

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 10 September 2019

**Public Authority:** Stockport Metropolitan Borough Council

**Address:** Town Hall  
Stockport  
Cheshire  
SK1 3XE

### Decision (including any steps ordered)

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1. The complainant has requested information about its dealing with "The Produce Hall" from Stockport Metropolitan Borough Council ("the Council"). The Council provided some information but withheld the remainder citing sections 41(1) (information provided in confidence) and 43(2) (commercial interests) of the FOIA.
2. The Commissioner's decision is that the Council is entitled to rely on section 43(2) to withhold the information at parts (3) (latter part), (4) and (5) of the request.
3. In respect of parts (1), (2) and (3) (former part) of the request she finds that neither section 43(2) nor 41(1) are engaged. In respect of these parts the Commissioner requires the Council to take the following steps to ensure compliance with the legislation:
  - disclose any recorded information held.
4. The Council 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. Following earlier correspondence, on 5 March 2019 the complainant wrote to the Council and requested information in the following terms:

*"... we have been asked to resubmit our request for the answers to the questions contained within our previous FOI request to you, on the basis that we are now informed the information is contained within the Agreement for Lease dated 11<sup>th</sup> September [2018] ...*

*As such, can you please accept this email as confirmation of our request to access the following information:*

*"1. Could you please state how much public money is being invested in, or underwritten by Stockport Council, for the developments in The Produce Hall?*

*2. Could you please state how much public money will be lost or generated as a result of this deal, and over what period any investment will be repaid to Stockport Council?*

*3. Could you please confirm what due diligence has been done to protect the public's investment as part of this deal and under what terms Stockport Council can terminate the contract to operate The Produce Hall?*

*4. Could you please confirm what the contractual obligations of The Produce Hall operator are to the council, including any contractual demands for the business to be open on a set number of days and hours?*

*5. Could you please outline why Stockport Council used the term 'informal tender' to describe this process and can you explain how this differs from a 'formal tender' process? Please supply the regulations or guidelines that covers this 'informal tender' process.*

*6. Can you please provide any documentation that was submitted to council officers to review before making a decision on the new private operator for The Produce Hall, including any written statements / recommendations from the selection panel?"*

6. The Council responded on 2 April 2019. It stated that the information relating to parts (1), (2), (3), (4) and (6) of the request was exempt from disclosure under sections 41 and 43(2) of the FOIA. It advised that information relating to part (5) was not held.
7. Following an internal review the Council wrote to the complainant on 3 April 2019. It maintained its position.
8. During the Commissioner's investigation the Council disclosed some further information.

## Scope of the case

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9. The complainant contacted the Commissioner on 3 April 2019 to complain about the way his request for information had been handled. Following further clarification with him, on 17 May 2019 the Commissioner agreed that she would consider the citing of exemptions in respect of parts (1), (2), (3), (4) and (6) of his request; she has therefore not further considered part (5).
10. It is also noted that some of the wording of the correspondence provided by the complainant seems to relate to matters other than those reflected in the wording of this particular request. For clarity, the Commissioner is only considering this specific request and the application of sections 43(2) and 41(1) to it.
11. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the FOIA. The FOIA is to do with transparency of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. The FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.

## Reasons for decision

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### Section 43 – commercial interests

12. This exemption has been cited in respect of all remaining parts of the request.
13. Section 43 of the FOIA provides that if the disclosure of information would prejudice the commercial interests of any person including the public authority who holds the information, then the information is exempt from disclosure. This is a prejudice-based exemption and is subject to the public interest test.
14. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met. First, the actual harm that 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.
15. Second, 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 that is alleged must be real, actual or of substance.

16. Third, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – eg disclosure '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.
17. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
18. In relation to the lower threshold of 'would be likely to', 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 of 'would', in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.
19. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner has considered the meaning of the term in her awareness guidance on the application of Section 43<sup>1</sup>. This comments 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"*.
20. The Commissioner considers that in order for the exemption to be engaged, it must be shown that the disclosure of specific information will result in specific prejudice to one of the parties. In demonstrating prejudice, an explicit link needs to be made between specific elements of the withheld information and specific prejudice which disclosure of these elements would cause.
21. It is the Council's position that disclosure of this information *would be likely to* prejudice the commercial interests of three named bidders.
22. The Council has deemed this information to be commercially sensitive as it considers that it is *"recognised that participating in a tendering process and subsequently agreeing a contract with the winning bidder is commercial activity"*.

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<sup>1</sup> <https://ico.org.uk/media/fororganisations/documents/1178/commercial-interests-section-43-foiaguidance.pdf>

23. The Commissioner will initially consider whether the withheld information is relevant to the applicable interests within the commercial interests exemption and therefore whether or not the first part of the test above is met.

***Does the information relate to the applicable interest?***

***Part (1) of the request***

24. During the Commissioner's investigation the Council advised the complainant:

*"The Council now publishes all spend data on data.gov.uk in line with the requirements of the Transparency Code. Accordingly, the information you have requested is exempt under Section 21 of the Freedom of Information Act 2000 as it is information already reasonably accessible via other means:*

*The information can be accessed by following the links below:*

*The financial data for expenditure over £500 can be found here: <https://data.gov.uk/dataset/0c5487f4-c863-4f99-b882-459d3acf4b54/expenditure-over-500>*

*The financial data for purchase orders over £5,000 can be found here: <https://data.gov.uk/dataset/7aba411f-4d53-4a2c-9043-054e22392e98/purchase-orders-over-5000>*

*However, the detail of the specific financial transactions referred to in the above links is commercially sensitive. This information is held in a contractual agreement, an Agreement for Lease dated 11th September 2018, between SMBC and The Produce Hall Company Limited. It is our view that this information is subject to the section 41 FOIA exemption 'Information provided in confidence' and section 43(2) FOIA 'Commercial Interests'.*

25. The Commissioner notes that the complainant has not requested any details of the specific transactions referred to by the Council above. He has asked to know: *"how much public money is being invested in, or underwritten by Stockport Council"*, ie total figures, not detailed breakdowns. Furthermore, he is only requesting to know what the Council itself has invested, not any other party. Therefore, the Commissioner does not consider this to directly relate to the commercial activity of any of the bidders concerned.
26. The Council has explained to the Commissioner that it had:

*"... identified that if a commercial tenant was to be attracted to provide a food and drink offer in the Produce Hall, then the Council*

*would need to renovate and refurbish the building to attract a suitable tenant, as is common practice amongst food and drink lettings”.*

27. Therefore, it would seemingly have needed to invest this money irrespective of who the successful bidder was and the Commissioner can therefore see no direct relationship between the Council's necessary costs and any bidder's own commercial interests. The investment is the Council's (and therefore public) money and the Council still owns the property so benefits from any investment made. Furthermore, it would seemingly have been necessary to make an investment for any potential tenant.
28. The Commissioner therefore does not find that section 43 is engaged in respect of this part of the request as the monetary costs relate solely to the Council. She also notes that the Council has not submitted any arguments regarding its own commercial interests being prejudiced by disclosure.

**Part (2) of the request**

29. This relates to whether or not public money will be lost or generated and the time frame for any repayment of the Council's investment. The Council has advised the Commissioner:

*“This question is difficult to answer, no public money will be 'lost' as a result of the deal. The money already spent by the Council has been on the wider project but in the main, in the investment in the fabric of the building as well as the fixtures and fittings. It is a capital investment in the Council's building asset. Public money will be generated as a result of the deal as the Council will receive rent for the premises for the 15 year term of the Lease.”*

30. According to its submissions, it is therefore unclear to the Commissioner what, if any, information is held in respect of this part of the request. She is therefore unable to find that section 43 is engaged.

**Part (3) of the request**

31. In respect of the first half of this part of the request regarding due diligence, the Commissioner does not consider that this information relates to the commercial interests of any party. The request seeks to simply know what due diligence was undertaken by the Council itself, not the results of any checks which were made. There is no direct link to the commercial interests of any third party. She therefore finds that the exemption is not engaged in this respect.
32. In respect of the latter part, the Commissioner notes that any terms of termination are specifically contained in the lease. As such these directly

link to the commercial interests of the successful bidder so the first part of the test is met in this regard.

**Part (4) of the request**

33. The Commissioner notes that any contractual obligations are specifically held in the terms of the lease. As such these directly link to the commercial interests of the successful bidder so the first part of the test is met in this regard.

**Part (6) of the request**

34. The Council has confirmed that section 43(2) has been cited in respect of the bids which were received from potential operators.
35. The Commissioner is satisfied that this type of information relates to the commercial interests of those parties and she is therefore satisfied that the first part of the test is met in this regard.

**Is there a causal relationship?**

36. The Commissioner will next consider whether there is a causal relationship with the prejudice claimed.
37. In respect of parts (3) (latter part only) and (4) of the request, clearly details contained within the lease are not in the public domain and disclosure of the termination clauses and any contractual obligations do have a direct bearing on the commercial interests of the third party concerned. The Commissioner is therefore satisfied that this part of the test is met.
38. In respect of part (6), although the names of the relevant bidders have been disclosed, specific details contained within their bids are not in the public domain. The disclosure of these bids would have a direct bearing on the commercial interests of these parties. The Commissioner is therefore satisfied that this part of the test is met.

**Is the level of likelihood of prejudice being relied upon met?**

39. In its internal review the Council provided the following arguments regarding the likelihood of prejudice in respect of all parts of the request:
- *Specifically, if local, competing businesses could gain insight into [names removed] proposed and final agreements with the council, they could adjust their financial operations accordingly. This would be to the detriment of the winning bidder [name removed] and the council. There is a specific competitor who operates a similar business model as proposed and agreed by [name removed] in sites across*

*Greater Manchester. It is our view that the competitor could gain an unfair advantage if this information was disclosed.*

- *If bidders were able to see previous successful bids submitted by competitors during a similar tender process, it is likely that the competitiveness of this selection process and the authority's ability to achieve best value would be hindered, thus harming the council's commercial interest.*
- *Similarly, disclosure of the Agreement could prejudice the Council's ability to negotiate future leases on the best terms possible. If potential tenants are aware of the terms of previous leases, this could harm the council's negotiating position.*
- *Any harm caused to the chosen operator may also harm the council as it may affect the council's ability to maintain rent payments or if it affected the success of the Produce Hall venue, could prejudice the council's vision in respect of the Market and Underbanks areas.*

40. The Commissioner is satisfied that these relate to parts (3) (latter part only), (4) and (6) of the request and that the arguments demonstrate that the chance of prejudice occurring is more than a hypothetical possibility. She is satisfied that they demonstrate that there is a real and significant risk and therefore finds that the exemption is engaged.

### **Public interest test**

41. Section 43 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Arguments in favour of disclosure**

42. The Council has confirmed that it has taken the following arguments into account:

- it is committed to openness and transparency and releasing this information would be compatible with those values;
- it is in the public interest that it is held accountable for its decisions; and,
- it is in the public interest that it is able to demonstrate that it is providing value for money.

43. The Council has also recognised that that there is a public interest in encouraging private sector companies to bid for public contracts, and also that any information that would improve the quality of bids would also be in its own interest. The Council also accepts that there is a public interest in disclosing information to test if the tender process followed was fair.



### **Arguments in favour of maintaining the exemption**

44. The Council has confirmed that it has taken the following arguments into account:

*"It is in the public interest that private companies who tender for public contracts are not disadvantaged by doing so. Private companies bid for public contracts in the knowledge that FOIA applies to public authorities, and that knowledge encompasses the fact that FOIA provides exemptions for the protection of a company's commercial interests.*

*There is an important public interest in ensuring that potential tenderers are not discouraged from tendering for public contracts by a justified fear that their commercially confidential information will be released publicly (and so released to their competitors). If tenderers were discouraged, this may adversely affect the quality of tenders for public contracts and so risk the discharge of those contracts by the eventually successful tenderer.*

*It is relevant that the tender information and Agreement sought is likely to remain relevant to future tenders and to a possible tenderer for the same or similar contractual services to the council in the short to medium-term. For example, there are provisions within the contract between the council and [name removed] that allow early termination, and in this circumstances [sic], information disclosed now could hinder the competitiveness of a future tender of the Produce Hall and Blackshaw site".*

45. The Council also argued that, whilst there would be advantages that could be achieved by competitors of the winning bidder having sight of this information, this would in turn harm the relationship between the Council itself and that party. It added that disclosure could also have a negative impact on future tenders of this type.

### **The Commissioner's view**

46. The Commissioner recognises that there is a strong and legitimate public interest in the openness and transparency of public authorities with regard to their decision-making processes. In particular, there will be a public interest in knowing more about commercial contracts and projects involving the expenditure of large amounts of public funds.
47. However, the Commissioner is also aware that it is necessary for public authorities like the Council, who negotiate with third parties on a regular basis, to be able to keep such information confidential so as not to cause prejudice to its ability to achieve the best value possible for public money in its public services and projects.

48. On balance, whilst the Commissioner accepts that disclosure of the withheld information could promote transparency, she considers that the public interest in disclosure of the withheld information is outweighed by the public interest in maintaining the section 43(2) exemption. Therefore, the Council correctly applied section 43(2) to the withheld information at parts (3) (latter part only), (4) and (6) of the request.

### **Section 41 - information provided in confidence**

49. This will now be considered in respect of any information which was not found to be exempt by virtue of section 43(2), ie parts (1), (2) and the first part of part (3).
50. Section 41(1) of the FOIA states that:

*"Information is exempt information if –  
a) it was obtained by the public authority from any other person (including another public authority); and  
b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*

51. In order for Section 41(1) to be engaged, the following criteria must be fulfilled:

- the authority must have obtained the information from another person,
- its disclosure must constitute a breach of confidence,
- a legal person must be able to bring an action for the breach of confidence to court, and
- that court action must be likely to succeed.

*Was the information obtained from another person?*

52. In this context the term 'person' means a 'legal person'. This could be an individual, a company, another public authority or any other type of legal entity.

53. In its internal review the Council has explained:

*"It is the council's view that information provided during the informal tender process has been provided by a third party and has the necessary quality of confidence, as expressed by [name removed]. The council is satisfied that disclosure of any of the bids would be a breach of confidence and disclosure of the bids could reasonably lead to [name removed] bringing a court action for that breach of confidence."*

*The requested information is also held in a contractual agreement, an Agreement for Lease dated 11th September 2018, between SMBC and The Produce Hall Company Limited. A duty of confidence forms part of the Agreement at section 17, and [name removed] has expressly refused disclosure of any information regarding his involvement to operate the Produce Hall to be disclosed via FOIA. It is evident therefore, from section 17 of the contract, that disclosure of any terms within the contract would constitute a breach of confidence. In addition, a disclosure of the terms within the contract could reasonably lead to [name removed] bringing a court action for that breach of confidence, in addition to a breach of contract. Based on the terms of section 17, that court action would be likely to succeed. Consequently it is our view that section 41 is engaged to information requested which falls within the contract. We note that section 41 is an absolute exemption; therefore, no public interest test has been carried out”.*

54. Whilst such arguments may be relevant to some parts of the original request, the Commissioner notes that the only parts of the request being considered here relate to the following:
  - how much public money is being invested in / underwritten by the Council;
  - how much public money will be lost / generated and over what time period any investment will be repaid; and,
  - any due diligence which the Council has undertaken.
55. The Commissioner does not consider that any of this information can be considered to be provided by a third party. Such information is information which it would generate itself.
56. In light of this, the Commissioner concludes that this remaining information has not been provided by another person. As she has not been able to find that it would represent information 'obtained' from another person, she does not need to proceed to consider whether disclosure would constitute a breach of confidence. As such, she finds that the exemption at section 41(1) is not engaged.

## Right of appeal

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57. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

58. 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.

59. 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** .....

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