

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 24 August 2021

**Public Authority:** Sheffield City Council  
**Address:** Town Hall  
Pinstone Street  
Sheffield  
S1 2HH

#### Decision (including any steps ordered)

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1. The complainant has requested information about the contract and payments for an interim Chief Executive from Sheffield City Council (the "Council"). The Council provided some information but refused to provide the remainder, citing sections 40(2) (Personal information) and 43(2) (Commercial interests).
2. The Commissioner's decision is that the Council was entitled to rely on both exemptions. No steps are required.

#### Background

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3. The Commissioner has previously issued a Decision Notice on this subject matter<sup>1</sup>. In that notice, the Commissioner determined that the Council was entitled to withhold two figures from Schedule 2 of a contract; these were two percentage figures related to a third party's profit margins. That information has not been reconsidered in this notice.

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2618578/ic-42521-h6t5.pdf>

4. In the background to that notice it was explained:

*"In October 2019, John Mothersole announced he would be retiring from his role of Chief Executive of Sheffield City Council, after 11 years in the post<sup>2</sup>. The council undertook a procurement exercise with executive recruitment agencies, appointing Odgers Interim to provide an Interim Chief Executive. On 4 December 2019, the council announced that Charlie Adan had been appointed Interim Chief Executive until a permanent Chief Executive was appointed"<sup>3</sup>.*

5. Regarding the associated recruitment consultants, the Council has advised:

*"IRG Advisors LLP is a limited liability partnership registered in England and Wales (registered number OC354226) which provides executive search services from offices in the UK. Its registered office and principal place of business is 20 Cannon Street, London, EC4M 6XD, UK. The company trades as Odgers Berndtson, Berwick Partners, Berwick Talent Solutions, Odgers Interim and Odgers Connect. Our contract for an Interim Chief Executive is with Odgers Interim, which is a separate and distinct legal entity whose specialism is in the provision of interim management services to businesses across a wide range of sectors and specialities"<sup>4</sup>.*

## **Request and response**

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6. On 17 February 2020, the complainant made the following information request:

*"I would be grateful if the council would provide the invoices so far sent to the council by Odgers Interim (or IRG Advisors LLP) following a contract agreed with the council to provide an interim chief executive. The council's reference for the contract is DN447596".*

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<sup>2</sup> SheffNews. 4 October 2019. [John Mothersole, Chief Executive of Sheffield City Council, announces retirement.](#)

<sup>3</sup> Sheffield City Council. 4 December 2019. [Letter to Councillors re Appointment of Interim Chief Executive.](#) Following meeting of [Senior Officer Employment Sub Committee](#) – Friday 22 November 2019

<sup>4</sup> [Odgers Interim](#) website.

7. This was acknowledged by the Council on 19 March 2020.
8. On 5 May 2020, the complainant made the following related request:

*" ... it is now around 12 weeks since the FOI request was made. I appreciate these are unprecedented times but that is still a very significant length of time. I would be grateful if you would update me.*

*Separately, I would like to make a fresh request for the same information regarding invoices as referred to in the original FOI request.*

*Additionally, I ask for the recorded information held on any updates to the arrangements surrounding the interim chief executive's employment and the recorded information regarding any contractual changes either with Odgers Interim or the interim CE herself. These may include, for example, any specific arrangements around expenses and accommodation. If there are any such arrangements and these are invoiced separately I ask also for those invoices.*

*Finally, I would be grateful if you would provide the interim chief executive's diary.*

*Given there do appear to be significant ongoing delays it would make sense if when the information is provided it is provided up to time you are able to respond rather than to the date of the request.*

*I will, if necessary, make further requests for the same information in future but it would appear to make sense in the circumstances that the council is also flexible with how it responds".*

9. On 27 August 2020, the complainant made the following related request:

*"Given more than three months have passed since the request below was made, without response, I would like to make a fresh request for information for the information held after 5 May 2020, when the last request was made.*

*So, I would be grateful if the council would provide the invoices so far sent to the council by Odgers Interim (or IRG Advisors LLP) following a contract agreed with the council to provide an interim chief executive.*

*The council's reference for the contract is DN447596.*

*In addition, please provide the correspondence between the council and Odgers Interim relating to the appointment of the interim chief executive.*

*Further, please provide the correspondence between the council and the interim chief executive relating to her appointment.*

*These would include any updates to the arrangements surrounding the interim chief executive's employment and the recorded information regarding any contractual changes or updates either with Odgers Interim or the interim CE herself. These may include, for example, any specific arrangements around expenses and accommodation. If there are any such arrangements and these are invoiced separately I ask also for those invoices.*

*Finally, I would be grateful if you would provide the interim chief executive's diary.*

*For the avoidance of doubt, all the previous requests remain outstanding and do still require responses”.*

10. On 10 September 2020, the Council responded to all three requests together. It refused to provide the invoices, citing section 43(2) of the FOIA. It said that it held correspondence but that this was exempt under sections 40, 41 and 43 of the FOIA. It said that no information was held regarding expenses or accommodation. It made no reference to the diary.
11. The complainant requested an internal review on 10 September 2020.
12. The Council provided the outcome of its internal review on 26 October 2020. It revised its position and disclosed some previously withheld correspondence, with personal data redacted under section 40. It advised that it was still withholding the invoices under section 43. No reference was made to section 41. It further advised that it had responded to the complainant separately regarding the diary.
13. During the Commissioner's investigation, a further small amount of information was identified as suitable for disclosure and provided to the complainant.

## **Scope of the case**

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14. The complainant contacted the Commissioner on 4 November 2020 to complain about the way his request for information had been handled. Further information was required from him which was provided on 20 November 2020.

15. The Commissioner understands the complainant's grounds of complaint to cover disclosure of "*invoices and correspondence which would catch all the related information as to how the financial arrangements were reached*" and any correspondence between the Council and the interim Chief Executive relating to her appointment.
16. The Council has advised that all information held has been disclosed other than the following:
  - The information being withheld under section 40(2) is the Chief Executive's CV and references, the mobile phone number of one of the third party staff and the names / contact details of the Council officers involved in procurement.
  - The information being withheld under section 43 consists of nine invoices (one of which is understood to be a duplicate) and the day rate and associated ENI [Employer National Insurance] / levy costs which are referenced in some related correspondence that has otherwise been disclosed.
17. The Council also explained that:

*"There are no expenses or accommodation that we pay. There is only the rate for the provision of an Interim Chief Executive which is fixed at the start of the contract. Any expenses incurred ... were between her and Odgers. The contract was extended beyond the originally anticipated end date. This was because of the pandemic and the longer than anticipated search for a permanent Chief Executive"*.
18. The Commissioner will consider the citing of sections 40 and 43 to withhold this information.
19. As no response regarding the application of section 41 was provided by the Council the Commissioner has not considered this exemption any further.

## **Reasons for decision**

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### **Section 40 – Personal information**

20. When requesting an internal review, in respect of section 40 the complainant argued:

*"In terms of personal information, the information relates to the council's most senior employee who is clearly public-facing. Information regarding her employment relates to the role and remuneration for carrying out work on behalf of Sheffield Council*

*(and by extension the public who pay for that work). If there is any particularly personal information in the correspondence that could potentially be redacted (for example personal phone numbers or addresses) but information relating to the job to be done on behalf of the public should not be withheld. There is a clear and legitimate public interest in disclosure as regards Section 40”.*

21. The Commissioner asked the complainant whether or not he was happy to accept the redaction of any of the information withheld under section 40. He did not respond, so the Commissioner will consider disclosure of this information below.
22. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
23. In this case the relevant condition is contained in section 40(3A)(a)<sup>5</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
24. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
25. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

***Is the information personal data?***

26. Section 3(2) of the DPA defines personal data as:

*“any information relating to an identified or identifiable living individual”.*

27. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
28. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an

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<sup>5</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

29. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
30. The information being withheld under this exemption is the Chief Executive's CV and references, the mobile phone number of one of the contractor's staff and the names / contact details of the Council officers involved in the procurement.
31. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that this information both relates to and identifies those concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
32. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
33. The most relevant DP principle in this case is principle (a).

*Would disclosure contravene principle (a)?*

34. Article 5(1)(a) of the GDPR states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

35. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
36. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

### **Lawful processing: Article 6(1)(f) of the GDPR**

37. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such*

*interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”<sup>6</sup>.*

38. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
39. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

#### *Legitimate interests*

40. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester’s own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency

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<sup>6</sup> Article 6(1) goes on to state that:-

*“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.*

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

*“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.*

for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

41. The complainant's views are included in paragraph 20 above. The Commissioner notes that they relate only to the Chief Executive with no reference to the other parties.
42. The Council recognised that there is a legitimate interest in the contact details of council employees and Odgers Interim partners as they are important to the processing of the contract. It further recognised that there is a legitimate interest in the CV and references, as access to these would show that the candidate was suitable to undertake the post at the Council.

*Is disclosure necessary?*

43. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
44. The Council argued that it was not necessary to publish the information. It advised that the Chief Executive's suitability for the role was:

*"... vouched for by Odgers Interim talent pool screening. The elected member panel and Director of HR the council were the discrete audience for her CV and employer references. They were delegated to view this information and test it, and make a recommendation adopted by full council, with the minimum loss of privacy to [the Chief Executive] herself".*
45. The Commissioner notes that the Council has followed suitable practices for testing the suitability of the candidate to the role. Appropriate staff viewed the CV and references and then made the necessary recommendations and decisions to employ her. It is not then necessary for her personal data to be placed in to the public domain for general consumption, after the event, as it has been viewed by appropriate personnel at the Council – to do so would be particularly intrusive to both the Chief Executive and her referees.
46. Regarding the other information, the Council added:

*"With regard to the withheld contact details, the individuals may be reached through the public contact points of the respective*

*organisations or if identified by role rather than name by reference to the services they perform (e.g., procurement)”.*

47. The Commissioner agrees that the parties concerned may be contacted through more appropriate channels. For example, the contractor's staff member can be found online and there is a landline which can be called to make contact with him (but not his mobile phone – which is all that is being withheld).
48. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and that disclosing the requested information held would not be lawful.
49. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

### **The Commissioner's view**

50. The Commissioner has therefore decided that the Council was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

### **Section 43 – Commercial interests**

51. As explained in 'Scope' above, the information withheld under section 43 consists of nine invoices (one of which is understood to be a duplicate) the day rate and associated ENI / levy costs which are referenced in some related correspondence that has otherwise been disclosed.
52. Section 43(2) of the FOIA states:

*"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)".*

*Is section 43(2) engaged?*

53. In order for section 43 to be engaged, the following 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 has to relate to the applicable interests within the exemption (ie be prejudicial to the commercial activities of any person – an

individual, a company, the public authority itself or any other legal entity);

- 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; and,
  - it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie that disclosure 'would be likely' to result in prejudice or that disclosure 'would' result in prejudice.
54. The first point for the Commissioner to consider is whether the arguments provided by the Council relate to the relevant applicable interests.
55. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner's guidance on the application of section 43<sup>7</sup> of the FOIA explains that a commercial interest relates to a person's ability to participate competitively in a commercial activity, such as the purchase and sale of goods or services. Their underlying aim may be to make a profit, however, it could also be to cover costs or to simply remain solvent.
56. The Commissioner considers that in order for the exemption to be engaged it must be shown that the disclosure of specific information will result in specific prejudice to one of the parties. In demonstrating prejudice, an explicit link needs to be made between specific elements of the withheld information and the specific prejudice which disclosure of these elements would cause.
57. The Commissioner asked the Council to provide full arguments setting out why it considers that the exemption is engaged. She explained that its submissions should identify whose commercial interests it believed would, or would be likely to, be prejudiced in the event of disclosure, and details of the nature of the prejudice itself. She also asked it to provide evidence that any arguments relating to the third party's interests were a genuine reflection of concerns known to be held by that party.
58. The Council confirmed that:
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<sup>7</sup> <https://ico.org.uk/for-organisations/foi-guidance/section-43-commercial-interests/>

*"The party whose commercial interests would be likely to be prejudiced if the withheld information was disclosed is Odgers Interim. Odgers Interim provide interim management services to businesses across a wide range of sectors and specialities" (see footnote 4).*

59. It went on to explain:

*"We consider that the disclosure of the invoices would be likely to prejudice Odgers Interim's commercial interests. As of 27 August 2020, we had received nine (one duplicated) invoices from Odgers dated between February and August 2020. Each invoice contained the rate charged per day for Odgers to provide Sheffield City Council with an Interim Chief Executive plus VAT. The rate is only paid for days worked and not for holidays, absences or any expenses incurred by the Interim Chief Executive. This rate is inclusive of Odgers fees. The invoices contain separate lines for Employer National Insurance contributions and the Apprenticeship Levy.*

*Odgers Interim made specific representations about [the complainant]'s request, saying: "breaking ... down to the amounts paid to the individual and the margin to the provider would reveal to a competitor what we charge." (Email from Odgers Interim of 4 September 2020) Pricing information is commercially sensitive because a competitor could seek to factor it into future bids which would undermine Odgers Interim. This is unfair as the competitor would not have revealed their own price".*

60. In providing evidence which demonstrates a clear link between disclosure and any prejudice to commercial interests which may occur, the Council advised:

*"In the recruitment industry, 85% of income is generated through temporary (interim) and contract placements, compared to permanent contracts.<sup>8</sup> Odgers Interim operates in a competitive market. If their price was revealed, that would allow competitors to see what they charge. That price reflects their 22 years of business knowledge, talent pools, track record and proprietary tools. It would gift to their competitors, information that they could exploit without revealing their own.*

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<sup>8</sup> Recruitment and Employment Confederation. January 2020. [Recruitment Industry Trends report for 2018/19](#).

*Odgers Interim says they have seen vendors leave the market, whilst others are forced to undercut their prices then provide a poorer service ... That means that either Odgers Interim would have to respond by providing a poorer service at a lower cost, or it might lose business because it is undercut by rivals”.*

61. The Council further explained and evidenced its position as follows:

*“In identifying the commercial interests of Odgers Interim, we have been mindful of their relevant business statements as well as engaging them directly about this request.*

*Odgers Interim stated in their tender:*

*We consider our fees and track record to be commercially sensitive information and request that they not be disclosed outside this tender process.*

*Freedom of Information*

*The content of the tender we are submitting is naturally confidential, particularly in regard to the fees and costs elements and is intended only for the client. It therefore should be protected from disclosure under the FOIA for **a period of three years from the date of the tender (emphasis added)**. To release prior to this date could give competitor information to enable them to prejudice future tenders that we may submit for other public bodies<sup>9</sup>.*

*The date of the tender was 4 November 2019. Three years will have passed on 5 November 2022.*

*IRG Advisors LLP (trading as Odgers Interim) Terms and Conditions of Business received on 14 October 2019 state at (4):*

**CONFIDENTIALITY**

*A party (**Receiving Party**) shall keep in strict confidence all technical or commercial know-how, specifications, inventions, processes or initiatives which are of a confidential nature and have been disclosed to the Receiving Party by the other party (**Disclosing Party**), its employees, agents or subcontractors, and any other confidential information concerning the Disclosing*

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<sup>9</sup> Contract, Commentary/breakdown (page 22)

*Party's business or its products or its services which the Receiving Party may obtain. The Receiving Party shall restrict disclosure of such confidential information to such of its employees, agents or subcontractors as need to know it for the purpose of discharging the Receiving Party's obligations under these Conditions, and shall ensure that such employees, agents or subcontractors are subject to obligations of confidentiality corresponding to those which bind the Receiving Party. This clause 4 shall survive termination of these Conditions.*

*On 4 September 2020, Odgers Interim wrote to us to state the nature of the prejudice to their interests:*

*To reveal certain information relating to the commercial elements of the contract would prejudice our organisation in future pitches for work with other clients for similar works. This is because it would reveal to competitors our pricing strategy and not just the amount being paid to the interim manager handling the assignment.*

*Section 43(2) of the FOIA allows a public body to withhold information where to release such information would prejudice, or would be likely to prejudice the commercial interests of a third party, in this case Odgers Interim. Whilst it might be appropriate for the Council to say that it has spent £ x on the service (where x is a total including all elements (VAT, expenses and so forth)) breaking this down to the amounts paid to the individual and the margin to the provider would reveal to a competitor what we charge. This would not be in the interests of future procurements and whilst providing transparency it is also likely to lead a to a degradation in levels of service. This is because the service ends up being price driven at the expense of quality. Whilst price is a key factor, as we have seen in other public sector procurement exercises, once price dictates the buying policy then there is a race to the bottom resulting buying decisions being made for the wrong reason and subsequently vendors leaving the market with those left unable to service the contract effectively because their price was too low.*

*By protecting third party commercial interests, and not revealing such information, buyers can make informed decisions on a level playing field as opposed to prices being artificially lowered based on other tenderers knowing the pricing policy of their competitors”.*

62. In respect of its own interests, the Council advised:

*"The council may experience reputational damage to its procurement processes should the information relating to Odgers*

*Interim's business model be disclosed. The outcome of this could be that suppliers are deterred from bidding for council opportunities where they feel that any sensitive commercial information may be disclosed, which could adversely affect their ability to successfully bid for other contracts. It may affect the council's ability to attract future bidders. Our reputation as a credible financial partner will be put at risk if suppliers saw us as an unreliable or irresponsible. That would not be positive for the council which would have less choice or face higher prices. That might impact our future tenders and those of other public authorities, which we have a public interest in protecting. It could have an unfavourable effect on the recruitment market".*

63. Having viewed the withheld information, the Commissioner accepts that it is relevant to the applicable interests within the commercial interests exemption and therefore the first part of the test set out above is met.
64. Furthermore, the Commissioner is satisfied that it would be of use to a competitor by providing insight into how the recruitment consultant conducts its business. She accepts that the Council has provided reasonable arguments to suggest that there is a causal relationship between disclosure of the withheld information and the prejudice envisioned which is real, actual or of substance in respect of the consultant's own commercial interests.

## **Public interest test**

### ***Arguments in favour of disclosure***

#### ***Complainant's views***

65. The complainant did not provide any specific arguments to support this complaint, however, the Commissioner notes that this request flows from the previous case which included his views on disclosure of this information. She has therefore included these as follows:

*"As it stands no invoices have been provided to back the payments the council has made, no financial information has been provided from the contract at all, no information is provided in the council's annual statement of accounts (something I've never seen before from a public body) and the chief exec's diary has also not been provided so the public does not have any idea how many days worked or what the payments are based on.*

*... At the moment we just have random and very different payments showing on the supplier payment list with no further indication as to what they are for.*

*You may recall the original council document confirming the appointment which the council said satisfied transparency requirements.*

*That document said payments would be £18,750 per month approximately. In reality payments have been up to nearly 50 per cent higher on occasion with no explanation as to why.*

*In the circumstances I don't believe the current lack of information represents reasonable transparency for the council's most senior employee and I also believe it falls well short of the transparency around payments exhibited by other public bodies.*

*I am not aware of another situation where the payments to the most senior employee or the basis of those payments is not known.*

*Typically, the salaried information will be recorded in annual accounts and most often just simply provided freely by the public body. But not in this situation.*

*Further, as far as I can see the contract at issue here has not been published by the council in contrast to other contracts typically published with their amounts also identified.*

*So far the amounts paid to this company amount to over £170,000 for the first 8 months of 2020. I trust the above identifies some of the key and legitimate public interest issues involved which weigh heavily in favour of disclosure”.*

### **The Council's views**

66. The council acknowledged the public interest in being open, transparent and accountable.

### **Arguments against disclosure**

#### **The Council's views**

67. The Council has argued:

*“We consider the disclosure of the invoices would unfairly prejudice Odgers in a competitive market. Their day rate specified in the invoices would be a figure competitors might seek to undercut in subsequent bids. The methodology and talent pool that informs their pricing would be revealed to the world. Pricing information is commercially sensitive because a competitor could seek to factor it into future bids which would undermine Odgers Interim. This is unfair as the competitor would not have revealed their own price.*

*That would put them at an unfair advantage as they bid for future contracts.*

*With regards to the costs of the contract stated on the invoices, the arguments presented regarding commercial prejudice to Odgers Interim, are also applicable public interest concerns. Odgers Interim says that the council should not publish their pricing information for a period of three years. We do not want to disclose information that prejudices their ability to compete by giving competitors an unfair advantage.*

*The information concerning Odgers Interim's invoices were provided in confidence as part of their contract. If these were published it would undermine fair competition and best value for money because competitors obtained an unfair advantage and could result in local government receiving less competitive bids. A level playing field which should exist at tender stage would be distorted, and the client would be the poorer. There are 408 principal (unitary, upper and second tier) councils in the UK. We have a responsibility to sister authorities to ensure a level playing field.<sup>10</sup>*

*The public interest in withholding this information is the likely degradation in levels of service from recruitment companies. This is because the disclosure of this information would likely result in recruitment services being driven by price at the expense of quality. If price dictates the buying policy of a client, then there is a race to the bottom resulting in buying decisions being made for the wrong reason and subsequently vendors leaving the market, with those left unable to service the contract effectively because their price was too low.*

*The council may experience reputational damage to its procurement processes should the information relating to Odgers Interim's business model be disclosed. The outcome of this could be that suppliers are deterred from bidding for council opportunities where they feel that any sensitive commercial information may be disclosed, which could adversely affect their ability to successfully bid for other contracts. It may affect the council's ability to attract future bidders. Our reputation as a credible financial partner will be put at risk if suppliers saw us as an unreliable or irresponsible. That would not be positive for the council which would have less choice or face higher prices. That might impact our future tenders and*

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<sup>10</sup> Local Government Information Unit (LGIU) 2020. [Local government facts and figures: England](#)

*those of other public authorities, which we have a public interest in protecting. It could have an unfavourable effect on the recruitment market”.*

### **The Commissioner’s conclusion**

68. The Commissioner’s guidance on section 43 says the following about applying section 43(2) in respect of information about third parties:

*“You don’t have to disclose information that a third party, such as a supplier or a contractor, provides to you if the disclosure would, or would be likely to, prejudice their commercial interests”.*

69. The guidance also says:

*“... if you propose to withhold information because the disclosure would, or would be likely to, prejudice a third party’s commercial interests, you must have evidence that this accurately reflects the third party’s concerns. It is not sufficient for you to simply speculate about the prejudice which might be caused to the third party’s commercial interests. You need to consult them for their exact views in all but the most exceptional circumstances”.*

70. The Commissioner notes the following arguments which the Council provided when summing up its position:

*“We have not refused to say how much Odgers Interim is receiving from the council. Every month we published the invoices we have paid to them. Between February and August 2020, these amounted to £149,180.15. We are not refusing to say what we have agreed to pay in total. The contract was initially for six months and was extended to 30 November 2020 because the pandemic slowed the search for a permanent chief executive. We said the invoices consist of a day rate, Employers NI and Apprenticeship Levy.*

*We published information about the cost of the contract with Odgers Interim under Officer Remuneration in the Annual Accounts of the council as required by the Accounts and Audit Regulations 2015 (Statutory Instrument 2015/234).<sup>11</sup> In the Audited Statement of Accounts 2019-20 on page 109 we state:*

*The Interim Chief Executive took up office on 6th January 2020 (with a prior three-day handover period in December 2019), and*

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<sup>11</sup> Accounts and Audit Regulations 2015 (Statutory Instrument 2015/234) Schedule 1: <http://www.legislation.gov.uk/ukSI/2015/234/made>.

*stepped down at the full Council meeting on 7th October 2020. The total cost for the Interim Chief Executive was £208,137. This cost is inclusive of agency fees, and no accommodation, travel or other expenses were paid. This figure does include Employer's National Insurance and the Apprenticeship levy, but does not include VAT.*

*We agreed with [the complainant] in his complaint to us of 17 February 2020 (Our Ref: [redacted]): "The public interest is clearly weighted in favour of disclosure of the total payments to Odgers Interim." All the expenditure on the Interim Chief Executive's contract is available under the Local Government Transparency Code 2015 on [Data Mill North](#). The total spend on the Odgers Interim contract is in the audited statement of accounts (above). The council has been fully transparent about the appointment process and publication of the costs incurred.*

*Procurement of the Interim Chief Executive's services has been subject to a competitive process. This provides assurance to the public that the appropriate procedures have been followed to obtain value for money for the Council.*

*We think that we have satisfied the expectations of citizens as to the cost of this contract in two different ways. We believe it is legitimate to uphold the commercial confidentiality of our supplier. We conclude that the balance of the public interest lies in withholding the invoices".*

71. As referred to in the previous decision notice, the Commissioner notes that it is clear that the FOIA was duly considered by both parties and that future disclosure was recognised as something which may need to occur. However, built into those considerations was a 'safety margin' of three years to represent the changes in the market and a reduced impact in disclosure which will naturally occur over a period of time.
72. The Commissioner has considered the public interest arguments both in favour of disclosure and of maintaining the section 43(2) exemption. She notes the importance of transparency and accountability with regard to the expenditure of public authorities. However, she considers that the public interest in the recruitment consultant being able to provide a service in a competitive field without fear of revealing its pricing structure to its competitors, outweighs the public interest in the disclosure of the invoices. Such disclosure could mean that it loses its competitive edge and may not win future business. It is also noted that the overall costs have been disclosed as the Council has tried to be as transparent as possible without breaching the commercial interests of the service provider.

73. The Commissioner therefore considers that, in all the circumstances of this case, the public interest lies in favour of maintaining the exemption.

### **Other matters**

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74. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

#### *Time for response*

75. The complainant did not specifically refer to timeliness in his grounds of complaint so the Commissioner has not considered this. However, she notes the considerable delay, which will be recorded for monitoring purposes.
76. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft Openness by Design strategy<sup>12</sup> to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our Regulatory Action Policy<sup>13</sup>.
77. The Commissioner wishes to place on record her understanding of the immense pressures placed on public authorities during the coronavirus pandemic. She is sympathetic to the difficult decisions such authorities must make, between prioritising front-line services and continuing to meet their obligations under the FOIA.

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<sup>12</sup> <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

<sup>13</sup> <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

## Right of appeal

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78. 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)

79. 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.

80. 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 .....**

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