

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 October 2024

Public Authority: Norfolk County Council
Address: County Hall
Martineau Lane
Norwich
NR1 2DH

Decision (including any steps ordered)

1. The complainant requested information relating to the costs for provision of adult social care for a specific provider from Norfolk County Council (the Council). The Council provided some information, but cited section 43(2) (commercial interests) of FOIA to withhold further information.
2. The Commissioner's decision is that the Council was correct to apply section 43(2) to withhold some information falling within the scope of the request.
3. The Commissioner does not require further steps.

Request and response

4. On 31 January 2024, the complainant wrote to the Council and requested information in the following terms (Council numbering):

"Please can I make a Freedom of information request.

The request relates to Adult Social Care funding.

If the following table could be completed it would be appreciated:

		2023-2024	2024-2025	Percent increase
1	Weekly rate for standard elderly placement:	£753.81	£798.51	5.93%
2	Weekly rate for enhanced elderly placement:	£830.60	£879.85	5.93%
3	NORSE Block bed standard elderly rate:			
4	NORSE block bed enhanced elderly rate:			
5	NORSE care total block beds			
6	NORSE block bed utilisation %			
7	NORSE care services profit y/e 2023			
8	NORSE care profit y/e 2023			
9	TOTAL profit y/e 2023 for running NORSE care			

[10] Please could a narrative be provided for the relationship of Norse care and Norse care services limited.”

5. The Council responded on 2 February 2024:
 - It provided information at part 5 of the request.
 - It applied section 43(2) (commercial information) of FOIA to parts three, four, and six of the request.
 - It applied section 21 (information available by other means) of FOIA to parts seven, eight, and nine.
 - For section 10, the Council directed the complainant to NorseCare.
6. On 20 February 2024, the complainant requested a review of the application of section 43(2) of FOIA to the request.
7. The Council responded on 18 April 2024, upholding its original decision to apply section 43(2).

Scope of the case

8. The complainant contacted the Commissioner on 22 April 2024, complaining about the Council’s application of section 43(2) (commercial interests) of FOIA to withhold some of the requested information. They did not complain about the application of section 21, nor to the response to part 10 of the request.

9. In light of the above, this decision notice will address the Council's application of section 43(2) to the request.

Reasons for decision

Section 43(2) Commercial interests

10. The Commissioner has defined the meaning of the term "commercial interests" in [his guidance](#) on the application of section 43 as follows: "A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent."
11. Most commercial activity relates to the purchase and sale of goods but it also extends to other fields such as services. The Commissioner's guidance says that there are many circumstances in which a public authority might hold information with the potential to prejudice commercial interests.
12. The public authority needs to demonstrate a clear link between disclosure and the commercial interests of either itself, a third party or both. There must also be a significant risk of the prejudice to commercial interests occurring and the prejudice must be real and of significance for section 43(2) to be successfully engaged.
13. The actual harm that the public authority alleges would or would be likely to occur if the withheld information was disclosed has to relate to commercial interests.

Does the information relate to commercial interests?

14. In this case, the withheld information is financial information relating to the cost of adult social care places provided by NorseCare to the Council, and the utilisation of those places.
15. The Council confirmed that NorseCare is part of the wider Norse Group which is wholly owned by Norfolk County Council but is operated entirely at arms-length, and is a separate legal entity. However, it operates within the same commercial market as other providers of adult care.
16. As the information relates to the cost and utilisation of services provided by NorseCare to the Council in a competitive market, the Commissioner is satisfied that the information being requested relates to a commercial activity of both the Council and NorseCare and hence to commercial interests.

Causal relationship

17. The Council explained that it buys beds from multiple providers and pays a variety of rates, which helps support this competitive market and gets best value for Norfolk residents with public money.
18. The Council negotiates prices through individual contract arrangements, and therefore has its own commercial interest in maintaining the confidentiality of the prices that it is willing and able to pay. Price is considered to be a key factor when making decisions about any contract awarded.
19. It further argues that, within the competitive marketplace of care providers, publishing rates paid by the Council to an individual provider would prejudice the commercial interests both of that provider and the Council itself.
20. This is because, as rates are negotiated directly with the various providers, the disclosure of rates agreed with NorseCare could undermine the Council's ability to negotiate with other providers of adult social care.

Likelihood of the prejudice occurring

21. In order to apply section 43(2), a public authority must be able to show that the disclosure of the information **would**, or **would be likely to**, prejudice commercial interests.

"would prejudice" means that if the information is disclosed, it is more probable than not that the harm identified would occur (ie there is a more than 50% chance of disclosure causing the prejudice, although it is not absolutely certain that it would do so).

"would be likely to prejudice" is a lower threshold. It means that if the information is disclosed, the probability of the harm occurring is less than 50%. However, the risk of prejudice occurring must be real and significant, and it must be more than hypothetical or remote.

22. The Council argues that a disclosure of the information **would** have a prejudicial effect if released into the public domain.
23. The request has come from a direct competitor of NorseCare. The Council have argued that providing the requested information would be prejudicial to the Council as it would no longer be able to fairly judge bids made by this, or any other care provider once the information was in the public domain.

24. It also argues that disclosing the information into the public domain would prejudice NorseCare's ability to compete within the marketplace. This is because, its competitors would, at the least, bear in mind the pricing accepted by the Council in this case when formulating their own bids in the future.
25. This would affect future bids received by the Council to provide similar services, and therefore affect the Council's ability to obtain services for their true market value.
26. The Commissioner considers that the Council's arguments are persuasive. His view is that as the care market is a highly competitive marketplace, publishing information on the rates paid by the Council to NorseCare would be more probable than not to prejudice the commercial interests of NorseCare in providing services, and the Council itself in obtaining best value for money.
27. As the three tests have been met, the Commissioner's decision is that the exemption at section 43(2) is engaged.

The public interest in the information being disclosed

28. The Commissioner accepts that, as a public authority, there is a public interest in the Council disclosing information about its use of public money.
29. It is accepted that resources in local government are very stretched and so there is a public interest in transparency about how councils are using those very stretched resources.
30. The Commissioner also accepts that there is public interest in showing that the process of commissioning providers of adult social care is fair and proportionate. Publication of the information would show that the rates negotiated with NorseCare have been properly evaluated and not just accepted at face value, and that NorseCare are not treated any differently to any other provider.

The Public interest in maintaining the exemption

31. The Commissioner has accepted the Council's explanation of the prejudice which would be caused to NorseCare and its own commercial interests if the withheld information were to be disclosed into the public domain.
32. The Commissioner accepts that there would be prejudice both to the Council and its ability to supply adult social care places, and to NorseCare in providing services should the requested information be released into the public domain.

33. There is a strong public interest in avoiding a disclosure that would be more likely than not to prejudice the Council's commercial interests.

The Commissioner's conclusions

34. The Commissioner has considered the arguments on both sides and accepts that there is a public interest in creating greater transparency on the use of public money for the funding of adult social care.
35. There is a weighty public interest in favour of maintenance in order to avoid prejudice to the commercial interests of the Council.
36. Having considered the arguments for and against disclosure it is the Commissioner's opinion that, while there are sound arguments on both sides, the arguments for maintaining the exemption in this case outweigh those for disclosure.
37. Therefore the Commissioner's decision is that the public interest in maintaining the exception outweighs that in favour of disclosure and the Council was entitled to rely on regulation 43(2) of FOIA to refuse to provide the requested information.

Right of appeal

38. 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

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

39. 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.
40. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Ben Tomes
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