

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

### **Decision notice**

**Date:** 3 August 2020

**Public Authority:** Bury Council  
**Address:** Town Hall  
Knowsley Street  
Bury  
BL9 0SW

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

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1. The complainant has requested information in relation to a method or tender statement for a contract regarding the collection, kennelling and disposal of stray dogs. Bury Council withheld the information on the grounds of section 43(2) – commercial interests.
2. The Commissioner's decision is that Bury Council has correctly cited section 43(2) and that the balance of public interest favours maintaining the exemption.
3. The Commissioner does not require any steps

## Request and response

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4. On 18 March 2019, the complainant wrote to Bury Council ('the council') and requested information in the following terms:

*"This is a new FOI request for the method / tender statement submitted by Animal Wardens Ltd in relation to the contract between the Greater Manchester local authorities and Animal Wardens Ltd for the collection, kennelling and disposal of stray dogs. I understand that Bury was the lead bidder for the Contract."*

5. The council responded on 1 April 2019 and refused to provide the requested information on the basis of the exemption at section 43(2) – commercial interests.
6. The complainant requested an internal review on 1 April 2019.
7. Following the internal review the council wrote to the complainant on 23 May 2019 to advise that it upheld the position outlined in the refusal notice to withhold the information.

## Scope of the case

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8. The complainant contacted the Commissioner on 19 August 2019 to complain about the way his request for information had been handled. Specifically disputing that section 43(2) is engaged, and that there is also a strong public interest in the release of the withheld information.
9. The Commissioner considers the scope of this case is to establish whether the council has correctly engaged section 43(2). If it has, then she will consider where the balance of public interest lies.

## Reasons for decision

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### Section 43 (2) – commercial interests

10. Section 43(2) of the FOIA states that

*"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)."*

11. Section 43 is a prejudice-based exemption. In order 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 relevant exemption;
  - 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 disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
12. In her guidance on section 43<sup>1</sup> the Commissioner explains that "would...prejudice" means that prejudice is more probable than not, ie that there is a more than 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so. "Would be likely to prejudice" is a lower threshold. It means that there must be more than a hypothetical or remote possibility of prejudice occurring; there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%.
13. As section 43(2) is a qualified exemption, it is subject to public interest considerations.
14. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner has considered what this means in her guidance:
- "...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."*
15. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

16. Having reviewed the withheld information, the Commissioner is satisfied that it comprises the Animal Wardens ('the Supplier') submissions for the Contract.

*The council's position*

17. The level of likelihood of prejudice being relied upon is that disclosure would 'be likely to prejudice' both the council and the Supplier.
18. The disclosure of details about the services provided, and the price, may affect the council's ability to contract services at a competitive rate in the future. This would negatively impact its stretched budget and therefore the wider public.
19. The information was provided in confidence as part of a tendering process, to subsequently disclose the information would affect the council's ability to attract future bidders.
20. If confidentiality is not upheld, then potentially attractive and viable organisations may be deterred from getting involved in the tendering process with the council for fear of disclosure of their bids. This may impact the quality and range of services that are delivered and increase the costs of those services.
21. The Supplier has advised the council that, in their view, the information was provided confidentially and should not be disclosed. They are a small company in a niche market providing services for other local authorities. They have unique business model that could be copied by competitors, thereby affecting their place in the market and their ability to provide the services at the price stated and this may in turn impact on their future viability. They advise that the dog warden business is a small market and that disclosure of information about working practice and strategies could be used by a third party, thereby creating a disadvantage to the Supplier in the longer term.
22. The information, if disclosed, could also be used by a competitor to undercut the Supplier, leading to unfair competition in any subsequent tendering exercises.
23. The Supplier is an applicant in the latest dog warden tendering process for the Greater Manchester Authorities ('the Authorities'). The tender evaluations and ultimately the award of contract has been delayed due to Covid-19. The council states that disclosure at this time could prejudice the Supplier, the Authorities, and the tender process.
24. The council advises that the withheld information also sets out contract details in relation to a number of other councils and therefore disclosure

may harm their interests as well as those of Bury Council and the Supplier.

*The complainant's position*

25. The complainant was concerned that the council had not expressed who's commercial interests would be prejudiced, nor made a sufficient case that disclosure would result in an adverse effect, nor advised whether the Supplier had been consulted regarding disclosure.
26. It is the complainants view that disclosure could have a beneficial commercial effect on the tendering process. They state that competitors to the Supplier may be able to submit more competitive bids after being able to further scrutinise the service delivery proposals made by the Supplier.
27. The complainant raises a number of accusations against the Supplier which they state may mean that the council is not achieving full value for money, and that rival bidders may have been overlooked.
28. The complainant's case is further considered within the public interest test.

*Is section 43(2) engaged?*

29. The Commissioner has reviewed the withheld information, being the Suppliers Method Statement in relation to the contract.
30. The relevant applicable interest cited in this exemption is the prejudice to commercial interests. The Commissioner accepts that the arguments made by the council, set out above, address the prejudice at section 43(2). As such the first criterion for the exemption is met.
31. When considering the second criterion, the Commissioner must be satisfied that the nature of the prejudice is "real, actual or of substance" and not trivial or insignificant. She must also be satisfied that some causal relationship exists between the potential disclosure and the stated prejudice.
32. The Commissioner accepts the council's position that the withheld information, containing details relating to the business model and pricing methodology of the Supplier, would be of use to competitors at the time of contract renewal. She also notes that there is a current tendering process underway for which the information could be used. As such the Commissioner is satisfied regarding the nature of the prejudice to the Supplier and the causal relationship to the proposed disclosure.

33. The Commissioner has also considered the commercial interests of the council. She agrees that if confidentiality is not upheld in the tendering process then organisations may be deterred in the future and this may prejudice the bidding process as a whole for the council resulting in less competition. However, conversely, the complainant's argument could also be the case, being that knowledge of the Supplier's method statement could give rise to challenge and scrutiny of their proposals and therefore more competitive bids.
34. The council have confirmed that disclosure 'would be likely' to result in the prejudice to the Supplier, and that the Supplier has expressed in their view that the information was provided confidentially and should not be disclosed. The Commissioner is satisfied that the council have therefore addressed the third criterion for the exemption.
35. As such the Commissioner finds that the council have provided sufficient arguments to support the case that the commercial interests of the Supplier would be prejudiced by the disclosure of the withheld information.
36. The Commissioner therefore considers that the section 43(2) exemption is engaged. As the exemption is engaged, the Commissioner must consider the balance of the public interest in disclosure.

### **Public interest test**

37. The exemption under section 43(2) is subject to the public interest test. This means that, even when a public authority has demonstrated that the exemption is engaged, it is required to consider the balance of public interest in deciding whether to disclose the information. The public interest is not a tightly defined concept, and can cover a range of principles including, but not limited to: transparency and accountability; good decision-making by public bodies; upholding standards of integrity; ensuring justice and fair treatment for all; securing the best use of public resources and in ensuring fair commercial competition in a mixed economy.

### *The complainant's view*

38. It is the complainant's position that the service implemented by the Supplier is vastly different to what has been contracted with the council. It is the complainants view that they have compelling evidence which supports the disclosure of the Suppliers Method Statement on the following grounds:
  - Transparency and accountability regarding the contractually agreed service, animal welfare standards; the commercial proposition and funding via the public purse;

- Best use of public resources through a fair commercial competition. Transparency of decision making in the council in awarding the contract;
- Upholding standards in terms of animal welfare legislation, contract and supplier management, and fraud detection and prevention.

39. The complainant invited the Commissioner to share with the council the information they had gathered as evidence, to support their position for disclosure.

*The council's view*

40. The council acknowledges the general public interest in being open, transparent and accountable. However, it considers that this is outweighed by the inherent public interest in avoiding the prejudice to the council and the Supplier, already set out above in terms of engaging the exemption.
41. The council considers the arguments presented regarding prejudice to the council's budget and expenditure, are also applicable public interest concerns.
42. It states that the potential effect upon the contractor and the council from a financial perspective are sufficient to maintain the exemption.
43. Furthermore, the council advised the Commissioner that it took the allegations made by the complainant very seriously. It requested time to undertake an investigation before responding on this case.
44. The council confirmed that it had reviewed the public interest in disclosure of the Suppliers Method Statement in light of the allegations made.
45. The council stated that it was particularly concerned about allegations that that there may be dubious practices being carried out and therefore had investigated the issues. Subsequently, a meeting was held between the Supplier and Environmental Health Officials. The council found that it was satisfied that the Supplier was carrying out work on behalf of the Council in accordance with applicable regulations.
46. The council stated that officers did not consider that the issues raised were relevant to the contract and therefore it upheld its decision to withhold the Suppliers Method Statement.

*The Commissioner's view*

47. The Commissioner considers that issues relating to animal welfare, public spending, and the implementation of contracts and services would attract a high level of public interest.
48. The Commissioner acknowledges the public interest in maintaining the integrity of procurement exercises. It is fundamental that these exercises are perceived to be fair and equal to all. However, it is also essential that prospective bidders are assured that in taking part in a procurement exercise, at their considerable expense, their competitive advantage is not lost for a substantial period of time thereafter.
49. The Commissioner has considered the withheld information and the arguments for openness and transparency to enable further scrutiny of the services provided. However, she is persuaded that revealing the business model of a supplier in this market would erode their competitive position and therefore impact the whole market to some degree. The result being that the public benefit of having an efficient market would be eroded to an extent.
50. The Commissioner is also persuaded that the council may incur some reputational damage in regard to its procurement processes should the information relating to the Suppliers commercial proposition and business model be disclosed.
51. The Commissioner has considered the substantial allegations made by the complainant which the council advises it has now investigated. However, if the Commissioner were to make a public interest decision based upon the arguments presented by the complainant, this would infer some formal decision or judgement upon the allegations made.
52. It is not for the Commissioner to make such a judgment, nor is the FOIA an appropriate route to pursue such serious allegations. There are other, more appropriate routes to appeal actions and decisions by public authorities and the Commissioner would advise the complainant to seek legal advice should they wish to take the matters further.
53. The Commissioner has considered the arguments presented by the complainant and the council. The Commissioner accepts that disclosure of the withheld information would erode the competitive advantage in similar and future procurement exercises. She is therefore satisfied that the greatest weight must be given to the potential harm that would be done to the commercial interests of the council should the withheld information be disclosed.



54. The Commissioner has decided that the council is entitled to rely upon the provisions of section 43(2) to withhold the information and that the balance of the public interest favours maintaining the exemption.

## Right of appeal

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55. 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: 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)

56. 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.
57. 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 .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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**SK9 5AF**