

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 May 2022

Public Authority: Cheshire East Council
Address: C/O Municipal Buildings
Earle Steet
Crewe
CW1 2BJ

Decision (including any steps ordered)

1. The complainant requested information held by Cheshire East Council (the council) relating to its business support expenditure during the Covid-19 pandemic; the complainant also asked for certain details held about the council's Supported Living providers.
2. The council provided the complainant with some information in response to his request. However, it withheld information relating to the hourly rates paid to some of its Supported Living providers, citing section 43(2) – commercial interests, of the FOIA.
3. The Commissioner's decision is that the council is entitled to rely on section 43(2) of the FOIA in respect of the withheld information.
4. The Commissioner does not require the council to take any steps as a result of this decision notice.

Request and response

5. On 3 December 2020, the complainant wrote to the council and requested information in the following terms:

'Please provide the following information as a Freedom of Information request:-

1. Cheshire East Council say that they have spent £85 million plus on business support during Covid, please provide a breakdown on exactly how this money has been spent.
2. Please provide the names of all Supported Living providers in Cheshire East, the number of people each provider supports and the hourly rate each provider is paid (if more than one rate then the range of rates paid to each provider).
3. Please provide the findings and recommendations from the benchmarking exercise into the hourly rates paid for Supported Living undertaken by CEC at the end of 2019.

For the last few years CEC has charged a levy on the Council Tax to cover Adult Social Care. Please provide details of how much this sum was for the last 3 fiscal years and a breakdown of where it was spent.'

6. The council provided its response on 5 January 2021, and disclosed some of the requested information.
7. On 6 January 2021, the complainant requested an internal review. They questioned the accuracy of part of the released information. The complainant also stated that the council had not released the range of fees given to each provider, as requested in part 2 of the request.
8. The council provided its internal review response on 11 February 2021. It stated that it believed that all the information it had supplied was accurate, and explained its reasons for this.
9. The council also released details of each of the different rates that it paid to eight of the Supported Living providers. However, it withheld the rates paid to the remaining fifteen providers, stating that the information was considered to be commercially sensitive, and that the providers had not agreed to the release of such information. The council went on to confirm that it considered the public interest to lie in favour of withholding this information.

Scope of the case

10. The complainant contacted the Commissioner on 12 February 2021, to complain about the way their request for information had been handled.
11. The complainant is primarily concerned that the council withheld some information relating to that part of the request where they asked for the hourly rate paid, or the range of rates if more than one payment is made, to any one Supported Living provider.
12. The Commissioner will therefore decide whether the council is entitled to rely on section 43(2) of the FOIA when withholding this information in response to the complainant's request.

Reasons for decision

Section 43(2) – commercial interests

13. Section 43(2) of the FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
14. The Commissioner's guidance¹ on section 43 of the FOIA defines the term 'commercial interests' as that which 'relates to a persons ability to participate competitively in a commercial activity.'
15. Whilst most commercial activity relates to the sale and purchase of goods, it also extends to other fields such as services.
16. In this case, the Commissioner considers the withheld information, which confirms the agreement of the hourly rates to be paid by the council to third parties for the provision of individual Supported Living packages, to be commercial in nature.
17. The exemption at section 43(2) can be engaged on the basis that disclosing the information either 'would' prejudice commercial interests, or the lower threshold that disclosure 'would be likely' to prejudice those interests.

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

18. The term 'likely' is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice is more probable than not. For the Commissioner to accept that prejudice 'would' result, he must be satisfied that this outcome would be more likely than not.
19. In addition, it is not sufficient for a public authority, or third party, to merely assert that prejudice would be likely to occur to a party's commercial interests to engage the exemption. The public authority must draw a causal link between disclosure of the information and the claimed prejudice. It must specify how and why the prejudice would occur.
20. As section 43 of the FOIA is a qualified exemption, the public authority must also demonstrate that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.

The complainant's position

21. The complainant does not accept the council's claims that the information can be withheld on the basis that it is commercially sensitive. They argue that (at the time the complaint was submitted to the Commissioner in February 2021) the rates would be redundant and historic by the end of that financial year (April 2021), and therefore no significant negative consequence would arise from the disclosure of the information.
22. The complainant goes on to question how the withheld information can be regarded to be commercially sensitive, given that some organisations have been willing to release the information, and argues that the council failed to show that disclosure would cause prejudice to any party.

The council's position

23. The council claims that the disclosure of the withheld information 'would be likely' to have a prejudicial affect on the commercial interests of both itself, and the relevant Supported Living providers.
24. The council has explained that the unique care requirements of individuals requiring support are used to calculate a cost threshold. These details are then uploaded onto the council's 'e-brokerage system'². It has said that it then assesses bids from providers to join the

² <https://www.local.gov.uk/sites/default/files/documents/E-marketplaces%20e-brokerage%20and%20wellbeing%20portals.pdf>

'complex care framework' four times each year; all providers on the framework can bid for individual packages of care each time they are published through the e-brokerage system.

25. The council argues that the disclosure of the hourly rate paid to a particular service provider for each of their Supported Living packages would prejudice the commercial interests of the providers. It states that allowing potential competitors to have access to the hourly rates that others had agreed with the council would give the competitors an unfair commercial advantage; this is because they would have an indication of the sorts of hourly rates that existing contractors might propose when bidding for forthcoming care packages.
26. With regard to the prejudice caused to its own commercial interests, the council has said that some suppliers charge more than the standard rate, and that if this information were to be disclosed, other suppliers may decide to submit higher bids than they would otherwise have done.
27. The council goes on to say that the pressures facing adult social care are widely recognised and that to destabilise the market in this way would harm the council's commercial interests. In addition, if other providers bidding to provide services to the council believed that their hourly rate may be made public, the council suggests that they may be less likely to bid at all; this would then reduce the number of bidders for the council's procurements, and reduce competition.
28. The council states that it believes that the passage of time does not render the requested information any less sensitive, as it is still directly linked to the current rates paid. It confirms that all Supported Living providers receive a standard uplift in each financial year, meaning that current rates could be easily extrapolated by the disclosure of the rates for any previous year.
29. The council has also referred to decision notice FS50591410³ issued by the Commissioner on 3 November 2015, in support of its decision to

'Some ten councils have implemented an e-brokerage system whereby individual care package requirements can be notified to appropriate local providers who then respond online. This is sometimes also referred to as a Dynamic Purchasing System (DPS). It can enable improved value for money by allowing providers to compete on quality and cost.'

³ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560160/fs_50591410.pdf

withhold the relevant information. In that case, the Commissioner upheld the public authority's decision to rely on section 43(2) of the FOIA when withholding details of the hourly rates it paid to existing homecare providers.

The Commissioner's view

30. The Commissioner must be satisfied that the nature of the prejudice is 'real, actual or of substance' and not trivial or insignificant. He must also be satisfied that some causal relationship exists between the potential disclosure and the stated prejudice.
31. The Commissioner intends to initially focus on whether disclosure of the information would have been likely to (at the time of the request) prejudice the commercial interests of the council. If necessary, he will then go on to consider whether disclosure would be likely to prejudice the commercial interests of the Supported Living providers.
32. The withheld information relates to part 2 of the complainant's request, where he had asked for the range of rates, or individual rates, paid to each one of the Supported Living providers. Whilst the council refused to provide this information, it did release the range of the hourly rates paid to the Supported Living providers as a whole.
33. In his consideration of the withheld information, the Commissioner has taken into account details of both the range of rates (where held) and the individual rates held that relate to each Supported Living provider.
34. The Commissioner notes that only one hourly rate is received by some of the Supported Living providers. Where there is more than one rate, it is the Commissioner's view that the disclosure of the range of rates paid to each provider would still reveal the majority of the hourly rates paid by the council for individual packages. This is primarily because, in most instances, the differences in the rates paid to any one Supported Living provider are marginal. For example, the difference between the lowest and highest hourly rate paid to one Supported Living provider for its individual packages was one pence.
35. The Commissioner is satisfied that access to the withheld information would be of some assistance to potential bidders when considering their competition, pricing strategy and position in the marketplace, and is likely to influence the bids that are made by both current, and new, providers. In the Commissioner's opinion, bidders would gain an unfair advantage in the marketplace which, in turn, would weaken the council's position and have a negative impact on its ability to obtain value for money, achieve the best commercial position, and protect public funds.

36. The Commissioner accepts that the disclosure of the requested information would be likely to prejudice the commercial interests of the council. This is because there is more than a hypothetical risk that third parties competing in the market place for bids for the individual packages could benefit from accessing the withheld information, and gain an unfair advantage. The risk of prejudice occurring to the council's commercial interests should this occur is, in the Commissioner's view, real and significant. The Commissioner is therefore persuaded that there is a causal link between the disclosure of the information and the harm to the council's commercial interests which has been described.
37. The Commissioner concludes that the exemption at section 43(2) is engaged, and he will now go on to consider the public interest test.

Public interest test

38. The council states that it accepts that there is a strong and legitimate public interest in public authorities being open and transparent, especially with regard to decision making and finances.
39. The council has also said that it accepts that disclosure would help the public to satisfy itself that public money was being spent appropriately and wisely.
40. However, the council argues that there is a significant public interest in ensuring fair competition, which should, in turn, help ensure that the council is able to obtain best value for money.
41. The council states that disclosure of the withheld information would be likely to have a detrimental effect, especially in light of the highly pressurised financial circumstances that currently face local government, particularly in relation to Adult Social Care.
42. The council goes on to say that the range of fees which it has provided to the complainant (where it confirmed that the overall rates paid to all Supported Living providers range between £13.33 and £23 per hour) go some way in satisfying the interests of openness and transparency around the fees paid to providers.
43. The council states that it believes that the balance of the public interest favours maintaining the exception at this time.

The Commissioner's view

44. The Commissioner considers that there is always some public interest in the disclosure of information. This is because it promotes the aims of transparency and accountability which, in turn, promotes greater public engagement and understanding of the decisions taken by public

authorities. He is also mindful that the disclosure of the withheld information could improve the wider public's confidence in the processes relating to the price agreed for the provision of care services to individuals.

45. However, the Commissioner is satisfied that the information which has been disclosed (which includes the overall range of hourly rates paid, and also a list of the Supported Living providers) provides a good insight into the costs that are incurred by the council in relation to Supported Living services; in the Commissioner's opinion, this goes some way in meeting the public interest in openness, transparency and accountability in this case.
46. Furthermore, it is the Commissioner's opinion that should the withheld information be disclosed, there is a danger that some providers will become focussed on the price, and the undercutting of bids from other Supported Living providers, rather than focussing on the provision of the best quality of service for an individual at a fair price; it would certainly not be in the public interest if this occurred. Alternatively, as suggested by the council, there is a real possibility that some rates could become overinflated, and this would also have a negative impact on the council's ability to achieve a fair market price for the services that it tenders.
47. In the Commissioner's opinion, there is a very strong and inherent public interest in ensuring fairness of competition, and it would be firmly against the public interest if the council's commercial interests are harmed. This would be of detriment to the council and the public purse.
48. The Commissioner is satisfied that, in this instance, there is a stronger public interest in protecting the commercial interests of the council and ensuring that it is able to achieve both best value for money and the best service for recipients of the Supported Living services.
49. Therefore, it is the Commissioner's decision that the public interest in maintaining the exemption at section 43(2) of the FOIA outweighs the public interest in disclosure in this case.

Right of appeal

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: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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

Suzanne McKay
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF