

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 July 2013

**Public Authority:** East Devon District Council  
**Address:** Knowle  
Sidmouth  
Devon  
EX10 8HL

#### Decision (including any steps ordered)

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1. The complainant requested the price offered by the commercial agents who quoted for their professional services in respect of the marketing and sale of a site for development. East Devon District Council withheld the information citing the section 43 exemption (commercial interests). The Commissioner has investigated and has found that the information was correctly withheld. He requires no steps to be taken.

#### Request and response

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2. The complainant wrote to East Devon District Council (the Council) on 24 October 2012 and requested information in the following terms:  
*"Exmouth Vision states 'other commercial agents were invited to tender alongside Jones Lang LaSalle'. Please can you tell me what price each commercial agent offered their services for".*
3. The request was made through the 'whatdotheyknow' website.
4. The Council responded on 28 November 2012. It refused to provide the requested information. It cited the section 43 exemption (commercial interests) as its reason for doing so.
5. Following an internal review the Council sent the complainant the outcome of its internal review on 17 January 2013. It upheld its original position.

## Scope of the case

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6. The complainant contacted the Commissioner on 28 January 2013 to complain about the way her request for information had been handled.
7. In bringing her complaint to his attention, she told the Commissioner:

*"The Elizabeth Hall in Exmouth is a public hall used by the local community and local charities. In April 2012 it was put up for sale by the East Devon District Council.....My request to know the full details of the tenders put forward by the agents who were approached by the EDDC to market the site is simply to confirm the EDDC followed the correct procedures as laid down in the EDDC constitution. Their refusal to grant this request on the grounds of commercial confidentiality not only makes their actions appear suspect, but is also damaging to the reputation of the EDDC in the eyes of the Exmouth people and wider East Devon public".*
8. The Commissioner is mindful of the complainant's reference to her request to know *'the full details of the tenders'*. However, he considers that the wording of the request, as posted on the *'whatdotheyknow'* website, defines the scope in this case.
9. The Commissioner's role is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of FOIA.
10. Notwithstanding the complainant's wider concerns about the sale and redevelopment of the site, the Commissioner understands that those of her concerns that fall within his remit are in relation to the Council's citing of the commercial interests exemption, section 43 of FOIA.

## Reasons for decision

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### *Section 43 Commercial interests*

11. Section 43 of FOIA sets out an exemption from the right to know if release of the information is likely to prejudice the commercial interests of any person, including those of the public authority holding the information.

### *Applicable interests*

12. When identifying the applicable interests, the Commissioner must consider whether the prejudice claimed is to the interest stated.

13. The information at issue in this case relates to the price offered by each of the commercial agents (the agents) who quoted for their professional services in respect of the marketing and sale of a site for development (the site). The Commissioner understands that, while six agents were approached by the Council in relation to the site, three bids were received.
14. The Council confirmed that the section 43 exemption was applied because disclosure of the requested information would be likely to have a prejudicial effect on third party commercial agents.
15. According to the submissions provided by the Council during the course of his investigation, in the Commissioner's view the relevant commercial interests which disclosure would be likely to prejudice include those of the Council itself.
16. Having viewed the withheld information, the Commissioner is satisfied that it relates to a commercial interest.

*Nature of the prejudice*

17. The Commissioner's view is that the use of the term 'prejudice' is important to consider in the context of the exemption at section 43. It implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way.
18. Furthermore, the authority must be able to show how the disclosure of the specific information requested would, or would be likely to, lead to the prejudice.

*Nature of the prejudice – the agents*

19. The Commissioner considers it important that, in claiming the exemption on the basis of prejudice to the commercial interests of a third party, the public authority must have evidence that this does in fact represent or reflect the view of the third party.
20. With respect to the commercial interests of the agents, the Council told the complainant in its internal review response:

*"In considering this review, we have contacted the commercial agents involved who have confirmed to us that they would not wish for this information to be disclosed as they too believe that their commercial interests could be compromised".*

21. The Commissioner considers that this argument lacks detail. However, during the course of his investigation, the Council expanded on its

arguments. In support of its position, it provided the Commissioner with evidence that the agents involved were contacted by the Council about this request. The Commissioner has had the opportunity to consider the responses provided by the agents.

22. The Commissioner can see some potential for the disclosure of the information to prejudice the commercial interests of the agents to the extent that it could provide competitors with a benchmark, for example in respect of future bids relating to regeneration proposals and other similar projects.

*Nature of the prejudice – the Council*

23. With respect to its own commercial interests, the Council told the Commissioner that disclosure in this case:  
*"could mean that in the longer term we struggle to attract external organisations to tender for large projects which would reduce our ability to see best value for the tax payer".*

*Likelihood of prejudice*

24. During the Commissioner's investigation, the Council confirmed that it considers that the circumstances of this case support the lower threshold of 'would be likely to prejudice' as opposed to 'would prejudice' in relation to the application of the exemption to the third parties.

*Is the exemption engaged – the agents?*

25. In determining whether or not the effect of disclosure in this case would be detrimental or damaging in some way to the commercial interests of the agents, the Commissioner has considered the nature and likelihood of harm that would be caused.
26. In the Commissioner's view, a commercial interest relates to a person's ability to participate competitively in a commercial activity, that is, the purchase and sale of goods or services. The Commissioner recognises that companies compete by offering something different from their rivals. That difference will often be the price at which goods or services can be delivered, but that difference may also relate to quality or specification.
27. The Commissioner accepts that disclosure of the disputed information in this case – the price quoted by each agent for their services – could harm the agents' ability to operate in a competitive market. It follows that the Commissioner finds the exemption engaged with respect to prejudice to the commercial interests of the agents.

*Is the exemption engaged – the Council?*

28. In the Commissioner's view many companies may, in practice, be prepared to accept greater public access to information about their business as a cost of doing business with the public sector. However, he recognises that the disclosure of this information may set a standard to which bidders would aim, which would potentially limit the drive for the bids to be made as competitive as possible. If this were to occur, the Commissioner considers that this would be likely to have a prejudicial effect on the Council's ability to obtain the best value for money, for example in any future bid for tenders for regeneration projects or similar developments.
29. Bearing this in mind, the Commissioner is satisfied that the disclosure of the withheld information would be likely to prejudice the Council's commercial interests. Therefore he finds the exemption engaged.

*The public interest*

30. Having established that the section 43 exemption is engaged in respect of the withheld information, the Commissioner must go on to consider the public interest test as set out in section 2(2)(b) of FOIA.
31. Where a public authority is satisfied that the release of the information requested would prejudice someone's commercial interests, it can only refuse to provide the information if it is satisfied that the public interest in withholding the information outweighs the public interest in disclosing it. The presumption is in favour of disclosure and there will be occasions where information is released even though it is a trade secret or is likely to prejudice someone's commercial interest.

*Public interest arguments in favour of disclosing the requested information*

32. In bringing her complaint to the Commissioner's attention, the complainant told the Commissioner:

*"Since the sale of the hall .... entails the loss of a valuable public asset and public community facility, it is not enough for the EDDC to simply give bland assurances, but in the public interest to ensure all of the details of this very controversial sale are made available to the public in an open and transparent way".*

33. In correspondence with the Commissioner, the Council recognised the public interest in the appropriate spending of public money, acknowledging that:

*"there is no question that the public should be able to receive assurances that the Council is tendering contracts properly and selecting the best value option for the Council tax-paying public".*

34. In this respect, the Commissioner notes that the Council told the complainant:

*"I can confirm to you that, of the six commercial agents we approached, three bids were received and we chose to work with the agent who came in with the most competitive bid".*

*Public interest arguments in favour of maintaining the exemption*

35. Arguing in favour of maintaining the exemption, the Council told the Commissioner:

*"there is also a public interest in the Council being able to attract organisations to tender for contracts. The fewer organisations that do so, the less flexibility there is for negotiation on price".*

36. It further argued that:

*"we feel the public interest in the long term is better served by not disclosing this detail and thereby potentially losing the trust and confidence of the business community".*

37. During the course of the Commissioner's investigation, the Council told the Commissioner:

*"In considering this request, we did look at the possibility of disclosing the amounts tendered anonymously..... However, in view of the fact that there were only three tenders received (and that we had publicly disclosed that we had selected the lowest tender) the possibility of linking the fees to the agents was very high – particularly for other commercial organisations. The names of the agents are already in the public domain so tying the two pieces of information together would be very easy".*

*Balance of the public interest*

38. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemptions does not outweigh the public interest in disclosure, the information in question must be disclosed.
39. The Commissioner recognises that the fact that a prejudice-based exemption is engaged means that there is automatically some public interest in maintaining it, and this should be taken into account in the public interest test.
40. He also acknowledges that, in providing the complainant with details of the number of agents approached, the number that responded and its choice of the agent who submitted the lowest bid, the Council has gone some way to address the public interest.
41. In balancing the public interest arguments in this case, while the Commissioner acknowledges that there is a strong public interest in promoting the accountability of the expenditure of public money, this has to be counterbalanced by the public interest in avoiding unnecessary prejudice to the commercial interests of third parties. In this respect he notes that the commercial interests of more than one third party are involved.
42. In reaching a conclusion in this case, the Commissioner is mindful of the context of the request. He considers that the public interest in the Council's ability to obtain the best deal possible in its engagement with commercial agents in respect of development opportunities is weighty.
43. Having weighted the public interest factors for and against disclosure, the Commissioner has decided that the public interest in disclosure is outweighed by the public interest in maintaining this exemption. Therefore the withheld information is exempt from disclosure under the commercial interest exemption and should not be disclosed.

## Right of appeal

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44. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

45. 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.
46. 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 .....**

**Jon Manners**  
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