

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

### **Decision notice**

**Date:** 21 November 2024

**Public Authority:** Royal Borough of Windsor and Maidenhead  
**Address:** Town Hall  
St Ives Road  
Maidenhead  
SL6 1RF

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

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1. The complainant requested copies of any letters held by Royal Borough of Windsor and Maidenhead (the council) which it received from residential care providers requesting 16, 17 and 18% increases in their fee rates for 2024-25.
2. The council refused the request, citing section 43(2) (commercial interests) of FOIA.
3. During the Commissioner's investigation, the complainant confirmed that they were content for information that identified any care provider to be redacted before disclosure of the requested information.
4. The Commissioner has decided that the council has failed to demonstrate that section 43(2) of FOIA is engaged in respect of the information held which falls within scope of the request that would not, if disclosed, identify any care provider.
5. The Commissioner requires the council to take the following step to ensure compliance with the legislation.
  - Disclose the information highlighted in yellow which has been provided separately to this decision notice.

6. The council must take this step within 30 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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7. On 15 April 2024, the complainant wrote to the council and requested information in the following terms:

“In his evidence to Corporate Overview and Scrutiny on the 29<sup>th</sup> of January 2024, the Executive Director of Adult Services and Health said, in connection to residential placements and I quote ‘.....we have already received letters from providers who want 16, 17, 18% increases next year’.

I want to see those letters, because if they do exist Cabinet has misled council, by refuting those figures at both Cabinet on the 20<sup>th</sup> and Council on the 29<sup>th</sup> of February and if they do not exist this officer knowingly misled Corporate O&S.”

8. On 14 May 2024, the council issued a refusal notice, citing section 43(2) of FOIA. It confirmed that it had considered the public interest test and had decided that this favoured maintaining the exemption.
9. The complainant requested an internal review, stating that as the percentages had been disclosed in the meeting, the requested information could not be deemed to be commercially sensitive.
10. The council’s internal review response upheld its previous position. It stated that the letters sent by specific health care organisations contained commercial information which it considered should be withheld under the exemption at section 43(2). The council said that the comments made by the Executive Director of Adult Services and Health at the meeting of 29 January 2024, had only included a general reference to percentage increases from providers and did not reveal commercially sensitive information.

## **Scope of the case**

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11. The complainant has raised concerns about the council's decision to apply section 43(2) to all of the information held that is relevant to their request.
12. The council has provided the Commissioner with a copy of the withheld information. This includes all of the letters received by the council from residential care service providers up to the 29 January 2024 (the date of the council statement) that either directly request, or refer to a previous request, for an increase in fee payments for the year 2024-2025.
13. However, the complainant's request specifically asks for "these letters" which request an increase in fees of "16, 17 or 18%" for the financial year 2024-25. Given this, the Commissioner considers that the majority of the withheld information provided by the council for his consideration does not fall within scope of the complainant's request.
14. In addition, the complainant has confirmed to the Commissioner that they are content for information which would allow for the identification of any care provider to be redacted from the withheld information. Given this, the Commissioner intends to exclude from his consideration of the withheld information any part that would, if disclosed, allow for the identification of a care provider.
15. The Commissioner will therefore decide whether the council is entitled to rely on section 43(2) of FOIA as its basis for withholding the information that falls within scope of the request that would not, if disclosed, allow for the identification of any care provider.

## **Reasons for decision**

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

16. Section 43(2) of 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.
17. When relying upon the exemption at section 43(2) to withhold information, the public authority must be able to demonstrate a clear link between disclosure and the commercial interests of either itself, a third party, or both. There must also be a real and significant risk of the prejudice to commercial interests occurring for the exemption to be engaged.

18. The exemption is subject to the public interest test. This means that even if the exemption is engaged, the Commissioner will need to decide whether it is in the public interest to release the information.

The complainant's position

19. The complainant has said that councillors subsequently downplayed the statement that was made on 29 January 2024, that care providers have asked for fee "increases of 16, 17 and 18%". The complainant has argued that, given the financial implications of these high percentage increases to the council's budget, it is important that the council is able to show that the public is being properly informed about the council's financial pressures and its management of the public purse.
20. The complainant has argued that if details that would reveal the identity of any care provider were to be redacted, the remaining information contained within each letter could not be attributed to any one service provider and would no longer be commercially sensitive, or cause commercial harm to any party, if disclosed.

The council's position

21. The council has said in its submissions to the Commissioner that it believes that the disclosure of the requested information would have a prejudicial effect on its own commercial interests.
22. The council says that the withheld information sets out proposed increases to fees that existing care providers are seeking for the new financial year, and includes the justification from each service provider for the increase. The council has said that if this information were to be disclosed, there is a real risk that other providers will review this and use it to make similar uplift requests with unjustified rationale that does not pertain to their circumstances. The council argues that some providers could simply "cut and paste" the rationale of the other providers to justify now inflated fee increase requests.
23. The council has said that, like many other local authorities across the United Kingdom, its financial situation is tenuous, and it is working to ensure that all monies spent are properly considered and scrutinised. It says that by forfeiting the need for each provider to assess their costs independently, it would be failing in its duty to protect the public purse and that it risks being exploited.
24. The council has said that it did investigate the benefits of releasing aspects of the letters to show only the percentage increases that had been quoted in the public domain, but had decided that this would still influence the market process available to the council and harm its duty to get "best value" for money. It says that this is because confirming the

number of high increases it had received could fuel care providers doubling down on their position of demanding higher rates, or encourage more care providers to follow suit. The council has said that this would severely reduce its bargaining position and impact its ability to achieve best value, and that this would cause harm to its commercial interests.

#### The Commissioner's analysis

25. For section 43(2) to be engaged, the Commissioner considers that three criteria must be met:
  - Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed must relate to the commercial interests;
  - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests; and,
  - Thirdly, it is necessary to establish whether the alleged prejudice would, or would be likely to, occur.
26. The Commissioner considers that the costs for the provision of care services provided on behalf of the council by third parties for an agreed fee relate to the council's commercial activities, and that the first criterion is met.
27. When considering the second criterion of the three-limb test, the Commissioner must decide whether there is a clear link between the prejudice that has been described by the council and the disclosure of the withheld information.
28. The council has provided the Commissioner with information about all of the requests for fee increases that it received from residential care providers for the financial year 2023-24. It has said that it believes this information is relevant to, and supports, its arguments that the information requested by the complainant should not be made publicly available, as it would cause commercial harm.
29. The Commissioner accepts that revealing the number of care providers who have asked for the significantly high fee increases of 16, 17 and 18%, and the reasons given for these increases, might be of interest to other care providers. However, he is not persuaded that the release of the withheld information would lead to other care providers making similar demands, as claimed by the council.

30. Care providers will already be aware of the statement made by the Executive Director of Adult Services and Health that increased fees of 16, 17 and 18% have been requested. In addition, information contained within the council's ["2023/24 Month 8 Budget Monitoring Report"](#) which was published with details of the council meeting of 29 January 2024, confirmed that:

"There is significant inflationary pressures from all providers, especially those with no contractually agreed terms. This is particularly noticeable in residential and nursing home places where we are seeing requests for 8%-16% uplifts on existing placements, having budgeted 5% (para 6.5).

31. In the Commissioner's view the withheld information does not reveal details that are confidential or unique to any one service provider, and would not provide valuable insight into how to successfully submit a request which over inflates fees.
32. In addition, the Commissioner considers it to be pertinent to note that the disclosure of the withheld information would not reveal any actual costs or charges. Care providers would therefore be unable to compare their own fee rates with that of any other unidentified provider requesting a fee increase of 16, 17, or 18%, or determine whether they are "underselling" their own services.
33. The Commissioner also considers it likely that, as the request was submitted on 15 April 2024, the majority, if not all, of the care providers would have already submitted their fees to the council for the financial year 2024-25. In addition, the withheld information, if released, would not reveal whether any request for a fee increase of 16, 17 or 18% was successful.
34. The provision of care services is a competitive market. Furthermore, residential care providers offer a wide range of different services for individuals with different needs, and the level and cost of the provision of such care, can vary significantly. The Commissioner considers that it is not unreasonable to assume that the level of fee increases requested in any one year will vary between providers, and will be dependent on a number of factors which will impact each care provider differently.
35. It is the Commissioner's view that care providers are fully aware that the council has a duty to protect the public purse, and that full justification will need to be provided for any request to increase fees. The Commissioner considers that this is something that is clearly demonstrated within the information provided for his consideration by the council which sets out all of the requests received from various care providers for fee increases over the last two years.

36. The Commissioner has not been persuaded by the council's arguments that the release of the withheld information would directly result in other care providers making similar fee increase requests, or lead to the commercial exploitation of the council as claimed. Given this, he considers that the council has failed to demonstrate that a causal relationship exists between the potential disclosure of the information being withheld and the prejudice to its commercial interests.
37. As a result, the Commissioner has decided that the second criterion of the three-limb test set out within paragraph 25 of this decision notice is not met. The Commissioner therefore finds that the exemption at section 43(2) of FOIA is not engaged in respect of the withheld information.
38. To conclude, the council is required to disclose the information held that is relevant to the request, redacting only that information which the Commissioner considers would allow for the identification of a care provider.

## **Right of appeal**

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39. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

40. 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.
41. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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