

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 November 2024

Public Authority: Warwickshire County Council
Address: Shire Hall
Warwick
CV34 4RRX

Decision (including any steps ordered)

1. The complainant requested weekly payments made by Warwickshire County Council (the "Council") for the care of individuals in a specific care home. The Council withheld the information under the exemption for prejudice to commercial interests (section 43).
2. The Commissioner's decision is that the Council has failed to demonstrate that the exemption in section 43(2) is engaged.
3. The Commissioner requires the Council to take the following step to ensure compliance with the legislation.
 - Disclose the requested information to the complainant.
4. The public authority must take these steps 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

5. On 17 April 2024, the complainant wrote to the Council and asked for the following information:

"How much are Warwickshire County Council paying for the weekly care of residents in the same care home, who are receiving the same service that my mom receives"
6. The Council responded on 14 May 2024 and confirmed that it was withholding the information under the exemption for prejudice to commercial interests (section 43).
7. Following an internal review the Council wrote to the complainant on 19 July 2024 and confirmed that it was maintaining its position.

Scope of the case

8. On 21 July 2024 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The complainant explained that their Mother is a resident at the care home in question and was responsible for funding their own care. The purpose of the request was to establish how their fee compared with those of Council subsidised residents. The complainant stated that their Mother was having to pay increasingly costly charges and they had concerns that she was being exploited to subsidise lower payments incurred by Council subsidised residents.
10. The Commissioner has considered whether the Council was entitled to withhold the requested information.

Reasons for decision

Section 43 – Commercial interests

11. Section 43(2) of FOIA provides that information is exempt if its disclosure under FOIA would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

12. A public authority must be able to show how and why its disclosure has the potential to prejudice someone's commercial interests. The prejudice can be to the commercial interests of any person (an individual, a company, the public authority itself or any other legal entity).
13. In order for section 43(2), to be engaged, three criteria must be met:
 - the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed must relate to someone's commercial interests.
 - 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 which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
 - the level of likelihood of prejudice being relied upon by the public authority must be met (i.e., it must be shown that disclosure would, or would be likely to, result in prejudice occurring).
14. The Commissioner's guidance on section 43 clarifies that a commercial interest relates to a 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 solvent¹.
15. The Council considers that disclosure would be likely to prejudice its own commercial interests and the commercial interests of Runwood Homes Ltd. (the "Provider"). The Commissioner accepts that the withheld information, which identifies payments made by the Council for care services, is commercial in nature. He has gone on to consider whether disclosure would be likely to result in prejudice to the Council's and the provider's interests.

The prejudice to the Council's commercial interests

16. The Council has stated that disclosing the amount it pays to Bracebridge Court Care Home (owned by the Provider) for the weekly care of Council funded residents could weaken its bargaining position with other providers of care services. The Council considers that it might also harm its ability to secure best possible contract terms in the future.

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

The prejudice to the provider's commercial interests

17. The Council has argued that disclosure would be likely to be prejudicial to the Provider because of the risk that it could weaken its bargaining position with other customers.
18. If the prejudice relates to the commercial interests of third parties, in line with the Information Tribunal decision in the case *Derry Council v Information Commissioner* (EA/2006/0014), the Commissioner does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns.
19. In this case the Council confirmed that it consulted with the Provider. The Commissioner has had sight of the relevant correspondence and he notes that, beyond confirming that their preference is that the information should not be disclosed, the Provider gives no indication of the reasons for this or the form that any prejudice might take.

The Commissioner's conclusions

20. The Commissioner accepts that a case might be made for applying the exemption. He recognises that the information relates to a very competitive market and that disclosure may help rivals to change their strategy. This in turn might have an impact on the Provider's competitive leverage and affect the fairness of the market.
21. The Commissioner considers that the timing of a request can impact on the relative sensitivity of information. In this case the Council has provided no details of any current or impending tender exercise which may arguably heighten the sensitivity of the information. It has also provided no details of specific competitors to the Provider or explained how the information might be used to assist them to the Provider's detriment.
22. The Commissioner is struck by the absence of detail in the Council's arguments and has concerns that it has sought to apply the exemption on a generic basis without regard for the specific information and the effects of disclosure.
23. Whilst he acknowledges that arguments might be made for applying the exemption the Commissioner considers that, in this case, the Council has failed to provide them. In such cases the Commissioner does not consider it appropriate for him to facilitate the withholding of information by submitting arguments on the Council's behalf.

24. In light of the above the Commissioner has concluded that the Council has failed to demonstrate that the exemption is engaged. He has not, therefore, gone on to consider the public interest test.

Right of appeal

25. 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

26. 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.
27. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Christopher Williams
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