

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 8 October 2008

Public Authority: Hampshire County Council
Address: The Castle
Winchester
Hampshire
SO23 8UJ

Summary

The complainant requested details of the budget and operating costs of the council's residential and nursing care homes.

Some items of the requested information were supplied by the council but it withheld the operating costs by virtue of section 43(2) (commercial interests) of the Act.

The Commissioner decided that the exemption at section 43(2) was not engaged and ordered disclosure of the information.

The Commissioner's Role

1. 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 Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

The Request

2. On 4 January 2007 the complainant requested the following information:

'(i) Minutes of the relevant council committee meetings where the budget for care homes for 2006/07 was set, giving full details of the rationale behind the setting of council's proposed usual prices, including consideration by the council of cost pressures being faced by the independent care sector.

(ii) Details of the council's planned procedure for the setting of its 2007/08 residential and nursing care budget including key dates.

(iii) Details of the costs to the council of operating its own care homes in 2006/07 and 2007/08 (projected) detailing separately: (the complainant then listed 38 care establishments that are managed by the council).

The information should give a detailed breakdown of the full gross cost to the council of operating each of the above facilities together with details of average occupancy levels for each location. Additionally, for each of the above facilities, we request details of the total construction cost including the cost of land, buildings and fixtures and fittings.

(iv) ...and we request copies of the council's forward- looking part of its AES (Annual Efficiency Statement) for 2005/06, backward looking part of its AES for 2005/06 and forward looking part of its AES for 2006/07.'

3. In a refusal notice of 26 January 2007 the complainant was referred to the council's website for information concerning parts (ii) and (iv) of the request. Part (iii) of the request was refused on the grounds that production of the information would exceed the appropriate limit of £450 and because the unit costs of the council's care homes were considered to be commercially confidential it was also exempt under section 43. It was unclear from the refusal notice whether part (i) of the request had been addressed, however, the council later clarified with the Commissioner that there were no committee meeting minutes to disclose as the setting of prices was decided at officer level.
4. The refusal notice also contained the council's consideration of the public interest test that is required by reliance on the s43 exemption. In favour of release of the information the council submitted that information on the cost of individual services and average activity contributed to the council's accountability to its citizens. Against release it submitted that disclosure of the information could prejudice the council's ability to negotiate costs, in the interests of tax payers, of services provided by the independent sector. It also submitted that disclosure of the costs breakdown could impact on the council's procurement of goods and services necessary to run its care homes.
5. In a letter of 21 February 2007 the complainant informed the council that he disagreed with its estimation that it would cost more than £450 to produce copy management accounts and budgets for each of its care homes as in his opinion these would be readily available either in hard copy or electronic format at little cost. In his letter, the complainant went on to narrow his request stating that as a minimum the information should provide a breakdown of the full gross cost to the council of operating each of its residential and nursing homes. He asked for the breakdown to consist of care staff costs, other staff costs, direct costs, indirect costs and cost of capital together with average occupancy levels for each of the establishments. He then asked the council to carry out an internal review of its decision to withhold the requested information.
6. On 16 April 2007 the council's internal review confirmed the council's original decision to withhold the information. The application of the appropriate limit to withhold the information was explained by reference to the time that would be involved in gathering information relating to the cost of land. The council

maintained that the exercise would involve time spent on current valuation and on alternative development valuation in relation to historic (purchase) price. It maintained that the exercise would require assumptions around planning consents in relation to all thirty eight homes and would involve more than eighteen hours work. Its review considered that the narrowed request was still subject to the s43 exemption.

Background information

7. In recent years local authority social services departments have increasingly purchased residential care from the independent sector rather than maintain and operate their own homes. However, between 2004 -2007 Hampshire County Council decided, in conjunction with the local health authority, to commission ten new nursing homes.
8. The council sells some of its care beds to other health and social care purchasers which provides an income stream for the council. Although the council has built ten new nursing homes the majority of its residential care is still purchased from the independent sector.

The Investigation

Scope and chronology of the case

9. The complainant wrote to the Commissioner on 28 June 2007 to complain about the council's refusal to disclose the requested information.
10. In support of disclosure the complainant put forward the following arguments:
 - (i) He referred the Commissioner to the Information Tribunal's decision in Derry City Council v the Information Commissioner -EA/2006/0014 - where the publicly funded airport was making a loss of £1.3 million a year and the council had argued that disclosure of financial information would be prejudicial to its commercial interests. In that decision, the Tribunal had taken the view that Derry City Council's commercial interests were not sufficient to outweigh the public interest in disclosure of the requested information. The complainant maintained that as there were similarities between the complainant's case and the Derry City Council case, Hampshire Council should also disclose the financial information that had been requested.
 - (ii) The council in partnership with its strategic health authority had agreed to build 500 care home beds across the county at a cost of £60 million of public money. The complainant maintained that the same number of beds could have been provided by the independent sector for £25 million less. He submitted that the new builds could have been delivered for £60,000 per bed whereas the council had paid £120,000 per bed.

- (iii) The complainant provided a report from PricewaterhouseCoopers LLP on the cost of residential and nursing care commissioned in January 2007 by another county council. In that report the average value of a grade one care home was £50,000 per bed including the cost of land. The complainant submitted that in comparison, Hampshire County Council's project was not a cost effective use of public money and that disclosure of the information was warranted in order to justify the council's expenditure. He maintained that the situation was compounded by the council continuing to run costly care homes when it would be cheaper to use the independent sector.
- (iv) The complainant supplied the Commissioner with a copy of a council publication indicating that ten per cent of nursing home beds had been lost in three years due to nursing home closures. The complainant argued that the main reason for the closures was that the prices paid by the council to homes within the independent sector were insufficient for them to continue operating on a viable commercial basis. The complainant submitted that if fair prices had been paid by the council the homes would still be in business and there would have been less need for the council to build 500 new beds at substantial cost to the tax payer.
- (v) One of the stated intentions of building new homes was that hospital beds would be freed up. However, according to the complainant, the reality is that more council owned beds have been introduced at the expense of the independent sector whose number has dropped.
11. On 7 May 2008 the Commissioner requested a copy of the information from the council in order to ascertain whether it had been withheld appropriately. The information that the council provided to the Commissioner comprised the income and expenditure spreadsheets for each of its thirty eight adult care and nursing establishments and contained the breakdown as detailed in the complainant's narrowed request of 21 February 2007.
 12. The council's internal review outlined the reason for its initial application of the appropriate limit but it was unclear as to whether or not the council intended the limit to apply to the narrowed request. The Commissioner therefore asked the council in his letter of 7 May 2008 to clarify its position on the matter. The council responded on 19 May 2008 but only to the extent that it had not addressed the issue because s43 applied anyway. The Commissioner therefore wrote again to the council asking it to clarify its position on the matter. In his view the land valuations that would be required to fulfil the original request would have required a creation of information and fall outside the Act. The council's replied on 4 June 2008 that it was no longer reliant on the appropriate limit in respect of the narrowed request.
 13. At the close of his investigation, the Commissioner supplied the council with his reasons for disclosure and on 10 June 2008 and again on 1 July 2008 he suggested informal release in order that the matter could be expedited without the need for a formal decision notice. The council however declined his suggestion.

Analysis

Exemption

Section 43 (commercial interests)

14. The council relied on the exemption at s43(2) of the Act in order to withhold the information. The reason why the council considered the exemption applied was stated in its refusal notice of 26 January 2007 as follows:

(a) disclosure would, or would be likely to, prejudice the commercial interests of the council as a provider of care services and as a purchaser of goods and services in order to run its care homes

(b) disclosure would prejudice the council's current negotiations with the independent care home sector as to agreement of funding levels which may result in the less effective use of public money.

The council did not specify the relevant subsection of the s43 exemption in its refusal notice but it did so in its internal review.

15. Section 43(2) of the Act exempts information if its disclosure *would, or would be likely to*, prejudice the commercial interests of any person including the public authority holding it. In the Commissioner's view, the term '*likely to prejudice*' means that the possibility of prejudice should be real and significant and certainly more than hypothetical or remote. The term '*would prejudice*' places a much stronger evidential burden on the public authority and must be at least more probable than not. Where the level of prejudice has not been specified by the public authority, unless there is clear evidence that the higher level should apply, the lower threshold of '*likely to prejudice*' should be used. In the absence of designation by the council as to which level of prejudice applies in this instance, the Commissioner has therefore considered it to be the lower level threshold.

16. On 20 May 2008 the Commissioner asked the council to explain how disclosure would be likely to prejudice the council's commercial interests as stated in paragraph 14(a) and asked the council to relate its explanation to each component of the request. The relevant components were itemised as follows:

- (i) costs of care staff
- (ii) other staff costs
- (iii) direct costs
- (iv) indirect costs
- (v) cost of capital
- (vi) average occupancy levels

17. The Commissioner also asked whether the council remained reliant on its argument at paragraph 14(b) in view of the interval that had elapsed since the date of request. If the council were still reliant on the argument, he asked that it

address each of the request's components when explaining how disclosure might weaken the council's position.

18. The council responded on 4 June 2008.

In relation to paragraph 14(a) it submitted the following arguments summarised by the Commissioner:

(i) the council sells some of its beds to other care providers – disclosure of the requested information would reveal the means of calculating rates offered to other providers – those rates could then be undercut by competitors

(ii) the council purchases some beds from the independent sector – disclosure would reveal differentials between these purchases and in-house costs which could then lead to a rise in the cost of independent purchases.

(iii) disclosure of staffing costs would allow competitors to undermine the council's position in the labour market.

19. The council stated that all the components of the request were commercially sensitive as disclosure would allow providers to factor into their fee rate a cost for each element that was set at slightly less than that of the council's. The council provided an example to support this proposition, namely, that if its staffing costs were published, it was likely that care providers would use that information to set their prices rather than what they actually pay their own staff. According to the council, this would detract from its ability to achieve the most competitive rates in the purchase of care. On the basis of this example the council declared that the same principle applied for each of the individual cost elements.

20. The Commissioner is not persuaded by the example given by the council to support its case particularly in view of the fact that the advertised pay rates of both the authority and independent sector are in the public domain and their additional on-costs are easily ascertained.

21. The council's explanation in respect of 14(a) failed to address each of the request's components as required.

22. In relation to 14(b) the council explained that it undertakes annual negotiations on a general level with the independent sector in order to reflect inflation and other cost increases. It also has negotiations with individual providers in relation to individual cases throughout the year. The council maintained that each annual negotiation and each individual negotiation builds on the negotiations of previous years and therefore the requested information does not lose its currency for some considerable time. It argued that as the annual increase to the council's budget and the annual inflationary increase payable to staff are normally publicly available, disclosure of the data for 2006/07 and 2007/08 would enable competitors to arrive at a reasonably accurate estimate of current costs. It declared that disclosure of the information would be commercially prejudicial in relation to all the components of the request for the same general reasons it proffered in relation to 14(a).

23. The council's explanation in respect of 14(b) failed to address each of the request's components as requested by the Commissioner. Whilst the Commissioner may question the soundness of the council's continuous currency argument, he is not required to argue the alternative in this decision notice. He is required instead to consider whether the exemption was engaged at the time of the request.
24. In forming his view as to whether the s43(2) exemption was applied appropriately the Commissioner has carefully considered the arguments submitted by the council. He is not persuaded by these arguments for the following reasons:-
25. With reference to the argument at 17(i):
- (i) 17(i) assumes a simple market model based on cost alone. If a competitor was able to undercut a particular rate at a particular time it does not necessarily follow that the transaction will take place. The service user or their family at the point of purchase may not be content with the provision offered. Other variables apart from cost need to be considered such as user choice, reputation of the care home, perceived quality of care, attitude of staff, location of home, proximity to visiting relatives etc.
- (ii) The Commissioner considers that if competitors can provide cheaper provision than the council there is nothing to stop purchasers approaching those providers in order to acquire this. The market provides for this and purchasers already do this. Disclosure of the requested information has no bearing on such negotiations.
- (iii) Service users frequently require specific types of care beds in specific locations at specific times. Alternative provision is not always available at the right time. The potential or otherwise for price undercutting becomes irrelevant in these circumstances.
- (iv) Should a competitor have the right type of bed in the right place at the right time there is no evidence that the competitor would or could undercut the rate offered by the council. Competitors operate within the constraints of a tight business model and do not necessarily have the automatic capacity to lower their prices.
26. With reference to the argument at 17(ii):
- (i) 17(ii) assumes a constant differential between care bed purchases and in-house costs. However there are variable dependency levels on admission and accordingly care beds are of differing types – residential, rehabilitation, planned or emergency respite care, nursing care including frail elderly, registered nursing care, continuing care etc. This is because service users require different levels of care according to individual need. It does not follow that comparison between a specific rate negotiated for a particular booking and the council's annually averaged in-house cost figures would lead independent providers to assume that the differential on that particular occasion will always hold true. On some occasions the council may need to purchase beds at higher rates than its

averaged in-house cost in order to meet specific needs at specific times. The market and the law of supply and demand work both ways.

27. With reference to the argument at 17(iii):

(i) 17(iii) assumes that competitors need to match the council's higher rates of pay in order to attract staff. However, there is no evidence presented for the validity of this assumption.

(ii) The argument at 17(iii) also assumes that in order to match the council's pay rates, disclosure of the council's staffing costs would be necessary. However, council pay rates are known to competitors as these are commonly available when posts are advertised. Competitors can therefore already choose to improve their pay rates should they wish to do so and they can do this without reliance on the disclosure of the council's staffing costs.

28. The Commissioner has observed the paradox of the council's argument, namely, that if disclosure were to enable cheaper provision by competitors then this would serve to benefit its service users rather than the reverse. Similarly, if differentials were to reveal that independents could increase prices by matching the higher in-house costs of the council then it would indicate that independents are able to provide equivalent services at less cost than the council. This raises questions as to whether the council's own provision succeeds in achieving best value.

29. The Commissioner considers the council has failed to demonstrate that prejudice to its commercial interests would be likely to result from disclosure of the requested information and that the exemption at s43 is therefore not engaged.

30. Section 43 of the Act is subject to the public interest test. However as the Commissioner does not consider the exemption is engaged, the public interest arguments are not explored further in this decision notice.

The Decision

31. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act by incorrectly applying the exemption at section 43(2).

Steps Required

32. The Commissioner requires that the council shall within 35 days of the date of this decision notice provide the complainant with a breakdown of the gross cost to the council of operating each of its residential and nursing homes as listed by the complainant in his request. The breakdown to consist of:

- care staff costs

- other staff costs
- direct costs
- indirect costs
- cost of capital
- average occupancy levels

Failure to comply

33. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

34. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 8th day of October 2008

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 43 provides that:

43. - (1) Information is exempt information if it constitutes a trade secret.

(2) 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).

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).