

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 7 June 2018

**Public Authority:** Barnet London Borough Council  
**Address:** North London Business Park  
Oakleigh Road South  
London  
N11 1NP

#### Decision (including any steps ordered)

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1. The complainant has requested unredacted information from a contract between Barnet Council and Capita. The Council provided the majority of the information but continued to withhold day rates paid to Capita on the basis of section 43(2) of the FOIA.
2. The Commissioner's decision is that the Council has failed to demonstrate that the exemption is engaged. The Commissioner finds that section 43(2) is not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the days rates as set out in Appendix 9 of Schedule 4 Payment Mechanism
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. The complainant had made an information request to Barnet Council relating to the Council's Price Payment Mechanism. Following on from

this information request a further related request was made by the complainant on 17 August 2017 for the following information in the Barnet CSG contract:

*“Day rates (unredacted) as set out in Appendix 9 of Schedule 4 Payment Mechanisms;*

*Payments on Termination (unredacted) as set out in Schedule 27 of the contract.”*

6. The Council responded on 14 November 2017 confirming the information was held but was being withheld under section 43(2) of the FOIA. The complainant did not ask at the time for an internal review of this decision as the letter from the Council indicated the next step would be to refer the matter to the Information Commissioner's Office.
7. However, over the course of the Commissioner's investigation, the Council did indicate it had reviewed its response and reached the conclusion that, given the passage of time, unredacted information on Payments of Termination in Schedule 27 could be provided. The Council maintained that the unredacted day rates in Appendix 9 of Schedule 4 should be withheld on the basis of section 43(2).

## Scope of the case

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8. The complainant contacted the Commissioner about this request on 20 February 2018 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of her investigation to be to determine if the Council has correctly withheld the unredacted day rates in Appendix 9 of Schedule 4 on the basis of section 43(2) of the FOIA.

## Reasons for decision

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### Section 43 – prejudice to commercial interests

10. Section 43 of FOIA states that information is exempt from disclosure if its disclosure would or would be likely to prejudice the commercial interests of any person (including the public authority holding it).
11. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers that three criteria must 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 – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner believes 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.
12. The Commissioner's 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 withheld information relates to the Council's provision of insurance cover from a commercial provider. The information clearly relates to a commercial service and the Commissioner accepts that the prejudice envisaged by the Council falls within the scope of the exemption. The Commissioner is satisfied that this first element of the test is met.
13. Furthermore, when a public authority is claiming that disclosure of requested information would prejudice the commercial interests of a third party the Commissioner follows the findings of the Information Tribunal decision in the case *Derry Council v Information Commissioner [EA/2006/0014]*. This confirmed that it is not appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Instead, the Commissioner expects that arguments advanced by a public authority should be based on its prior knowledge of the third party's concerns.
14. The information relates to Capita's contract with the Council. This contract covers provision on behalf of the Council of services and back office functions including finance, HR, procurement, property services

and benefits for a ten year period beginning in 2013/14. Details of the contract have been published by the Council<sup>1</sup> and explains that the Capita contract provides services making up the new Customer and Support Group (CSG) replacing the former New Support Customer Services Organisations (NSCSO).

15. The Council also explains on its website that:

*"The Council is legally and contractually obliged to redact information that Capita has designated as confidential and commercially prejudicial. This is also consistent with statutory guidance from the Information Commissioner's Office. However in the interests of transparency, Capita has agreed to waive its right to keep confidential much of the information defined in the contract as commercially sensitive and confidential, so that more information is in the public domain."*

16. The Council has stated that it considers that disclosure of the unredacted day rates would prejudice the commercial interests of both the Council and Capita.

17. It is argued by the Council that disclosing the day rates would allow for competitors who are competing for business from other local authorities to have an advantage. This would lead to Capita being less likely to succeed in obtaining tenders or losing business to competitors.

18. The Council provided the Commissioner with evidence it had consulted with Capita about the disclosure of the day rates and some of this centred on the confidentiality clause in the CSG contract. Schedule 23 of the contract refers to commercially sensitive contractual provisions and for "Appendix 9 of Schedule 4 (Payment and Performance Mechanism) – Day Rates" it is stated the duration of the confidentiality should be for three years from the Agreement Date.

19. The complainant argues that as this three year period has passed this information should be disclosed as it is no longer commercially confidential. However, Capita takes a different view of this and considers that the duration of confidentiality was set at three years when it was believed that local government outsourcing would have developed considerably in that time making the standardised operational features/contractual mechanisms in the contract less commercially

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<sup>1</sup> <https://www.barnet.gov.uk/citizen-home/council-and-democracy/one-barnet-transformation-programme/customer-and-support-group-csg/customer-and-support-group-csg-formerly-nscso-contract.html>

sensitive. Capita argues that this has not developed as expected and therefore the details of the CSG contract and rates paid are still a source of competitive advantage if they were to be disclosed.

20. Capita argues that competitors having sight of Capita's rates and mechanisms would be able to reverse engineer Capita's pricing strategies for similar services in the market place without Capita having access to the same information for its competitors.
21. During the course of the Commissioner's investigation the Council also said that it was of the view that disclosure would prejudice its own commercial interests as well because it impacts on its ability to achieve best value for money in respect of future negotiations to contract out council functions.
22. The Commissioner does not accept that the Council has demonstrated there is a causal link between the disclosure of the day rates and prejudice to its own commercial interests. The Council has provided no evidence to suggest there is any prospective tendering exercise and, in fact, she understands the contract with Capita still has several years left to run so any re-tendering in the near future is unlikely.
23. Dealing next with the Council's argument that disclosure would allow a competitor to calculate Capita's day rates and use this as means to gain a competitive advantage over them in future tenders; the Commissioner is not satisfied that section 43(2) is engaged on this basis. Whilst it is acknowledged disclosing the day rates paid to Capita by the Council would provide insight into the spending under the CSG contract it would be information which shows a snapshot of the situation at a moment in time. The contract commenced in 2013 and it is not unreasonable to assume that Capita, since this time, will have varied its rates. In any event the day rates may, to some extent, be based on what is expected of each individual in that role. This may well vary from one contract to another as in some public services the role of, for example, a project manager may entail different duties.
24. The Commissioner is also unclear how the disclosure of the day rates could be used to 'reverse engineer' Capita's pricing strategy and this point has not been expanded on by either Capita or the Council. The Commissioner therefore considers this a speculative argument that cannot be taken into account.
25. As regards the argument that disclosure would allow a competitor to undercut Capita in any future contracts it bids for, the Commissioner has considered the fact that whilst there is no retendering taking place in the contract with the Council it is reasonable to assume a company as large as Capita will be involved in some kind of ongoing tendering exercise for

services in the public sector given public sector contracts account for just under half of Capita's work<sup>2</sup>.

26. That being said, without clear evidence to show how disclosing the day rates agreed at the onset of the CSG contract would prejudice any prospective or ongoing tendering exercise with other public authorities it is difficult to accept the arguments presented by the Council and Capita.
27. Finally, the Commissioner has taken into account the Local Government Transparency Code, issued by the government and which sets out the minimum data that local authorities should be publishing as a matter of course<sup>3</sup>. In particular, it recommends that local authorities should publish details of all expenditure over £500 including, for example, "individual invoices" and "payments for goods and services". The code also notes, when considering the impact on commercial confidentiality that:

*"The Government has not seen any evidence that publishing details about contracts entered into by local authorities would prejudice procurement exercises or the interests of commercial organisations, or breach commercial confidentiality unless specific confidentiality clauses are included in contracts. Local authorities should expect to publish details of contract newly entered into – commercial confidentiality should not, in itself, be a reason for local authorities to not follow the provisions of this Code."*

28. Having taken all of the above into account, and after considering the circumstances of the case, the Commissioner has found that disclosure would not prejudice the commercial interests of either the Council or Capita. Consequently the Commissioner has determined that the section 43(2) exemption is not engaged.

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<sup>2</sup> [http://investors.capita.com/~/\\_media/Files/C/Capita-IR-V2/documents/capita-annual-report-2016.pdf](http://investors.capita.com/~/_media/Files/C/Capita-IR-V2/documents/capita-annual-report-2016.pdf)

<sup>3</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/408386/15\\_0227\\_PUBLICATION\\_Final\\_LGTC\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408386/15_0227_PUBLICATION_Final_LGTC_2015.pdf)

## Right of appeal

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29. 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)

30. 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.
31. 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** .....

**Jill Hulley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**