

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 17 March 2011

**Public Authority:** London Borough of Lewisham Council  
**Address:** Lewisham Town Hall  
1 Catford Road  
Catford  
London  
SE6 4RU

#### Summary

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The complainant requested information about a decision taken by the council during a tendering exercise for the provision of care services. He subsequently narrowed his request to any information which would highlight the reason for the change to the service provider providing care to his sister. The Commissioner has identified one document which responds to the request, although other information is also held. The council stated that the information held in this document is exempt under section 43 and section 40 of the Act (commercial interests and personal data). The Commissioner's decision is that the council was partly correct to apply section 43 to one small section of information. However it was not correct to apply this to other redactions. His decision is that Section 40 was not applicable.

He also asked the council to return notes he had made during presentations delivered by the tendering service providers tendering to provide the service. The council was willing to provide this to the complainant providing he agreed to sign a confidentiality agreement, which the complainant refused to do. The Council's decision was that some information is exempt under sections 40, 41 and 43. The Commissioner's decision is that section 41 is applicable to the complainant's notes. He has also decided that the information is not the complainant's personal data for the purposes of section 40(1).

#### The Commissioner's Role

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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.

## Background

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2. The case relates to provision of care services provided by Lewisham Council. After a tendering competition the provision of these services was awarded to various providers, as a result of which some former providers ceased to provide caring services for the area. This meant that some individuals' care was disrupted as service providers changed.
3. The complainant himself took part in the tendering competition on behalf of the council. He, and other service users were invited as part of a panel to question tendering companies and record their thoughts and views of the companies to the council. Part of the complainant's request is for a copy of the notes which he took as part of the panel, as these were collected from panel members at the end of the session.

## The Request

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4. On 16 June 2009 the complainant requested from the authority:

"In the first round of retendering, (name of a former service provider) lost the contract to provide future support for my sister. I am very unhappy with this decision and would like to make a freedom of information request to see any documents relating to this decision. I would also like a copy of the rules and regulations for running such a re-commissioning/retendering process, as I have concerns that the process was flawed."
5. On 25 July 2009 the complainant wrote again to the council and reminded it that he had not received a response. A council officer responded on the same day stating that she would find out why as response had not been provided.
6. On 31 July 2009 the council responded. It stated that the information which fell within the first part of the request was exempt under section 43 of the Act (commercial interests). As regards the second part of the request it stated that there were no rules and regulations for a re-commissioning process, however there were guidelines. It provided the complainant with an electronic link to access the guidelines. The Commissioner has not therefore considered this aspect of the complaint further.

7. On 6 August 2009 the complainant wrote to the council and asked it to review its decision to withhold information under section 43 of the Act. He asked whether any redacted disclosure could be made. He suggested to the council that the section 43 claim was difficult to understand as he understood that service providers had been given a set budget and the tender had asked them to submit details of the services they could provide for that budget.
8. On 18 September 2009 the council wrote back to the complainant asking him to clarify his request. It stated that it believed that his initial request had been for the tendering documentation submitted by all parties (which it considered to be exempt), however his request for a review had suggested that that might not be the case. It described a number of different types of documents which it holds and asked the complainant to clarify his exact requirements.
9. On 21 September 2009 the complainant responded. He stated that he did not wish to see documents submitted by external organisations. All that he wanted to see was information which would give:

"a sense of the basis on which the final judgement was made - if there are any documents that you can release me, redacted or not, that would help me understand how the decision to change my sister's care was made, that's what I'd like. I would also like the return of the notes I made while on the carer's/service users panel that interviewed the four short listed service providers. The notes were collected at the end of the day. I have asked for them back, but have been told they can only be supplied if I sign a confidentiality agreement. I am not happy to do that; they are my notes and they cannot in any way be considered to be 'commercially sensitive'."
10. On 28 October 2009 the council stated that no specific documents were held which set out to explain why the successful tendering company was chosen. It stated that it did hold a vast amount of information which it held that it used for evaluating the tenders, but none that specifically recorded how it had made its final decision. It reiterated that the complainant's notes were exempt under section 43 and were commercially sensitive.
11. On 4 November 2009 the complainant wrote to the council about the second part of his request. He stated that none of his notes held any commercially sensitive material. "They simply note what the various providers pitching for the contract told us about the services they provide – information that is already in the public domain. My notes, in

- part record my responses to what they said. I would request again that you provide them to me without condition."
12. On 20 January 2010 the council responded. It separated the above request into 2 and provided the following responses:
  13. Information on how the decision to change the care provider had been reached. The Council stated that it holds information on individual bidders, and that that information had been evaluated as part of the tender process to establish which organisation offered best value for a given site, but that it did not hold records which explain why the successful provider was chosen.
  14. A copy of the notes the complainant made while on the carers/service users panel. The council stated that the information is exempt under sections 40, 41 and 43 but that it was willing to supply it to him provided he agreed to sign a confidentiality agreement.

## **The Investigation**

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### **Scope of the case**

15. On 8 March 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant asked the Commissioner to consider whether the information which he had asked for should have been disclosed to him.
16. In response to the Commissioner informing them that he had deemed the complaint eligible the council initially said that the information it held was so voluminous that it could not provide that information to him in order for him to carry out his investigation. The Commissioner pointed out that the complainant had narrowed his complaint in his email of 21 September 2009. He pointed out that an objective reading of the narrowed request suggested that a summary of the tendering exercise explaining how the council arrived at its recommendations for Cabinet would suffice to respond to the complainant's request. He therefore asked the council to provide him with the Award of Contracts document so that he could consider whether this would provide the complainant with all of the information he wanted. His decision is that it would.
17. The Commissioner has also considered the complainant's notes and whether this information can be disclosed to the complainant.

## Section 44

18. In its letter to the Commissioner of 18 May 2009 the council initially claimed that the Award of Contracts document was exempt under section 100(a)(4) of the Local Government Act 1972. Under that section the public can be excluded from a meeting during the discussion of an item if it involves the likely disclosure of exempt information, as defined in paragraph 3 of part 1 of Schedule 12A of the Act. The council said that this paper was deemed exempt as the public interest in maintaining the exemption outweighed the public interest in disclosing the information, which related to the “financial or business affairs of any particular person (including the authority holding that information)”.
19. The council did not initially specify an exemption under the Act which it was relying upon, but its arguments suggested that it considers that this section provides it with a statutory prohibition on disclosure and therefore the information would be exempt under section 44 of the Act.
20. The Commissioner has previously considered whether section 100(a)(4) provides a statutory prohibition to disclosure and has decided that it does not. He therefore informed the council that his view was that this section would not be applicable to a request under the Act and provided an explanation as to why that would be the case. He asked it if it would therefore like to reconsider whether an exemption under the Act would apply, given that for all other documents other exemptions had been applied.
21. The council therefore said that the information was exempt under section 43 and the notes which the complainant had requested were exempt under section 43 and 41 of the Act. The Commissioner has not therefore considered the application of section 44 further.

## **Chronology**

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22. The Commissioner wrote to the council on 20 April 2010 and informed it that he had received an eligible complaint from the complainant.
23. On 14 May 2010 the council telephoned the Commissioner and stated that it had concerns about sending the exempted information to the Commissioner as it contained sensitive personal data and was commercially sensitive. It also added that due to the volume of records this would be extremely difficult to do.

24. On 18 May 2010 the council provided a response to the Commissioner's letter. It explained in detail its position as regards the information, but stated that due to the volume and sensitivity of the information it would await further clarification from the Commissioner as to how he wished to proceed prior to sending the information to him. It provided instead a list of the documents it held, highlighting the exemptions which were applicable to that information.
25. On 28 July 2010 the council telephoned the Commissioner and asked for an update on the case. The Commissioner informed the council that it was currently considering the council's submission and would respond in due course.
26. On 3 September 2010 the Commissioner highlighted to the council that the complainant had narrowed his request to information, He asked for 2 documents from the list of documents to be provided to him for consideration. One of these documents was the 'Awards of Contracts' document.
27. On 16 September 2010 the council wrote to the Commissioner. It stated that due to the sensitivity of the documents it could not provide the information to the Commissioner. It invited him to its offices to view the information in situ. It also argued that the information was exempt under provisions under the Local Government Act.
28. On the same day the Commissioner telephoned the council and said that he needed the information at his office in order to properly consider it over a period of time. He also explained that the provisions of the Local Government Act were not applicable as regards his request. The council asked for that to be put in writing and so the Commissioner did so the next day.
29. On 23 September 2010 the council wrote to the Commissioner and stated that although it wished to provide the information, it was currently in discussion as to whether that could be done. It further explained that a council officer would ring within the next week to explain whether the information could be provided to him.
30. On 4 October 2010 the council rang the Commissioner and discussed his request. The information was then provided to him on 8 October 2010.
31. On 19 November 2010 the Commissioner informed the council that his view was that the Award of Contracts document responded to the complainant's narrowed request. He asked the council to clarify which exemption it was relying on given that it had indicated that it was

- withholding the information under the provisions of the Local Government Act, which is not a valid exemption under the Act. He also asked the council for a copy of the complainant's notes.
32. The council responded on 10 December 2010 providing further arguments and a redacted version of the Awards document for consideration. It did not provide a copy of the notes, but provided arguments why they should be considered exempt under section 41 and section 43.
  33. On 17 December 2010 the Commissioner wrote to the council asking it to send the notes to him, and to clarify its reliance on the exemption.
  34. The council responded on 21 December 2010 stating that due to the Christmas period it would need extra time to respond and would seek to do so shortly after the Christmas break.
  35. The Commissioner telephoned the council on 17 January 2011 and asked the council to send the notes to him. The information was received on 18 January 2011. The council also clarified its reliance on sections 43 and 41.
  36. The Commissioner contacted the council on 20 January 2011 and asked it to provide a further explanation of its reliance on section 40(2) for sections of the 'Awards of Contract' document. The council responded on 26 January 2011 providing its reasons for relying on this exemption.

## **Analysis**

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### **Exemptions**

#### **Section 43**

##### The award of contracts document

37. The council stated that the information is exempt under section 43 of the Act. It said that a disclosure of the information would prejudice both its, and the commercial interests of those who tendered to provide the services.

##### Identifying the applicable interests within the relevant exemption

38. The council said that the interests are relevant are its, and the tendering companies commercial interests. This is the first tranche of

the council's intention to renegotiate and retender some of its social service agreements. At the time of the request the council would therefore still be in the process of preparing other similar tenders for similar services within Lewisham. Some of the providers who tendered in this tranche may also have been considered tendering in other tranches.

#### The commercial interests of tendering companies

39. The council did not provide any evidence from third parties that a disclosure of their tendering information would be commercially sensitive to them. The Commissioner is not prepared to speculate on the likelihood of, or the nature of prejudice which the council has foreseen for third parties where no evidence that that prejudice would occur has been submitted. He has not therefore considered this aspect further within this Decision Notice.
40. The Commissioner has however considered the commercial prejudice that would be likely to occur to the council if this information is disclosed. As part of that analysis some account must be taken of the likelihood that a disclosure of the information would be commercially prejudicial to the third parties if this would affect the nature of their relationship with the council and of tenders being submitted in the future.

#### Considering the nature of the prejudice

41. The council provided the following arguments in support of the view that a disclosure of the information would be commercially prejudicial.
  - a) Disclosure would have a serious detrimental affect on a number of organisations, some of whom are small organisations who only provide services in the London Borough of Lewisham.
  - b) The information is commercially sensitive to the authority in respect of its strategic commissioning intentions for the future and financial information.
  - c) Disclosing the information would cause serious detriment to the competitive nature of the procurement process and could directly or indirectly advantage/disadvantage providers.
  - d) There are a number of associated risks involved for the Council, not least the possibility of liability around a provider not winning business as the Council has disclosed business sensitive information.

- e) If this information is disclosed the competitive nature of the tendering process will diminish, making it very hard for Commissioners to assess competency.
42. The council further identified the following elements of the information which would be likely to be prejudicial to the third parties if disclosed.
1. Section 5.1 should be exempt because the information relates not only to providers that were shortlisted, but those who were not. Disclosure would be likely to affect the commercial viability of those organisations which were not successful in getting to the short listing phase.
  2. Section 6 of the document should be exempt as it relates to expressions of opinion made by the council when assessing the ability of the organisations to deliver the services they were bidding for. The council's comments may be used by competitors in order to discredit other providers when tendering for other services with different organisations. There is a significant risk that it would be likely to prejudice the commercial interests of all the providers who tendered during this tranche.
  5. Appendix 4 details the costing proposed by each of the organisations. The council argued that this information should be exempt as disclosure would damage the commercial interests of all those organisations tendering for services not only with the London Borough of Lewisham but any other organisation they may approach in the future. It argued that disclosure could also possibly lead to anticompetitive practises.
43. The council provided the following arguments in support of its own commercial interests.
- a. Appendix 3 is a detailed breakdown of how the Council ranked each organisation's ability to deliver the service which they tendered for. This information is compiled from a series of criteria detailed within Appendix 2. The council said that if this information was disclosed it would significantly reduce the ability for the Council to manage its tendering process. Organisations would tailor their bids to satisfy the scoring criteria, and therefore possibly not deliver the best service to the vulnerable people they are due to support.
  - b. Appendix 5 gives the relationship between appendices 3 & 4. Due to the reasons stated for withholding appendices 3 & 4 the council argued that the information should be exempt under Section 43(2) because the information could be used to damage

the commercial interests of all providers and the Council by clearly laying out the council's criteria for selecting a particular service.

c. Section 7.3 gives a breakdown of the value of each provider's contract along with a total value for 1 and 5 years. The council said that whilst it could release the totals, it would not break these down to individual service provider level. It argued that a break down can be used to calculate the weekly rates at which service providers tendered and thus would be likely to lead to uncompetitive pricing from other organisations tendering at a later stage.

44. The Commissioner also recognises an argument that knowledge of the previous tender prices submitted could lead to a levelling of tenders around that particular tender. This is the argument that a disclosure could diminish the competitiveness of future tenders.

#### The likelihood of prejudice

45. The Commissioner has considered the likelihood of the prejudice occurring. He notes that the council did not specify in its arguments whether prejudice would, or whether it would be likely to occur, and so has considered the application of the lower threshold.
46. He notes that organisations should now be generally aware that local authorities are subject to the Act and that details of tenders which are submitted may be requested under the Act. The Commissioner also notes that he has made many decisions in the past requiring information from tenders to be disclosed, or at least partially disclosed. It should therefore be not be surprising to organisations seeking significant contracts with local authorities that information of this sort can be requested and may be disclosed.
47. The Commissioner notes that the information relates to Tranche 1 of a service procurement exercise. It is therefore possible that some of the service providers which have tendered for services within this tranche may also be considering tendering for similar services in other tranches.
48. Tenders generally take account of the specifics of each individual service which is tendered for, and each tender may therefore be individual to each service – costs and services provided will be dependent upon the nature of each individual property and the needs of the individuals living within those properties. In this case some individuals will require a greater degree of care than others and the

costs of providing the service may therefore be greater in those instances. Tenders may reflect this and therefore be specific to a particular location and service. Evaluations of information provided on this tender may not therefore be an ideal indicator of tenders which would be submitted by competitors in response to other tenders. Having said this the Commissioner recognises that some information will carry over such as services and care provisions which are more universally applicable; e.g. any leisure services or provisions provided as part of the package may be similar between sites.

49. The Commissioner notes that the information includes comments analysis and opinions about the services being offered by the tendering companies as well as financial information on the bids themselves. He notes that the information therefore contains a mixture of financial information, summaries of the tender and opinion on individual services provider's responses at interview.
50. The analysis and opinion for the most part relate to how tendering companies fared in their interviews or how they matched up against the criteria which needed to be met. They include specific criticisms of the tenders and demonstrate weak areas within submissions or interview responses. This would provide the companies with valuable feedback compared to other tenders. Individual feedback of a company's submission which is provided to it after the tendering exercise would not provide comparative figures from the other tenders and so this would be useful to them to identify which areas of their tenders are weak compared to others.
51. The council has argued that a disclosure of the ranking and of any negative comments or evaluations would be likely to prejudice the commercial interests of tendering companies. A disclosure of unsuccessful bids would highlight to companies concerned where they are falling short on contracts they have tendered for as explained above. This would provide valuable feedback with which they might produce more competitive tenders in the future. This will therefore benefit the service provider concerned.
52. The council argues that a disclosure of the criteria which it used to evaluate tendering companies would lead to companies manipulating their tenders to best meet the criteria, thereby affecting the overall tender and potentially offering a lesser service. The council did not however provide an explanation as to how that would occur. The Commissioner considers that clarifying the factors which the council places greater emphasis may in fact be likely to lead to better tenders being submitted which better meet the factors which the council considers are important. The tenders should therefore better meet the

needs of the service users because the criteria set by the council would presumably take these needs into account. It is also likely to benefit the council (and therefore the public) as the increased competition and better informed tenders will serve to drive down prices or improve value for money where the price of the contract is fixed.

53. The council also argues that a disclosure of pricing would lead to uncompetitive practices - that service providers will not significantly undercut each other or the costs of the service to the council previously. The Commissioner is not persuaded by such an argument. The Commissioner notes that this argument is speculative and that the council has not submitted evidence of the likelihood of this occurring or having occurred in the past. Competition and transparency will in general reduce overall pricing or the quality of services offered as compared to when than the final price of a service is hidden. The Commissioner considers that it is likely that companies would seek to reduce their prices as much as possible in order to provide a competitive tender for the service.
54. Alternative arguments have been put to the Commissioner previously that a disclosure of the marking would lead to service providers undercutting each other to the point where the quality of services on offer are affected. However the criteria set for the evaluation will not simply rest on price alone. It will also take into account the quality of the services on offer. The Commissioner therefore notes that these evaluation criteria, together with requirements on the services being stipulated within the contract should ensure that the pricing provided by tendering companies is not cut to the point where the quality of services are affected. Competition may therefore serve to drive down the overall price of services to the public without affecting the quality of the services being provided.
55. The Commissioner notes that this is, in itself prejudicial to the commercial interests of the third party companies who will obviously seek to maximise profit from the contracts they enter into, however it is clearly of benefit to the taxpayer.
56. The Commissioner notes guidance produced by the Office of Government Commerce entitled FOIA (Civil Procurement) Policy and Guidance and the consideration of this document by the Information Tribunal in the case of *Keene v Information Commissioner EA/2008/0097*. This document provides working assumptions on information obtained via tenders where that information is requested under the Act. The working assumptions it makes essentially provide that information on tenders, including unsuccessful tenders, should generally be disclosed, however sensitive information should be

- withheld. It adds however that information should only be considered sensitive during the tender stage. Essentially therefore the OGC recognises that in the majority of occasions, information obtained during a procurement exercise should be disclosed to requestors, with an exception where specific ongoing prejudice can be identified.
57. The Commissioner notes that the council's arguments about its own commercial interests are general in nature and could equally be applied to the vast majority of commercial procurement exercises which public authorities carry out. He therefore recognises that the approach taken by the council does not accord with the view of the OGC as to the sensitivity of information in question or the likelihood that a disclosure would affect future tendering exercises. The Commissioner recognises that the OGC document is merely guidance, however it is guidance based on knowledge of government procurement exercises. Although there will be a difference as regards the potential personal sensitivity and privacy issues in some information relating to the tenders, this is not particularly an issue with the majority of information held within the Award of Contracts document.
58. The Commissioner therefore considers that the above significantly weakens the arguments submitted by the council. If other, larger authorities rely upon the OGC guidance and therefore do not give significant weight to such arguments then the Commissioner would expect to identify arguments over and above these 'general' arguments which are applicable to all tendering exercises before accepting that these hold significant weight. They would need to be arguments specific to this tendering exercise which raise issues with the disclosure of this specific information. The Commissioner does not believe that the council has provided such arguments for the majority of this information.
59. The Commissioner notes that there is one comment within the evaluation which may be damaging to the company concerned. The Commissioner considers that a disclosure of this sentence, without further clarification or without offering an opportunity for the tendering company to respond would be likely to cause damage to that company's future prospects. This would in itself prove prejudicial to the interests of the council by hindering free and frank expression. The Commissioner is therefore satisfied that the disclosure of the information held in this particular sentence would be likely to engage section 43.
60. However the Commissioner is also aware that redacting this information by simply blacking out the relevant sentence would not of itself be sufficient to prevent potential commercial damage to the

company concerned. This is because the particular service provider would be able to be identified, and negative connotations could be drawn from the contents of this Decision Notice.

61. The Commissioner notes that the severity of any prejudice which might occur is not a factor which is relevant to a decision as to whether section 43 is engaged or not. The Commissioner notes however that for a harm to constitute a prejudice it has to be at least real, actual and of substance. It cannot be merely hypothetical. Although he recognises that the prejudice which has been foreseen by the council can be offset against many other benefits, he nevertheless recognises that there would be a degree of prejudice if this information is disclosed. He is therefore satisfied that the exemption in section 43 of the Act is engaged. He has therefore carried out a public interest test as required under section 2 of the Act.
62. The above information rests on the Commissioner's analysis of the Award of Contracts document only. Given his decision as regards the application of section 41 to the complainant's notes (which is outlined below), he has not considered this information in his analysis above).
63. The Commissioner has considered further arguments as to why the exemption applies to the document.
64. If the council's criteria for tendering are disclosed then companies will better understand the process it has in place and will amend their tenders to best meet those criteria. The council's argument is that this would not necessarily involve the company bettering its services, merely learning how to 'say the right things'. The Commissioner has discounted this view above, stating that the council can ensure the standards which companies must meet through appropriate contracts and supervision.
65. The council has argued that its ability to obtain best value will be detrimentally affected by a disclosure of financial figures from the tenders. This could affect the services provided and the funds the council has available for other functions. The Commissioner has also considered this above and is satisfied that in fact this is likely to lead to increased competition rather than anti-competitive practices.
66. The council has argued that a disclosure would be detrimental to the interests of the tendering companies. The Commissioner has shown above that that would be unlikely to be the case. The company with the winning tender will have details of that tender disclosed and this may mean that other companies may copy successful parts of that tender, and that tenders may therefore become more competitive

overall. However the successful company itself may also benefit from other tenders where it has been unsuccessful in the same way.

67. However in the case of one particular sentence identified above, the Commissioner notes that a disclosure of the information would cause damage to the reputation of the service provider, without providing a proper understanding of the nature of the comment, nor its reason for inclusion within the report.
68. The comment is not supported by evidence, it is not explained, and if the company was given the opportunity to respond to the comment this is not reported in the information itself. No explanation is also provided with the comment which might allow a better understanding of its nature. The Commissioner is satisfied that this would be prejudicial to the commercial interests of the company concerned. He has therefore carried out a public interest test as regards this information.

#### The public interest in maintaining the exception

69. As regards the sentence which he considers would be prejudicial to disclosed, the Commissioner is satisfied that a disclosure of this information would affect the ability of the council to provide full and frank advice to its decision makers in the future. It must be open to the council to be able to clearly inform decision makers of issues which it has with a particular company without fear that that company will be able to access that information. A disclosure of such information could lead to appeals and potentially litigation, could slow down the process of tendering, and could increase the overall costs. It is imperative that decision makers can discuss the merits of particular providers frankly with each other. This impact of the procurement process is closely linked to the Council's commercial interests.

#### The public interest in disclosing the information

70. The Commissioner considers that the public interest in the information being disclosed revolves around the council's transparency and accountability in its decision to retender its care services. Such changes will often affect the lives of the individuals in care to a great degree. The council's reliance on private service providers to care for vulnerable individuals should be as open and as transparent as possible. Service providers will to a great degree determine the quality of life and the wellbeing of the individuals within their care. It is therefore essential that professional, caring organisations are chosen as providers, and a disclosure of the evaluation information would provide greater transparency on the council's decision in that respect.

71. At the same time there is an ongoing duty on authority's to ensure that they obtain value for money and that they properly balance out the need to provide appropriate care with the duty they have to taxpayers to spend public money effectively. A disclosure of this information would provide the ability to properly scrutinise how the council has gone about balancing those requirements. This would build public confidence in the council's decision making.

#### Balance of the public interest arguments

72. The Commissioner has considered the above. As regards the sentence he highlighted in paragraphs 67 – 68 his decision is that in this case the council's comments reflect their duties to ensure value for money and excellent quality of service. In this respect it is essential that council officers are able to raise and report issues about particular service providers to council decision makers and the cabinet. It is clear that if the Commissioner were to order a disclosure of this comment then this would seriously dissuade council staff from including such comments in the future because of the commercial damage that that might cause to the provider concerned. The council has argued that there is a possibility of legal challenges being made about negative comments if they are disclosed widely and affect a particular provider's reputation. The Commissioner also highlights the possibility of disclosure raising the costs of tenders and increasing the time taken to complete the process if council officers cannot be candid with decision makers regarding particular tenders.
73. The Commissioner is therefore satisfied that the council was correct to apply section 43 to this particular statement, and that the public interest rests in the maintenance of the exemption in this particular case. As noted above however, he considers that merely redacting this comment in a way that the redaction could still be associated with the company concerned would still be likely to be prejudicial in itself. The Commissioner's decision is therefore that the council should remove the wording from the document in such a way that it cannot be ascertained where the comment was situated within the Award of Contracts document, nor which company it referred to.
74. However as regards the remainder of the information he is satisfied that the public interest rests in disclosure. Section 43 is not therefore applicable to this information.

## Section 40

75. Section 40(2) of the act provides an exemption where a disclosure of the information would be a disclosure of personal data, which would breach one of the data protection principles of the Data Protection Act 1998 (the 'DPA'). Section 40(1) provides that information is exempt from disclosure under the Act if it is personal data of the applicant.
76. The council argued that there is personal data within the complainant's notes and that the information exempt under section 40(2) of the Act. The Commissioner has considered whether the information is personal data belonging to the complainant bearing in mind the notes were written by him and recording his opinions of the tendering companies' presentations and their responses to interview questions. If the information is his personal data then it would be exempt from disclosure under the Act, but the council would have a duty to consider providing it to him under the provisions of section 7 of The Data Protection Act 1998.
79. The council also highlighted 2 small sections of personal data within the award of contracts document which it stated was the personal data of third parties. It argued that this information should be disclosed under section 40(2).

### Is the information personal data for the purposes of the DPA?

#### The award of contracts document

80. The council argues that some of the information in question within the Award of Contracts document would allow individuals to be identified and would therefore be a disclosure of personal data. The council identified 2 sentences which it argued would disclose personal data if disclosed. However neither sentence specifically identifies individuals. The information simply refers to a number of individuals living within properties tendered for by particular service providers. It refers to the individuals as a group, and to those individual's reasons for receiving services. The properties they live in are not identified but are referred to in general terms.
81. The council said that it believes that a disclosure of this information, in collaboration with other information which may or may not be in the public domain would potentially mean that that information is personal data. Its argument is that there is information within the public domain which might allow the individuals to be identified. It also highlighted that friends and relatives of an individual in the properties may be able

to recognise the individuals living within that property from the descriptions provided.

82. The Commissioner asked the council to explain why it considers that a disclosure of the redacted sections of the awards of contract document would allow the individuals to be identified. He pointed out that there are very similar sentences in other paragraphs in the same section of the document which have not been redacted in any way, and asked the council to explain why the information in these 2 paragraphs needed to be redacted. He also pointed out that neither the properties location nor can the individuals be identified from that information alone. He asked the council what information would be available in the public domain which could result in the identities of the individuals being identified.
83. In response the council simply reiterated its view that there may or may not be information already in the public domain which would allow those individuals to be identified. It did not explain further why it considered that to be the case, nor what information it considers might already be in the public domain which would allow them to be identified. Additionally, it added that on reflection it had decided that the entire 2 paragraphs should in fact be exempted rather than simply 2 sentences from them.
84. Given this lack of further clarification from the council the Commissioner is unable to agree with council argument. It has been unable to provide any details supporting that view.
85. The Commissioner notes however the argument that friends and relatives of the individuals may be able to identify the residents who are referred to. The Commissioner considers that friends and relatives, and some members of the public who are already aware of the properties and the services being provided may be able to identify the properties being referred to, and therefore the individuals living within those properties.
86. The Commissioner considers that there is an inherent difference between this form of identification and between the general public being able to identify individuals. In many circumstances where anonymised information is disclosed some individuals who have direct knowledge of the individual concerned and/or their situation may be able to recognise that person. In essence however, identifying the individual(s) involved would not add anything new to their knowledge about that individual – they would not gain additional knowledge through the disclosure. The Commissioner considers that it is not necessary to take account of other information that is held purely as a

result of close confidential relationships between a third party and a data subject when considering whether an individual may be identified through a disclosure of anonymised information. The complainant in this case is already aware of, and knows the individuals at the home, and a disclosure of the information would not advance that knowledge.

87. The Commissioner is satisfied that in such scenarios that the data controller has anonymised the data at the point of disclosure, and that in this case he should discount such factors as personal experience and knowledge of the subject of the data when considering whether its disclosure would disclose personal data. As he is not aware of any other information within the public domain which would identify that individual to the general public then his decision is that that information was anonymised at the point of disclosure and so is not personal data.
88. The Commissioner therefore concludes that disclosing the information would not be a disclosure of personal data. Hence his decision is that the council was not correct to apply section 40(2) to this information.

#### The complainant's notes

89. The Commissioner has considered whether the fact that the complainant wrote the notes means that it is personal data belonging to him. The notes are primarily a set of questions which have been prepared before the interview in table form. They identify the person asking the question, provide the question itself and an also provide an open cell for notes to be taken on the companies' responses. The companies responses to the questions are not included, however the complainant took notes on some of the responses. Additionally there are also other questions which were asked at the time of the panel, and so notes about these have been made by the complainant.
90. The information in question is therefore not about the complainant. Nor for the most part do the notes it refer to him. The Commissioner notes that 2 of the questions were written by the complainant and the set paperwork refers to him by name as having asked those particular questions. The questions relate to whether staffing and services may change in the event that the particular company wins the tender and are not about him or his sister specifically, although obviously changes in services will affect them.
91. Although written by the complainant, the information is clearly not about him but reflects instead the tendering companies' intentions should their tender be the successful one. Other sections refer to

questions being asked by other individuals on the panel, and the complainant has made some notes to some of their responses to these.

92. The Commissioner's decision is that the information is not personal data belonging to the complainant. His experiences on the panel, and the notes he wrote were for the use of the council for evaluation purposes. They are not about him, do not provide any biographical details about him and do not clearly reveal personal opinions. Accordingly the Commissioner is satisfied that the information is not personal data of the complainant and section 40(1) does not apply.

#### Section 41

93. The Commissioner has considered the application of section 41 to the complainant's notes. It did not claim that the Award of Contracts document was exempt under section 41 and so the Commissioner has not considered this within this Notice.
94. The complainant's comments are his evaluations of the service provider's presentations together with their responses to issues and questions raised by service users.
95. The council stated that the information is exempt under section 41 of the Act. Section 41(1) provides that information is exempt from disclosure if:
- a. it was obtained by the public authority from any other person; and
  - b. the disclosure of the information to the public by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
96. In order for the exemption to be engaged the Commissioner considers that in this case the appropriate test is that it must be shown that the information:
- a. was provided to the authority by another person, and
  - b. that a disclosure of the information would give rise to an actionable breach of confidence - which in turn the Commissioner considers in this case requires that:
  - c. the circumstances in which the information was provided gave rise to an obligation of confidence, in that a 'confider' provided information to a 'confidant' in the expectation, whether explicit or implied, that the information would only be disclosed in accordance with the wishes of the confider;

- d. The information has the necessary 'quality of confidence' – it need not be highly sensitive, but it must not be trivial;
  - e. disclosure of the information would be unauthorised and to the detriment of the person(s) to whom the duty of confidence is owed, or cause a relevant loss of privacy;
  - f. the action would not fail on grounds which provide a legal defence to a breach of a duty of confidence, for instance that disclosure would be protected by a public interest defence.
97. The Commissioner accepts that the above does not constitute the only test of confidence, however he considers it appropriate to use in this case.
98. The Commissioner does not accept that all information is held in confidence merely because the parties decide together that that will be the case. Allowing this would allow parties to contract their way out of their obligations under the Act. The Commissioner has therefore considered whether the information meets the necessary criteria for a duty of confidence to apply.

Was the information provided to the council by another person?

99. The Commissioner has considered whether the information was provided to the council by another person.
100. The complainant made notes on presentations made by tendering companies and the answers they gave in response to questions from service users. The Council argues that the service providers provided this information to the panel (which included the complainant) as part of its tender, and that it has a contractual duty to hold information gained within the tender process in confidence.
101. Although the information was created by the complainant it was created from information provided to him (and to the council) by the tendering companies. In essence, in taking part in the panel the complainant was effectively acting on behalf of, or in conjunction with, the council. His, and the other notes fed into the process of evaluation which would eventually lead to the successful company being chosen.
102. The Commissioner is therefore satisfied that the complainant does not have the right to waive confidence the notes, and that the information he created was created from information provided by the tendering companies. The council did therefore receive the information from another person.

### Obligation of confidence

103. The council argues that there is a contractual duty of confidence which it owes to the service providers. It states in evidence that Section 23 of the contract for tender states;

“The Service Provider and the council must keep confidential and must a make sure their staff keep confidential all information which is learnt or obtained by the council or the service provider and/or the council's or the service providers staff in connection with this agreement and provision of a service, except:

as allowed under Data Protection legislation and,

where there is a risk of serious harm to the service user or other individuals and,

where information is to be released to other professionals for the purpose of the provision of the service to a service user and,

where information is required to be released for the purpose of any legal proceedings, Ombudsman inquiries, public inquiry, tribunal or arbitration”

104. The Commissioner is therefore satisfied that there was clearly an intention for the council to hold information it obtained from the service providers in confidence. However the information in question was information written by the complainant, and he was not informed that his notes would be considered confidential.

105. The council states that although service users present at the panel were not provided with any indication that the information they were about to hear was to be held in confidence, as the notes were collected at the end of the day this should have been recognised by them. They have since added a stipulation to this effect to the paperwork used by service users in the panels in other tranches. The Commissioner does not give this argument a great deal of weight given that there was no discussion or information provided to the complainant that the information should be held in confidence.

106. The Commissioner must also consider the request ‘applicant blind’. He must therefore consider the position as if any person had asked for that information.

107. The council was under a contractual duty to hold that information in confidence. Its apparent error in not informing the panel members of that duty of confidence would not of itself override that obligation. The council's error should not be compounded by a disclosure of the

information purely because it made an earlier error in not explaining the status of the information to panel members. He is therefore satisfied that on the facts of the case the council obtained the information with the necessary obligation of confidence.

### Quality of confidence

108. In order to decide whether the information has the necessary quality of confidence the Commissioner must consider whether the information is otherwise accessible and/or whether the information is more than trivial.
109. The complainant has stated that the information which he wrote notes on was information which was provided by the service providers as part of their presentations. He argues that this information does not have the necessary quality of confidence because it is information which is readily provided by the service providers as part of their marketing package.
110. Marketing presentations would largely have been composed of information introducing the company and providing an overview of the services they could provide – presenting a case for them to be the successful company. The presentation probably would reiterate information which is freely available from the companies' own marketing material.
111. The Commissioner notes however that the notes for the most part relate to specific questions asked about current staffing levels, service provisions and questions about how the company would handle the provision of care for specific individuals. The notes refer to specific questions from specific individuals and the responses which the companies provided to those questions rather than simple generic information on how the company approaches providing services.
112. The Commissioner is satisfied that this information is specific to individuals and that it would provide a very intrusive picture of how services to particular individuals would be addressed by that provider. The service providers, when asked specific questions about individuals needs have provided details of the sorts of care, entertainment and life opportunities which they are able to offer to individuals. He is therefore satisfied that the information is not trivial.
113. The Commissioner is also satisfied that the information is not in the public domain generally. The Commissioner is therefore satisfied that the information has the necessary quality of confidence, and that the information is not well known.

### Detriment to the confider

114. The Commissioner has considered what detriment would occur to the provider if this information was disclosed.
115. In the panels the companies are asked to go into detail about the care which would be provided to specific individuals. He notes that they were asked about their intentions for the services, how these might be affected and how current staff at homes will be affected by that company being the successful bidder.
116. The Commissioner is satisfied that this information, as it is so specific, would be sensitive to the companies concerned. They highlight specific issues which have been raised with them. If the companies could not respond in an open way because the confidentiality of that information would be in question then they could not be so specific about their intentions when responding to direct questions from service users in the future.
117. The Commissioner is satisfied that such a restriction on their ability to respond may damage their ability to properly present their case to panels in the future. A disclosure of the information would therefore be detrimental to them.
118. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.

### Would an unauthorised disclosure be actionable?

119. The Commissioner must also consider whether the tendering companies could take action against the council in order to prevent that information from being disclosed if it chose to do so. He has established above that all of the necessary criteria for a duty of confidence to arise are in place; however there are a number of defences to a disclosure of confidential information which prevent action being taken against the discloser. The Commissioner has therefore gone on to consider whether there would be any defence to an unauthorised disclosure of the information.

### The public interest defence

120. The Commissioner has considered whether an action for a breach of confidence would fail because the disclosure of the information would be protected by a public interest defence.
121. In *Derry v ICO (EA/2006/0014)* the Information Tribunal clarified that the test to be applied in deciding whether the public interest provides a defence to a breach of a duty of confidence is that the duty should be

maintained unless the public interest in disclosing the information outweighs the public interest in protecting confidences.

#### Public interest in disclosing the information

122. The central public interest in the information being disclosed lies in the increase in transparency such a disclosure would bring. It would increase the ability of the public to scrutinise the actions of the council. It would add further details of the information which it had in front of it when it made the decisions it did.
123. The information would also provide some indications of the services which specific service providers offer to individuals in their care, which would provide reassurance to the public that the decisions of the council did not rest purely on financial costs of the services being offered. The Commissioner notes that this would, in any event, be relatively clear from the Award of Contracts document which he considers should be disclosed above.

#### The public interest in maintaining confidences

124. The Commissioner notes that the courts have generally taken the view that the grounds for breaching confidentiality must be strong ones, since confidentiality is recognised as an important value in itself. There is a public interest in maintaining trust and preserving the free flow of relevant information to public authorities to enable them to perform their functions. This argument has a particular strength in the case of information provided by the care providers in this case. The duty of confidence protects the necessary relationship of trust between the confider and the confidant, thereby operating to serve the public interest.
125. In the case of *Bluck*, the Information Tribunal quoted from the Lords decision of *Attorney General v Guardian Newspapers [1990] 1AC109*:

‘as a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence...’
126. Historically, a duty of confidence has only been disapplied by the courts in very limited circumstances. Examples of cases where the courts have required disclosure in the public interest include those where the information concerns misconduct, illegality or gross immorality. In this case none of these provisions apply. That limitation has widened when considering confidentiality in response to questions under the Act however.

127. The disclosure of confidential information may undermine that relationship, and prevent service providers providing valuable information to service users, and hence the service users views to the council. The system of using service users to help evaluate individual service providers is clearly a step in itself towards transparency and allows them to be involved in the process to a limited degree. Negating that process by reducing the details which can be openly discussed would be contrary to transparency for the families and individuals concerned. The ability of service users to ask pertinent and specific questions about how the service will be provided to specific individuals is a major factor in the Commissioner's decision.
128. The Commissioner particularly notes that if service providers feel unable to provide such specific answers to questions asked by service users then their opportunity to reassure themselves and the service provider's opportunity to properly present themselves will be damaged. In a confidential atmosphere the service provider is able to provide specific details both regarding individual care it can provide to service users, and also talk openly about their intentions about the service and about the staff and how they will handle the change over of providers.
129. In essence therefore the Commissioner is satisfied that a disclosure would actually damage the transparency of the process for service users; restricting their ability to properly question prospective service providers.
130. On balance therefore the Commissioner is satisfied that the public interest rests in maintaining confidences in this instance.
131. In light of this finding the Commissioner has not gone on to consider the other exemptions which the council applied to the notes.

### **Substantive Procedural Matters**

132. The Commissioner notes that the council's refusal notice fell outside of the 20 working day deadline for the provision of the information set by section 10 of the Act. He therefore considers this to be a breach of section 10(1).
133. The council failed to provide information to the complainant which the Commissioner's decision finds should have been disclosed to him. Accordingly the Commissioner's decision is that the council also breached section 1(1) (b) of the Act. It also breached section 10 (1) in not providing that information within 20 working days.

134. It is also a breach of section 17(1) which requires that an authority choosing to rely upon exemptions provides a valid refusal notice within the deadline set by section 17(1).
135. The Commissioner notes that the refusal notice initially stated that the council did not hold relevant information when in fact it did. The Commissioner's decision is that the Award of Contracts document does however fall within the scope of the complainant's request. This is a breach of section 1(1)(a) of the Act.

## The Decision

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136. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- It was correct to withhold the complainant's notes under section 41 of the Act.
137. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The council was not correct to apply section 43 to the entire Award of Contracts Document. It was correct to apply the exemption to one paragraph as outlined in paragraphs 67 to 68 above.
  - The council was not correct to apply section 40 to the information it identified as personal data within the 'Award of Contracts' document.
  - The council breached section 10(1) in not providing a refusal notice within 20 working days.
  - The council breached section 1(1)(a) in not informing the complainant that it held information falling within the scope of his request.
  - The council breached section 17(1) as it did not provide a valid refusal notice within 20 working days.
  - The council breached section 1(1)(b) in that it did not provide information to the complainant which did not fall within the scope of the exemptions of the Act.

## **Steps Required**

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138. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- To disclose the Award of Contracts document other than the paragraph highlighted in paragraph 67 and 68 above, withholding the paragraph in line with his comments in paragraph 73.

139. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## **Failure to comply**

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140. 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

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141. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877  
Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

142. 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.

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

**Dated the 17<sup>th</sup> day of March 2011**

**Signed .....**

**Steve Wood  
Head of Policy Delivery**

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

## Legal Annex

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### Information provided in confidence.

#### Section 41(1) provides 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.”

### Commercial interests.

#### Section 43(1) provides that –

“Information is exempt information if it constitutes a trade secret.”

#### Section 43(2) provides 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).”

#### Section 43(3) provides that –

“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).”

#### Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

(c) it constitutes personal data which do not fall within subsection (1), and

(d) either the first or the second condition below is satisfied.”

#### Section 40(3) provides that –

“The first condition is-

(e) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data

Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

1. any of the data protection principles, or
2. section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(f) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

**Section 40(4) provides that –**

"The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data)."