

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 4 November 2020

**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 for its interim Chief Executive from Sheffield City Council (the "Council"). The Council provided some information, said some was not held and withheld the remainder citing the exemptions at sections 40 (personal information) and 43 (commercial interests) of the FOIA. During the Commissioner's investigation further information from within the contract was disclosed.
2. The Commissioner's decision is that, where the Council advised that information was not held, the Commissioner accepts that, on the civil standard of the balance of probabilities, it was entitled to do so. She also finds that it was entitled to rely on section 43 to withhold the remaining information in the contract. The complainant did not contest the citing of section 40 so this has not been considered. No steps are required.

### Background

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3. The Council has 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>1</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>2</sup>".*

4. 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>3</sup>".*

## Request and response

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5. On 28 December 2019, the complainant wrote to the Council and requested information in the following terms:

*"I would be grateful if you would provide the following:*

*The contract for the interim chief executive;*

*Correspondence between the council and the interim chief executive relating to the appointment;*

*The costs information relating to any advertising of the post and/or any head-hunting process undertaken to secure an interim chief executive. This should include identifying which monies were paid to which companies or organisations involved.*

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<sup>1</sup> SheffNews. 4 October 2019. [John Mothersole, Chief Executive of Sheffield City Council, announces retirement.](#)

<sup>2</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>3</sup> [Odgers Interim](#) website.

*The number of people interviewed for the position and when".*

6. On 17 February 2020, the Council responded. It provided some of the contract, but refused to provide the remainder, citing sections 40 and 43 of the FOIA. It advised that it had had no correspondence with the interim chief executive relating to the appointment. It explained that there were no costs associated with advertising / head-hunting. It advised that two people had been interviewed.
7. The Council provided an internal review on 17 March 2020 in which it maintained its position.
8. During the Commissioner's investigation, the Council disclosed more of the contract to the complainant.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 19 March 2020 to complain about the way his request for information had been handled. He asked her to consider whether any information was held in respect of head-hunting / advertising costs and the application of section 43 to the withheld information in the contract. He also raised issues with the internal review which are commented on in 'Other Matters' at the end of this notice. Much reference was made by him to figures and amounts which he considered would be in the contract, but, in line with the wording of the request, the Commissioner can only consider the actual content of the contract itself, which she has seen in full.
10. The complainant did not raise concerns about the citing of section 40 so the Commissioner has not considered the application of this exemption (which was applied to a very small amount of personal information in the contract).
11. When requesting an internal review, the complainant stated:

*"The response further refers to 'Method Statements'. I don't think these relate to the amount the council is paying the interim chief executive.*

*As far as I can see they have no direct relevance to pay and therefore do not need to be provided".*
12. Schedule 4 of the contract is entitled "Method Statements". The disclosure of Schedule 4 has therefore been removed from the scope of the investigation.
13. The complainant did not initially query whether there had been any correspondence between the Council and the interim Chief Executive

about the appointment so the Commissioner had removed this from the scope of her investigation. However, at a very late stage in her investigation, the complainant raised the following issue with the Commissioner regarding any correspondence the Council may have had with the interim Chief Executive:

*" ... it would be questionable for the ICO to not include all correspondence with Odgers relating to the appointment as it is clear ... that Odgers are effectively acting for the interim chief executive and representing her in this matter".*

14. In respect of this late broadening of the grounds of complaint, the Commissioner notes the initial letter she wrote to the complainant when commencing her investigation. As is customary, she had advised him as follows:

*"The focus of my investigation will be to determine whether the Council handled your request in accordance with the FOIA. As per your grounds of complaint I will consider the application of section 43 and whether any information is held in respect of head-hunting / advertising costs. You have also raised issues with the internal review which I will comment on ...*

*Please contact me within the next 10 working days if there are matters other than these that you believe should be addressed. This will help avoid any unnecessary delay in investigating your complaint. If I do not hear from you by this date, my investigation will focus only upon the matters identified above".*

15. The complainant did not raise the matter of correspondence between the Council and the interim Chief Executive within the 10 day time frame so the Commissioner has therefore not considered it. However, she is satisfied from the specific wording of the request that it relates only to direct correspondence between these two parties, and not also to correspondence between the Council and the recruitment consultants. Furthermore, it is understood that the complainant has since separately requested any such correspondence between the Council and the recruitment consultants in a further information request.
16. During the Commissioner's investigation the Council located an email chain which it initially considered fell within the scope of the request. This was disclosed to the complainant, with a redaction applied citing section 43 of the FOIA. The Commissioner queried whether it was actually a part of the contract itself and the Council responded saying:

*"On review we agree that the email chain ... referred to in your correspondence is not within the scope of this request ... The email was part of standard post-contract discussions about the terms of the council's preferred candidate ... and was not the contract or*

*correspondence between the council and the interim chief executive”.*

17. The Commissioner has therefore not further considered disclosure of this email as it falls outside the scope of the request.
18. When discussing the case with the complainant, the Commissioner confirmed with him that day rates and monetary figures are not actually included in the contract, it is only the profit margins being withheld. He did not accept that this could be the case and insisted that any related information subsequent to the contract which included these details would be caught within the scope of the request. He also suggested that there may be a further contract which includes the rates and additional Terms and Conditions which had not been provided. However, the request clearly stipulates disclosure of the contract itself which is what the Commissioner has considered. The Council has also confirmed:

*“The contract provided is the only contract. It secures Odgers Interim as the contract provider, it does not include a breakdown or details of any monetary fees. There is a reference to Odgers Interim’s organisational fee. The fee is expressed as a percentage of their candidate’s day rate. This is referred to in the contract as a “margin of X%” (where X is the information withheld.) The day rate was agreed separately by the Council when it accepted the candidate put forward by Odgers Interim for the Interim Chief Executive role. There are no further Terms and Conditions”.*

(The Council confirmed that the complainant has also made subsequent information requests which will cover any further documentation which specifically refers to day rates / monetary amounts; such correspondence is not considered to be part of the contract itself.)

19. When discussing the case with the complainant, the Commissioner confirmed with him that information about day rates and monetary figures is not actually included in the contract, and that only profit margins are being withheld. He did not accept that this could be the case and insisted that any related information subsequent to the contract which included this information would be caught within the scope of the request. However, the request clearly stipulates that it is for a copy of the contract itself, and this is what the Commissioner has therefore considered. The Commissioner can also confirm that the contract under consideration is the only contract which exists. It secures Odgers as the service provider and does not include a breakdown or details of any monetary fees. There are no further Terms and Conditions supplementary to the contract. (The complainant has also made subsequent information requests which will cover any further documentation which specifically refers to day rates / monetary

amounts; such correspondence is not considered to be part of the contract itself.)

20. The Commissioner's duty 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 the FOIA. The FOIA is concerned with transparency of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. The FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.

## **Reasons for decision**

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### **Section 1 – general right of access**

21. Section 1 of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds that information and, if so, to have that information communicated to him.
22. In this case, the complainant suspects that the Council holds information from which it could answer part of his request, namely costs information relating to any advertising of the post and/or any head-hunting process undertaken to secure an interim chief executive. The Council's position is that it does not.
23. In cases where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner – following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.
24. The Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.



25. Therefore, the Commissioner has sought to determine whether, on the balance of probabilities, the Council holds the information described in paragraph 22. Accordingly, she asked the Council to explain what enquiries it had made in order to reach the view that it did not hold the information.
26. In response to her enquiries about any searches conducted, the Council explained as follows

*" There were no searches to be undertaken. Neither 'headhunting' nor 'advertising' costs are incurred when using an executive search agency to secure a pool of candidates for consideration. The Director of HR who led the search for an interim chief executive says this is standard practice. We told [the complainant] this on 17 March 2020 when we provided our internal review. Of course, he could not see this information on the unredacted contract, but this is what it says:*

*There are no up-front charges or retainer fees charged to the client. The client only incurs any costs when an executive is successfully selected and placed and commences work (page 32\*).*

*The council had determined at the outset a recruitment company would be appointed to provide a shortlist from whom an appointment would be made. No advertising costs would be incurred because the recruitment company holds the names and CVs of candidates, the so-called 'talent pool', which they supply for consideration. There is likewise no distinct or separate 'headhunting' cost. Once Odgers Interim was contracted to supply an acceptable candidate, the council has started receiving invoices for the cost of the service (i.e., an Interim Chief Executive) which Odgers Interim provides".*

(\* It is noted that the extract referred to by the Council at page 32 of the contract is part of Schedule 4 which has been deemed out of scope).

#### *The Commissioner's conclusion*

27. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in the paragraphs, above, the Commissioner is required to make a finding on the balance of probabilities.

28. The Commissioner considers that the Council has provided a convincing explanation as to why the requested information is not held. Based on the Council's response above, and bearing in mind the specific wording of the request, the Commissioner is satisfied that, on the balance of probabilities, no recorded information falling within the scope of the request is held. She is therefore satisfied that the Council has complied with the requirements of section 1 of the FOIA for this part of the request.

### **Section 43 – commercial interests**

29. This exemption has been applied to a small amount of information. This is specifically two figures from Schedule 2 of the contract, which shows a 'reduction' in respect of its standard organisational fee which the recruitment consultants have granted to the Council. There is no actual 'monetary' figure, it is two percentage figures related to the company's profit margins.

30. 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?*

31. 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.

32. The first point for the Commissioner to consider is whether the arguments provided by the Council relate to the relevant applicable interests.



33. The term '*commercial interests*' is not defined in the FOIA. However, the Commissioner's guidance on the application of section 43<sup>4</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.
34. 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.
35. 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.
36. In his grounds of complaint to the Commissioner, the complainant commented:

*"I point out ... that the council has not put forward any arguments it states have been specifically advanced by the company concerned ... surrounding commercial interests. It has stated they exist and provided an outline as to what it is contended they are but I am not clear if they have been advanced by the company itself".*

37. The Council has confirmed that it did liaise with the recruitment consultants. In submitting its views, the consultants advised:

*"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.*

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<sup>4</sup> <https://ico.org.uk/media/for-organisations/documents/1178/commercialinterests-section43-foia-guidance.pdf>

*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 to 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 on the basis of other tenderers knowing the pricing policy of their competitors”.*

38. The Council also explained:

*“We consider that the disclosure of the information in the contract would be likely to prejudice Odgers Interim’s commercial interests. It is information provided during the tendering process and details of our contract with them.*

*Odgers Interim stated that for this assignment, they would reduce their standard fee from a margin [amount withheld] (page 21 of the unredacted contract). There are two commercially sensitive aspects to this statement. Firstly, the margin on the contract is specified. These are the reasons why disclosure of this information would be likely to prejudice Odgers Interim’s commercial interests:*

- The margin is the fee the company takes from the contract for its costs and profits. It would likely give insights into its business to its competitors.*
- Given that FOI is a “disclosure to the world”, a competitor could use that information to undercut Odgers Interim in future tenders.*

*Secondly, Odgers Interim’s discount to the council of [amount withheld] on their standard fee is commercially privileged. If this*

*was disclosed, another client could demand the same or more. That would prejudice Odgers Interim's ability to make revenue. It is not for us to reveal this discount, which is part of the successful company's tender or a result of negotiation".*

39. The Council further advised the Commissioner that:

*"In the recruitment industry, 85% of income is generated through temporary (interim) and contract placements, compared to permanent contracts.<sup>5</sup> Odgers Interim operates in a competitive market. If their pricing structure was revealed, that would allow competitors to see what they charge. That price reflects their 21 years of business knowledge, talent pools, track record and proprietary tools. It would gift to competitors information that they could exploit without revealing their own.*

*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".*

40. Regarding the likelihood of the prejudice occurring, the Council advised:

*"The level of likelihood we are relying upon to engage section 43(2) is 'would be likely to' prejudice Odgers Interim commercial interests ...*

*We have shown prejudice likely from the exposure of Odgers Interim's pricing and methodology, which could be adopted, or modified by competitors for their own ends. This unfairly diminishes Odgers Interim's investment and disadvantages their future in the market. Odgers Interim has said there is a likelihood of a race to the bottom on price, quality suffers and a vendor can even leave the market having priced their offer too low".*

41. Having viewed the withheld information, the Commissioner accepts that the withheld information is relevant to the applicable interests within the commercial interests exemption and therefore the first part of the test above is met.

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<sup>5</sup> Recruitment and Employment Confederation. January 2020. [Recruitment Industry Trends report for 2018/19](#).

42. 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.
43. In respect of its own commercial interests, the Council advised that disclosure: *"could lead to a breakdown of Sheffield Council's relationship with our suppliers or cause them to seek a claim for a breach of confidence"*. Whilst such an action could potentially be the result of a disclosure, the Commissioner does not consider this to be a commercial interest, as it is not a commercial activity such as the purchase and sale of goods or services (see paragraph 33 above).
44. However, the Council was also concerned that disclosure may result in reputational damage to its procurement processes which may affect its ability to attract future bidders. It advised that this: *"would not be positive for the council which would have less choice or face higher prices. It could have an unfavourable effect on the recruitment market"*.
45. The Commissioner is satisfied that the Council has demonstrated sufficient support for the lower level of prejudice in respect of both its own and the recruitment consultant's commercial interests. As she is satisfied that disclosure would be likely to prejudice these commercial interests, and thus, that section 43 of the FOIA is engaged, she will now go on to consider the public interest test.

## **Public interest test**

### *Arguments in favour of disclosing the information*

#### *Complainant's views*

46. The complainant advised the Commissioner as follows:

*"When we're faced with such a severe lack of finance for local authorities should a local authority be able to refuse to show how and why it is paying £25,000 or more a month for the services of an interim chief executive?"*

*Does the public not deserve clarity over such spending in the context of such limited financial resources, particularly when many members of the public have themselves struggled financially but will still be finding enough money to pay their taxes, including Council Tax?"*

*As previously detailed I do think the public interest here weighs heavily in favour of disclosure".*

And:

*"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.*

*This was further confused by the email provided below which raised the prospect of employment and/or payment for work prior to 1 January 2020 and referred to both four-day and five-day weeks.*

*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.*

*We are not talking about an insignificant contract. 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”.*

47. Whilst the Commissioner notes the complainant's concerns, she also notes that they relate to information which is not caught within the scope of this request. Whilst the complainant may believe that there should be further financial information within the contract, the only information which is under consideration here consists of the margin which the recruitment consultant makes and a percentage discount that has been agreed for the Council; there is no other monetary / financial information in the contract or caught within the scope of the request.

48. The complainant has further stated to the Commissioner

*“... I am pointing out that if the council does not disclose related information and has [sic] significant question marks about how and when the contract in question was agreed then the public interest in full disclosure is enhanced.*

*The simple contract on its own does not exist in a vacuum in the context of the public interest.*

*There will always be related factors. Who is the contract for (the most senior employee in this case), when was it agreed and how (unknown), how was the amount arrived at (given the questions I have raised about the process, also unknown), why was it awarded prior to any candidates being interviewed and so on.*

*I am submitting that those issues should not be ignored in the context of the public interest if the council has contended it has been transparent - and said its actions demonstrate that transparency”.*

49. Whilst the Commissioner understands the comments that the complainant is making, she again notes that the only withheld information in this case is specific to profit margins. Furthermore, she can only consider the disclosure of information which has been specifically requested, ie the contract itself. Whilst it is understood that the complainant has made further information requests which seek information around the appointment of the interim chief executive, where arguments such as those presented here may be of relevance, those requests are not being considered as part of this complaint.



*The Council's views*

50. In its refusal notice, the Council advised that it supported the transparency agenda which made it clear that local authorities should provide information about how they deliver services, spend money and make decisions.

*Arguments against disclosure*

*The Council's views*

51. The Council has argued that:

*"... disclosure of the negotiating fees would reveal potentially competitive rates which would not otherwise be made public – however, the final cost agreed is published online (link stated above) as part of our commitment to Transparency".*

52. It added that

*"The information concerning Odgers Interim's bid and underlying methodology was provided in confidence as part of a tendering process. The tender process should ensure fair competition and best value for money. This would likely be distorted if competitors obtained an unfair advantage, and could result in local government receiving less competitive bids. 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>6</sup>".*

53. And:

*"With regards to the pricing structure of the contract, 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".*

54. The Council has further explained to the Commissioner that:

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<sup>6</sup> Local Government Information Unit (LGIU) 2020. [Local government facts and figures: England](#)

*"The public interest is clearly weighted in favour of disclosure of the total payments to Odgers Interim. These are being made available as they are paid against the costs that we have outlined. The council has been fully transparent about the appointment process and publication of the costs incurred.*

*The contract with Odgers Interim was suited to the circumstances of an interim role. The council approved the budget for the role. The council publishes the expenditure. The council recognises the business model of a supplier in the recruitment market that disclosing it would wear away 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 reduced. On balance, the public interest lies in withholding the information to avoid the potential harm to the commercial interests of Odgers Interim – and any knock on effect disclosure would have for the council".*

#### *The Commissioner's conclusion*

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

*"Where the disclosure of requested information may potentially prejudice a third party's commercial interests, a public authority should consult with the relevant third party about such disclosure at the time of the request".*

56. The guidance also says:

*"When a public authority wants to withhold information on the basis that to disclose the information would or would be likely to prejudice the commercial interests of a third party, it must have evidence that this does in fact represent the concerns of that third party. It is not sufficient for the public authority to speculate on the prejudice which may be caused to the third party by the disclosure".*

57. The Commissioner initially notes that the Council has now disclosed the vast majority of the contract in this case, other than the Schedule 4 information, which the complainant agreed could be withheld. The remaining information has been withheld on the expressed wishes of the recruitment consultant, and is minimal. She further notes it does not specifically relate to the actual payments made by the Council or any monies received by the interim Chief Executive. It consists only of profit margins which would be likely to be of particular interest to the contractor's competitors.

58. It is also noted that the contract terms recognise that the Council is subject to the FOIA and include wording relating to this. Within these, it states:

*"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. To release prior to this date could give a competitor information to enable them to prejudice future tenders that we may submit for other public bodies."*

59. It is therefore clear that the FOIA has been duly considered and that future disclosure is recognised as something which may need to occur. However, built into this is a 'safety margin' of 3 years to represent the changes in the market and a reduced impact in disclosure which will naturally occur over a period of time.
60. 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 profit margins to its competitors, outweighs the public interest in the disclosure of the percentage figures. Such disclosure could mean that it loses its competitive edge and may not win future business.
61. Furthermore, as the exact monetary figures are not held within the contract, there is a reduced public interest in knowing what percentage discount the Council has negotiated as this would not actually disclose the monies directly affecting the public purse. However, were monetary figures to be disclosed in a future, related request, then it would be possible to identify the specific profits made by the recruitment consultant, thereby placing it at a significant disadvantage.
62. 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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63. As part of his grounds of complaint the complainant raised the following issues:

*“... I suggest the internal review response is unusual. It does not state who carried out the review and the review response does not interrogate or even acknowledge the arguments put forward in the internal review request.*

*There has been no reconsideration of the application of Section 43 as far as I can see from the response and no reconsideration of the public interest.*

*Nevertheless the response states it is the council's final position and the only option is to contact the ICO as I am now doing”.*

64. The Commissioner put these grounds to the Council for its views. The complainant's concerns and the Council's responses are as follows:

*“The internal review was not signed. It is our procedure to do so. We regret this omission and wish to state that [name redacted], who is an Information Management Officer, undertook the review.*

*The review response does not interrogate or even acknowledge the arguments put forward in the internal review request.*

*We tried to respond to the specific complaints raised by [the complainant] in our response of 17 March 2020. We accept we should have done more to respond to his arguments when he requested an internal review on 17 February 2020. We have done so now in paragraph 7.6 below on the application of the public interest test.*

*We did not respond at the time to [the complainant]'s query why the redacted contract we disclosed to him was dated: 2019-08-26 – Short Form - General Services. The date refers only to the version of the template. The date given for the commencement of the contract is 1 January 2020. You can see the same information on the unredacted copy of the contract.*

*There has been no reconsideration of the application of Section 43 as far as I can see from the response and no reconsideration of the public interest.*

*We accept this shortcoming in the Internal Review of 17 March 2020. The Code of Practice under s.45 of the Freedom of Information Act 2000 requires that the review “includes decisions*

*taken about where the public interest lies if a qualified exemption has been used.”<sup>7</sup> We will ensure this does not happen again”.*

65. The Commissioner has no specific authority to specify who should undertake an internal review within a public authority. On this occasion, whilst she recognises that the review was undertaken by a suitable member of staff, she considers that it would have been best practice to evidence that this is the case by providing that person’s details. She also notes that the Council says that this is its usual practice and that it was an omission on this occasion. The Commissioner recommends that it maintains its usual standards for future requests.
66. Within the section 45 Code of Practice, the Commissioner considers that the review procedure should involve a thorough re-examination of the original decision and handling of the request, and that it should be genuinely possible to have a previous decision amended or reversed. Clearly on this occasion the review was not adequate. However, it is again noted that the Council has accepted these short comings and that it has agreed to address them properly when dealing with future requests.
67. 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>8</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>9</sup>.

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<sup>7</sup> Cabinet Office. [Freedom of Information Code of Practice](#). 4 July 2018.

<sup>8</sup> <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

<sup>9</sup> <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

## Right of appeal

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68. 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)

69. 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.

70. 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**