannot see how disclosure would be disadvantageous to the Council or LCD in respect of their negotiations with each other.
33. She has already dismissed the argument that disclosure of third party information (as described in request 3) would have a commercially disadvantageous effect for third party care providers. This is because she has received no evidence to explain how such a disclosure would reveal detailed information about how much any identifiable provider was being paid for the provision of specific packages of care. If it did

reveal such information, the Commissioner may well have reached a different view.

34. Arguably, disclosure may give rise to prejudice to LCD's negotiating position with respect to competitors because it would reveal some information about its average rates. A competitor could use information to its advantage where it knows the amount LCD is paid for specific services that it would also seek to provide. However, with no other contextual information (the complainant did not request contextual information) it would be more difficult for any competitor to determine what LCD was being paid for specific services. It is difficult to see how a competitor could use the information described in request 2 to its commercial advantage and to LCD's disadvantage.
35. If disclosure cannot be shown to distort the market in which negotiations are conducted, it is difficult to see how disclosure would be disadvantageous to the Council's commercial interests either.
36. The Commissioner explicitly asked the Council for a copy of any correspondence it had had with any third parties about this request regarding the risk of prejudice to commercial interests but this was not provided. The Council made unclear comments as to what LCD had asserted about the disclosure of information. The Commissioner is unable, therefore, to give particular weight to these reported assertions from LCD where it has no evidence other than the Council's paraphrasing of LCD's view which may or may not relate specifically to this request. Had LCD, for example, experienced adverse consequences to its commercial position as a result of disclosures by other councils of virtually identical information, the Commissioner would expect to have received a copy of a letter to the Council from LCD advising this. If she had received such evidence, she would have given it considerable weight in her consideration of this case.
37. It is reasonable to assume that if the earlier widespread disclosure of this type of information had had a negative effect on the procurement process in general, the Council would have been able to provide evidence of this to the Commissioner. It did not. Had it done so, the Commissioner would have considered it.
38. For the reasons set out above, the Commissioner is not satisfied that the exemption contained at section 43(2) is engaged in respect of the information described in request 2 or request 3. In reaching this view, she has given particular weight to the lack of evidence from the Council other than its assertions which do not stand up to scrutiny. It was given ample opportunity to provide supporting evidence to the Commissioner to explain its position more clearly.

39. The Commissioner is pleased that the Council has now disclosed the information under FOIA. That said, the Council's failure to do so within 20 working days from the date of the request was a contravention of the requirements of both section 1 of the FOIA and section 10 of the FOIA.
40. Section 1(1) provides that -
- "Any person making a request for information to a public authority is entitled -
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."
41. Both provisions of section 1 are subject to exemptions. While the Commissioner is satisfied that the Council was acting in good faith when it initially refused to provide the requested information upon request, it was, for reasons outlined above, unable to rely on the exemption at section 43(2) as its basis for doing so.
42. Section 10(1) provides that -
43. "Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."
44. The Council did not provide the information within 20 working days and therefore contravened the requirements of section 10 in failing to do so.

Other matters

45. The Commissioner notes that there was a significant delay in responding to the complainant's request for an internal review in respect of his request.
46. Part VI of the section 45 Code of Practice makes it desirable practice for a public authority to have a procedure in place for dealing with complaints about its handling of requests for information and that the procedure should encourage a prompt determination of the complaint.
47. As the Commissioner has made clear in his *'Good Practice Guidance No 5'*, he considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for

review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.

48. In this case, the request for an internal review was made on 25 April 2016 and the response was issued on 21 July 2016 following the Commissioner's intervention. The Commissioner notes that in this case, the time taken to respond was 89 working days.
49. As noted above, the Council explained that there had been an administrative error which meant that it did not conduct an internal review despite receiving the complainant's request for review. It did not log the correspondence properly. It has, as a consequence, revised its systems to avoid similar delays.
50. The Council observed that the complainant had made similar requests to many other councils. The Commissioner can see no reason as to why this would add weight to any argument against disclosure in this case.
51. If a requester is researching a particular field of enquiry, it would seem wholly logical to the Commissioner that they should make similar requests to a number of other councils in order to obtain comparison data. There are other factors which may render a request vexatious such that it can be refused on that basis under section 14 of the FOIA. The Commissioner has published extensive guidance on section 14 of the FOIA.² None of those factors appears applicable in this case.
52. Section 14 includes a provision whereby a public authority can refuse a repeated request. However, the Commissioner notes that the complainant had made the reasonable assumption that circumstances had changed between his request of January 2015 and his request of February 2016. Furthermore, the Council did not seek to argue that this was a repeated request that could be refused under section 14.

² <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

Right of appeal

53. 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

54. 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.

55. 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

Pam Clements
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