

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

### **Decision notice**

**Date:** 10 January 2013

**Public Authority:** Sunderland City Council  
**Address:** Civic Centre  
Burdon Road  
Sunderland  
SR2 7DN

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

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1. The complainant has requested information about the business tenants at the E-volve Business Centre and Rainton Bridge Business Park regarding the financial support and assistance provided by Sunderland City Council (the council) since opening to the date of the request. The council initially relied on section 43(2) as it considered that the information would prejudice the businesses' commercial interests. The council also considered that its own commercial interests would be prejudiced. Finally, it relied on section 41 as it considered that if disclosed, the information would in turn disclose information that had been provided in confidence by the businesses.
2. The Commissioner's decision is that the council has incorrectly applied section 41 and section 43 to withhold the requested information.
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
  - Disclose the requested information to the complainant.
4. The council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 23 November 2010, the complainant wrote to the council and requested information in the following terms:

*"Please can you provide a list of all tenants at the Evolve Centre and businesses at the Rainton Bridge Business Park where you have provided financial support and/or assistance since the opening.*

*Please provide:*

*- Details of any Rent/Business rate reduction provided  
- Details of any Accommodation/relocation grant(s) directly provided and/or supported (eg relocation grant received by other organisations such as One North East)."*

6. The council initially responded to say that the request was vexatious. This response was considered by the Commissioner and the decision notice FS50374873 found that the council was not entitled to refuse the request under section 14(1) of the FOIA. It therefore ordered the council to either comply with section 1(1) or issue a valid refusal notice.
7. Following the decision notice, the council responded to the request on 2 March 2012. It stated that the information was exempt from disclosure under section 43(2) and section 41(1) as it would prejudice the commercial interests of the council and the businesses, and if disclosed would result in the disclosure of confidential information.
8. Following an internal review the council wrote to the complainant on 8 May 2012. It upheld its original refusal notice and confirmed that it considered that the information was exempt from disclosure under section 41(1) and section 43(2).

## Scope of the case

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9. The complainant contacted the Commissioner on 9 May 2012 to complain about the way his request for information had been handled.
10. During the course of the investigation, the council reconsidered the information falling within the scope of the request and informed the Commissioner that the information previously identified was the financial assistance given to businesses between 2009 and 2012. The council recognised that as most of it post-dated the request a significant proportion of it did not fall within the scope of the request. The council then identified the information it held which covered the requested

period from the opening of the business park in 2006 to the date of the request.

11. The Commissioner therefore considers that the scope of this case is to determine whether the council was correct to withhold any of the requested information under the FOIA.

## **Reasons for decision**

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### **Section 43(2) – Prejudice to Commercial Interests**

12. Section 43(2) of the FOIA states 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)."*

13. This is a qualified exemption and is therefore subject to the public interest test, if engaged.

14. Broadly speaking, section 43(2) protects the ability of a party to participate competitively in a commercial activity, for example the purchase and sale of goods or services. The successful application of section 43(2) is dependent on a public authority being able to demonstrate that the following conditions are satisfied –

- Disclosure of the requested information would, or would be likely to, prejudice the commercial interests of any party (including the public authority holding it).
- In all the circumstances, the weight of the public interest in maintaining the exemption outweighs the public interest in disclosure.

15. Therefore, the first issue for the Commissioner to assess is whether, in this case, the council has identified relevant prejudices that the exemption is designed to protect against. If this is not found to be the case, the exemption is not engaged and there is no requirement to go on to consider the prejudice or public interest tests.

16. The term 'commercial interests' is not defined in the FOIA, however, it is understood to have a broad meaning, encompassing activities which have both a direct and an indirect effect on commercial activities. This will therefore include the buying or selling of goods and services as well as information which can be shown to affect a person's ability to undertake such activities effectively.

17. The council has argued that section 43(2) is engaged with regard to both its own commercial interests and those of the businesses that have received financial assistance from the council. It has said that its own commercial interests would be prejudiced if the withheld information were disclosed because it would harm its ability to attract new businesses to the area which it is often in competition with other local authorities for.
18. With regard to the commercial interests of the businesses, the council initially consulted with three businesses and they considered that there is a commercial interest in not undermining their position or reputation with customers and competitors.
19. The Commissioner accepts that the information does relate to commercial interests in both instances. The next step is therefore to consider the nature and likelihood of the prejudice to those commercial interests.
20. In the Commissioner's view, the term "prejudice" implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way. If a "trivial or insignificant" prejudice is claimed, such that it cannot be said to have any real detrimental or prejudicial effect, then the exemption should not be accepted. The detrimental effect need not necessarily be severe although the level of severity will inform any relevant public interest considerations.
21. There are two limbs of prejudice within section 43(2). "Would be likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not. In both cases the council has stated that disclosure of the requested information *would* prejudice commercial interests. Where the Commissioner is not satisfied that the higher threshold of would prejudice is met but there is sufficient evidence to meet the lower threshold he may find that disclosure is likely to prejudice the specified interests.

### **Prejudice to the businesses' commercial interests**

22. In view of the Information Tribunal decision in *Derry City Council v The Information Commissioner (EA/2006/0014)* the Commissioner considers that any arguments regarding the prejudice to the commercial interests of a third party should come from the third party. In this case, the council first sought the views of three of the business. Following initial discussions with the businesses, the council compiled a questionnaire

which reflected the commercial interest themes brought out in the discussions. The points included in the questionnaire were:

1. *"It would undermine confidence in the company, making it appear financially weak, creating a false perception that it is dependent on 'handouts'. This in turn would make it harder to secure finance. Also, suppliers would be less willing to trade with the company, doubting its ability to pay, and potential customers could question its capacity to deliver on orders.*
  2. *It would make sensitive information about the company available to competitors, indicating the scale of a specific project and the level of investment associated with it, potentially undermining the company's commercial position.*
  3. *It would tarnish the image of the company if its name were to be linked to any negative publicity surrounding the City Council's incentives scheme. This in turn would undermine the company's ability to secure clients, since other businesses would not want to be associated with what would then effectively be a tarnished brand.*
  4. *It would be likely to make prospective customers expect a lower price, since they would perceive that the company had benefited from a financial windfall.*
  5. *When an award of financial incentives was made, this was on the basis that all details would be held in the strictest confidence and any breach of this agreement would deter the company from dealing with the City Council again."*
23. The council explained that of the three respondents, two considered that all grounds applied and the third agreed that all grounds applied with the exception of the customer expectation of a lower price (4).
  24. During the course of the Commissioner's investigation, the council attempted to contact the remaining businesses to seek their views on the disclosure of the information. Of the remaining 19 businesses, a further four responded. Of those four, three were content for the information to be disclosed.
  25. In some cases the Commissioner may accept arguments formulated by a public authority based on its prior knowledge of a third party's concerns. However, in such circumstances the public authority would

need to evidence that their arguments genuinely reflect the concerns of the third party involved. The council has not received arguments from 18 businesses regarding a prejudice to their commercial interests, nor has it suggested that its arguments reflect the concerns of those 18 companies. Therefore, in line with the Information Tribunal decision referenced at paragraph 22, the Commissioner finds that the council has not demonstrated that section 43(2) is engaged in relation to the commercial interests of the 18 businesses.

26. This leaves four businesses that have maintained that their commercial interests would be prejudiced. As noted at paragraph 21, the council has argued that the disclosure of the information would prejudice the commercial interests of these businesses.
27. For completeness, the Commissioner has considered each point of the questionnaire separately in order to determine whether the likelihood of prejudice envisaged has been satisfactorily demonstrated.
28. With regard to point 1, the Commissioner considers that financial assistance of the type in question here will rarely be received in such a negative light by suppliers and customers as has been suggested. The type of funding which is on offer is generally investment to encourage businesses to set up in Sunderland. The Commissioner has seen nothing to suggest that the funding is provided as means of a bailout to support failing businesses. He considers that the financial support is provided for the purposes of investment in local business which in turn will benefit both the local economy and local people. In this respect, there is no demonstrable evidence to suggest that a business that has received financial support from the council will be less likely to pay its bills or be less able to supply its goods and services, nor that there is a perception that this is the case amongst customers or suppliers. The Commissioner does not therefore accept that the disclosure of the requested information would, or would be likely to, have the effect specified in point 1. On point 2, the Commissioner notes that the prejudice envisaged is described as, "potentially undermining the company's position". As the test to apply when considering prejudice is that it should at the very least be real and significant, the Commissioner is not satisfied that the council has demonstrated that this has been met in this instance. In particular it has not evidenced why such information is likely to be of use to competitors. Moving on to point 3, the Commissioner has had regard to the information which was available at the time of the request about Rainton Bridge Business Park and the E-volve Centre. The Rainton Bridge Business Park website states that, "*Rainton Bridge is building on the success of Doxford, with the same development and design team and the same strong partnership with the*

*City of Sunderland Council*".<sup>1</sup> Therefore, the very fact of having a business located at Rainton Bridge would suggest strong links with the council. As such, the Commissioner cannot accept that the disclosure of the withheld information would 'tarnish' the businesses' reputations by association with the council to a substantially higher degree than is already present.

29. In addition to this, the Commissioner notes that the E-volve Centre is a council initiative and it actively seeks to attract new businesses through its own dedicated website, [www.e-volve.sunderland.gov.uk](http://www.e-volve.sunderland.gov.uk). The website also publicises that the council can provide business support from the council's Business Investment Team, which it states has a proven track record in assisting start-ups and micro, small and medium sized businesses. Whilst the Commissioner accepts that this does not by any means confirm that all businesses at E-volve or in the Rainton Business Park will have received financial assistance from the council, it does mean that were such information disclosed, it is unlikely to be controversial.
30. The final issue to raise in relation to point 3 is whether the prejudice envisaged is at least real and significant. Point 3 hinges upon the notion that bad publicity about the council and its finance schemes would have a negative effect on businesses if it was known that they had received financial assistance. The Commissioner has not been provided with any evidence to suggest that the council's financial assistance schemes have received negative publicity in the past or that there is a strong likelihood that it will receive such in the future. Based on these points, the Commissioner is not persuaded that either limb of the likelihood of prejudice test is met .
31. With regard to point 4, the Commissioner first notes that not all the businesses considered that the release of the information would give customers cause to expect lower prices. Again, neither the council nor the businesses concerned have demonstrated why this prejudice would occur. Referring once more to the nature of the financial assistance in question, the Commissioner is not satisfied that customers would consider that this equates to a financial windfall that would lead a business to reduce its prices and he is therefore not satisfied that such a prejudice would or would be likely to occur.
32. Turning finally to point 5, the Commissioner does not consider that this is a commercial interest which would prejudice the businesses. Clearly the matter of breaches of confidentiality and the fallout from this would

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<sup>1</sup> <http://www.raintonbridge.com/customers/overview.html>

be more appropriately covered by the council's application of section 41(1).

33. In view of the above the Commissioner is not satisfied that the prejudice to the businesses' commercial interests is real or significant, and the council has therefore certainly not demonstrated that it is more probable than not. The Commissioner finds that section 43(2) is not engaged with respect to the commercial interests of any of the businesses. He has therefore gone on to consider the prejudice to the council's commercial interests.

### **Prejudice to the council's commercial interests**

34. Turning now to the commercial interests of the council, it has argued that the disclosure of the information would prejudice its ability to promote economic investment and growth in a competitive environment. It has explained that the Economic Masterplan for Sunderland launched in 2010 has identified key sectors to be encouraged to set up businesses in Sunderland. These include low carbon vehicles, offshore energy generation, creative industries and software.
35. The council has expressed concerns that the disclosure of the amount of financial assistance granted to businesses would be used to the advantage of other local authorities in securing the investment of businesses to their areas. The council has argued that attracting business is a highly competitive environment in which local authorities compete with one another. It is the council's position that the release of the financial assistance information would disadvantage it in this process.
36. The council has also argued that the disclosure of the information would have a detrimental impact on its long established and successful relationship with the business community. It has explained that the council has had a scheme of financial incentives for businesses since 1980 which is considered to be instrumental in the future success of the Economic Masterplan. The council has stated that the scheme has been administered on the basis of absolute confidentiality for 30 years, and it considers that this is one of the main contributors to its success. It has explained that the betrayal of the trust that has been built up over 30 years would have an 'extremely detrimental effect' on its ability to implement the Economic Masterplan.
37. The Commissioner has not seen any evidence from the council as to the degree to which local authorities compete with one another to attract a business to their local area. Whilst it is recognised that the scheme of incentivising business is long standing, it is not considered that the amount or type of incentive provided by a local authority will not be the



only factor a business will consider when deciding where to locate or relocate to. Clearly each business will have its own criteria to meet and the incentives provided by one or another local authority will only be one of many factors in their decision. In addition to this, the Commissioner has noted that the business and self-employment section of the Gov.uk website provides a list of available business finance and support. The council's financial assistance is listed here and states the maximum amount of investment, along with comparable schemes from other sources including other local authorities.

38. The Commissioner is not persuaded that businesses will be put off from accepting the council's assistance if it was known that information relating to the amount and type of investment would be disclosed. In this case, three of the businesses have confirmed that they do not have any issue with the release of the information and a further 18 do not appear to have been sufficiently concerned to register any concerns or objections. Therefore, the Commissioner cannot accept that such a prejudice to the council's commercial interests would occur, neither is he persuaded that such a prejudice would be likely to occur.
39. In conclusion, the Commissioner finds that section 43(2) is not engaged either in relation to the commercial interests of the businesses or the council. He has therefore gone on to consider the council's application of section 41(1).

### **Section 41 – Information provided in confidence**

40. Section 41(1) of the FOIA states that:

*"Information is exempt information if—*

*a) it was obtained by the public authority from any other person (including another public authority), and*

*b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*

41. The council has explained that information regarding the rents or business rate reductions allowed by the council and the payment of grants by the council is factual information held by the council about its own activities. It has therefore accepted that it is not information which has been obtained by any other person.
42. However, it has argued that in releasing the requested information, it is indirectly disclosing the fact that those businesses applied for financial assistance, and that such requests for financial assistance were made in

confidence. This is also a concern put forward by 3 of the businesses through the questionnaire.

43. The Commissioner understands the logic the council has applied to this situation and has therefore gone on to consider whether disclosure of the requested information would constitute a breach of confidence.
44. Whilst it is not the only test for establishing confidence, the Commissioner finds that the appropriate test for this case is that which is set out in the case of *Coco v Clark* [1969] RPC 41. According to the decision in this case a claim for breach of confidence can be established where:

*"... three elements are normally required if ... a case of breach of confidence is to succeed. First, the information itself ... must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it..."*

45. All three elements must be present for a claim to be made and, for that claim to be 'actionable' within the meaning of section 41(1)(b) of the FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed. This requires consideration of whether or not there would be a public interest defence to such a claim.
46. The council has stated that it considers the information to have the necessary quality of confidence as application forms for funding are marked "in confidence" and as part of the council's financial incentives schemes they have been treated as confidential for over 30 years. The council has argued that in treating such applications as confidential for this length of time the council has built up a trustworthy reputation which in itself has contributed to its success in attracting inward investment.
47. The council also considers that the fact that a business has asked for financial assistance from a public authority is not trivial as it could be interpreted by customers and investors as an indication of financial standing or worth. In addition to this, as part of the council's section 43(2) consultation with the businesses, they stated that any breach of the agreement with regard to the confidentiality of the financial assistance would deter the company from dealing with the council in the future, and that this was a prejudice to their commercial interests.
48. The Commissioner therefore considers that the council has argued that the detriment from disclosure of the confidential information is

commercial in nature. As such, it is necessary to demonstrate the commercial detriment to the provider of the commercial information in order to establish a claim for breach of confidence.

49. The Commissioner found earlier in this notice that disclosure of the requested information would not be likely to be commercially detrimental to the businesses. Therefore, as the third element of the test set out above to establish a claim for breach of confidence is not met, the exemption at section 41(1) is not engaged. In view of this conclusion the Commissioner has not needed to consider whether there would be any public interest defence to a claim for a breach of confidence. .

## Right of appeal

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50. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

51. 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.
52. 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 .....**

**Jo Pedder**  
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