

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

### **Decision notice**

**Date:** 18 May 2021

**Public Authority:** Calderdale College  
**Address:** Francis Street  
Halifax  
HX1 3UZ

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

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1. The complainant has requested information about the highest scoring applications in response to a tendering exercise. Calderdale College ("the College") disclosed some information and withheld the remainder under the exemption provided by section 43(2).
2. The Commissioner's decision is that the College is entitled to withhold the information under section 43(2). However, the College has failed to address that part of the request which seeks the identities of "assessors". The College also breached the requirements of section 10 and section 17 when responding the request.
3. The Commissioner requires the College to take the following steps to ensure compliance with the legislation:
  - In response to that part of the request that seeks the identities of "assessors", issue a fresh response in accordance with the Freedom of Information Act (2000) ("the Act").
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 8 November 2018, the complainant wrote to the College and requested information in the following terms:

*I would be grateful if you would send me paper copies of all paperwork associated with how the College selected bids and allocated Skills Support for the Workforce 'developmental' projects.*

*There are approximately 16 projects that the College's External Funding Unit refers to as 'developmental' projects. These projects are offered for applications and awarded either directly or by tender (to the College's Associates, Approved Providers or by the InTend platform).*

*I would like access to the following information about each project:*

### **Project:**

- Title
- Value
- Whether offered direct or by tender
- Date offered/Date offer closed
- Start date/completion date

### **For each project**

- Number of applications and when each was received
- Name of applicant/organisation that applied
- Status of applicant, e.g. Approved Provider, Associate, Independent
- How offered, e.g. InTend, Direct, Other
- Details of assessor/s (role, organisation)
- Score awarded by each assessor
- The scoring document (e.g. matrix) completed by each assessor with score and all comments including scribbled notes and related emails
- A copy of the successful application for each project
- Any relevant information associated with awarding the contract such as whether the College approached an organisation and suggested that it considered submitting an application

### **General**

- Assessment criteria, guidelines and scoring key

- *Good practice or rules around identifying any conflicts of interests with assessors*
  - *Whether feedback to unsuccessful candidates is offered*
  - *The threshold value that determines whether a project can be awarded directly*
6. On an unknown date the College disclosed information.
  7. On 10 December 2018, the complainant asked for an internal review that considered the completeness of the disclosure, and specifically whether the College held the identities of the “assessors” responsible for scoring each of the applications.
  8. The College responded on 21 December 2018. It disclosed further information and stated that the remainder was withheld under section 43(2).
  9. The College responded again on 2 January 2019. It disclosed yet further information.
  10. The College provided the outcome of its internal review on 19 March 2019. It disclosed further information that it had identified but maintained the application of section 43(2) in respect of that originally withheld.

### **Scope of the case**

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11. The complainant contacted the Commissioner to complain about the way his request for information had been handled, specifically that the College was not entitled to withhold information under section 43(2), and that further recorded information was held that had not been disclosed.
12. The Commissioner considers the scope of the case to be the determination of whether the College has correctly applied section 43(2), and whether all recorded information has otherwise been disclosed.

### **Reasons for decision**

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

13. Section 43(2) of the FOIA 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.

14. The term 'commercial interests' is not defined in the FOIA; however, the Commissioner has considered her guidance on the application of section 43<sup>1</sup>, which clarifies that:

*A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent.*

Does the information relate to a person's commercial interests?

15. The information withheld in this case are the two highest scoring applications (or otherwise, the only application if only one was submitted) submitted by prospective suppliers in response to a tendering exercise. The purpose of this tendering exercise was to seek providers to deliver projects using funding that the College has been awarded under a 'Employees Support in Skills' contract from the European Social Fund (ESF) for the period of 1 November 2016 to 31 March 2019.

16. The Commissioner's guidance<sup>2</sup> explains that a public authority is likely to hold commercial information in relation to a range of activities. One such activity is procurement, in relation to which the guidance explains that:

*You may be involved in the purchase of goods and services, including services outsourced to private companies, to be delivered on your behalf. If so, you will hold a wide range of commercial information relating to the procurement process. This can include:*

- *information provided during a tendering process about both successful and unsuccessful bids;*

17. Having reviewed the withheld information and the College's explanation of the basis on which it is held, in conjunction with her guidance of section 43(2), the Commissioner accepts that the information is commercial in nature as it relates to the 'purchase' of services.

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<sup>1</sup> <https://ico.org.uk/for-organisations/section-43-commercial-interests/#432>

<sup>2</sup> <https://ico.org.uk/for-organisations/section-43-commercial-interests/#432>

### The likelihood of the prejudice occurring

18. 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, affect one or more parties.
19. The ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of First-tier Tribunal (Information Rights) ("the 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.
20. With regard to 'would be likely to' prejudice, the 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).
21. 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 College's position*

22. In this case the College has stated that disclosure of the information 'would' prejudice both its own commercial interests, and those of the applicants.
23. In relation to its own commercial interests, the College has explained that, at the time of the request, it had the potential to be awarded a further ESF contract (and this event has since occurred, with the College securing an ESF contract for the York, North Yorkshire, and East Riding LEP area for the period of 2019 to 2021). The disclosure of the highest scored applications would allow bidders to have advance knowledge of the desirable aspects that the College would look for, and to effectively base their own applications on them. This action would prevent the College from making a fair assessment when scoring applications, and may lead to the College awarding contracts to inexperienced or unqualified applicants, which would have a significant impact on the College's ability to deliver best value for money.
24. In relation to the commercial interests of the bidders, the College has explained that the applications contain descriptions of how the prospective suppliers intend to provide the required services, and give a

detailed insight into their operational practices, contract delivery approaches, and tendering strategy, including details about their processes, quality standards, resource allocation, and pricing structures. The disclosure of this information to competitors would have the potential to diminish the bidder's competitive advantage in future procurement exercises, either by the College or other Further Education providers.

25. To evidence the prejudice that may occur to the commercial interests of the bidders, the College has contacted the winning applicant for the project given the reference of 'AB003', who has provided a response confirming that their view is that the disclosure of the information would prejudice their commercial interests in the event that they made a future application in a similar context.

*The Commissioner's conclusion*

26. The Commissioner recognises that the College has applied the exemption in respect of both its own and the highest scoring bidders commercial interests. The Commissioner has therefore proceeded to consider the College's commercial interests first.
27. In the circumstances of this case, the Commissioner understands that, at the time of the request the tendering exercise had been completed, and that the College had already awarded contracts for 2016 to 2019.
28. The Commissioner has considered the potential impact of timing (of any disclosure) as part of her guidance<sup>3</sup>. In that she has explained that the commercial sensitivity of information may in turn depend on the timing of any disclosure, and, in respect of a tendering process, that sensitivity may diminish following a contract being awarded. However, this will depend on whether the disclosure would undermine the person's position in any subsequent transaction; and that determination will also need to consider the nature of the information and the degree of similarity between the transactions.
29. The Commissioner recognises that - at the time of the request - the College considered there to be realistic prospect that it would need to run a subsequent tendering exercise for the 2019-2021 period if it secured a further ESF contract. The Commissioner also recognises that

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<sup>3</sup> <https://ico.org.uk/for-organisations/section-43-commercial-interests/#prejudicetest>

the disclosure of the information would allow bidders in any new tendering exercise to base their applications on those which the College has already scored highest, and therefore submit tenders that are not representative of the bidder's true ability or experience. Such an action would hinder the College's ability to assess applications based on their own merits, which in turn prevent the College from ensuring that it is able to attain best value when awarding a contract.

30. The Commissioner has considered a similar scenario in decision notice FS50880905<sup>4</sup>, in which she found that the prospect of a similar competition being undertaken in the future, meant that a previously successful tendering bid remained commercially sensitive. Whilst in that case the focus of the exemption was on the prejudice that may affect the supplier (who may find themselves competing against other suppliers who have copied their application), the Commissioner accepts in this case that such an action may also impact the authority's ability to assess those applications and select the best supplier.
31. Whilst the College has referred to the commercial interests of the bidders, only one such bidder has been approached to seek their views. The Commissioner's guidance<sup>5</sup> explicitly states that in cases where a public authority has applied section 43(2) based on a third party's commercial interests, it must consult with those parties for their exact views. In this case, the College has only consulted one bidder; and as such the Commissioner does not consider that the College has provided sufficient evidence to support its argument. On this basis the Commissioner has only considered the Colleges' own commercial interests.
32. However, the Commissioner considers that section 43(2) was correctly engaged based on the College's own commercial interests, and she has therefore gone on to consider the public interest test.

### The public interest test

#### *Public interest arguments in favour of disclosure*

33. The College has acknowledged that there is an inherent public interest in ensuring transparency about the spending of public money, and

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<sup>4</sup> <https://ico.org.uk/media/action-weve-taken/decision-notice/2020/2617712/fs50880905.pdf>

<sup>5</sup> <https://ico.org.uk/for-organisations/section-43-commercial-interests/#prejudicetest>

particularly to illustrate that the procurement process it has undertaken has been fair and transparent.

34. The College has also stated that it recognises that there is a public interest in providing public assurance that it is achieving best value for money when seeking to award a contract to a bidder.
35. The Commissioner agrees that there is an inherent public interest in ensuring transparency in this matter, not only to encourage public confidence in the College's spending of public money, but also to demonstrate that it is seeking to maintain high standards in the courses that it delivers as a Further Education provider. The disclosure of the information in this case would therefore allow the public to understand the steps that the Council has undertaken and promote public confidence in it.

*Public interest arguments in favour of maintaining the exemption*

36. The Commissioner acknowledges that the exemption is designed to protect commercial interests, and she has given due weighting to the public interest in maintaining such protection in this specific case. The central public interest in the exemption being maintained revolves around protecting commercial activity and the level playing field which exists when carrying out tendering competitions of this nature.
37. The Commissioner has already established, based on the arguments provided, that there is a more than hypothetical risk of prejudice occurring to the College if the withheld information was disclosed.
38. The Commissioner considers that release of the information would undermine the integrity of the College's procurement process, through making it publicly known the type of application that it would score highly. This in turn would damage the College's ability to pursue best value for money, as it would allow bidders to have advance knowledge of what to include in their application to be highly scored, even if this did not accurately reflect the bidders' background. Such a scenario may lead to the College awarding a contract to a less able bidder, and it is reasonable for the Commissioner consider that such a scenario would not only lead to the College being unable to secure the best provider that it is able, but also damage the College's reputation as a Further Education provider, which in turn may damage its ability to compete against other Further Education providers.
39. In the Commissioner's opinion, there is a very strong and inherent public interest in ensuring that the College can prevent such prejudice to its commercial interests in this context.



*Balance of the public interest arguments*

40. The Commissioner recognises that there is a public interest in ensuring transparency about the spending of public money. In this case, disclosing the highest scoring applications would give an insight into the standards expected by the College, and provide public assurance about the quality of those bids that have been highly scored when deciding whether to award a contract.
41. Balanced against this, the Commissioner has accepted that there would be a prejudice to the College's commercial interests should the information be disclosed. There is significant public interest in ensuring that the College can undertake a robust tendering exercise to ensure that it attains best value when deciding to award a contract; should the College not be able to pursue this, it has the potential to result in less qualified bidders being awarded contracts, which would in turn impact upon the College's ability to fulfil its role as a Further Education provider.
42. Having considered the above, the Commissioner's decision is that there is a strong public interest in protecting the commercial interests of the College and ensuring that it is able to run a robust procurement exercise.
43. The Commissioner has therefore decided that the public interest in maintaining the exemption outweighs the public interest in disclosure.

**Section 1(1) – General right of access to information**

44. Section 1(1) of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information relevant to the request, and if so, to have that information communicated to them. This is subject to any exclusions or exemptions that may apply.

The College's position

45. The Commissioner has directed the College to the complainant's concern – as raised when seeking an internal review – that he has not been provided with the identities of those individual assessors responsible for scoring each application.
46. The College has informed the Commissioner that it has previously disclosed whether the assessors were College staff or non-College staff but has not provided their names.

The Commissioner's conclusion

47. Having considered the College's position it is evident that it has failed to either disclose, or otherwise withhold under an exemption, the identities of the assessors. Whilst the Commissioner recognises that such information will represent personal data, and potentially fall under the exemption provided by section 40(2), no such arguments have been provided by the College that would enable to the Commissioner to determine this.
48. On this basis the Commissioner must find that the College has failed to address this specific part of the request under section 1.

**Section 10 – Time for compliance**

**Section 17 – Refusal of request**

49. Section 10 of the FOIA states that a public authority must comply with section 1(1) within 20 working days following the date of receipt.
50. Section 17 specifies that a refusal notice must be provided by a public authority no later than 20 working days after the date on which the request was received.
51. In this case, the College breached section 10 by failing to disclose all held information within the time for compliance, and further, breached section 17 by issuing a refusal notice outside the time compliance.

## Right of appeal

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52. 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)

53. 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.
54. 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**  
**Head of FoI Casework and Appeals**  
**Information Commissioner's Office**  
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**Water Lane**  
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