

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 19 December 2011

**Public Authority:** London Borough of Newham  
**Address:** Broadway House  
322 High street  
Stratford  
London  
E15 1AJ

#### Decision

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1. The complainant has requested from Newham Council:  
“...all the details you have on companies or individuals contracted by Newham to provide advice and consultancy to help Newham find ways to reduce their costs and save money. This might include copies of contracts with these companies and or individuals and how much they are being paid by Newham.”
2. The Commissioner’s decision is that the council correctly relied upon section 43(2) (the commercial interests exemption) to withhold the requested information.

#### Background

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3. The London Borough of Newham (the council) received advice on the reduction of its costs from the consultancy firm Kingsgate Interim Advisory Investment Limited (the company) during 2010.

#### Request and response

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4. On 10 February 2011, the complainant wrote to the council and requested information by asking for:

"...all the details you have on companies or individuals contracted by Newham to provide advice and consultancy to help Newham find ways to reduce their costs and save money. This might include copies of with these companies and or individuals and how much they are being paid by Newham."

5. The council substantively responded on 10 March 2011. It refused to disclose the information requested based on the exemption contained in section 12 (cost of compliance exceeds appropriate limit).
6. The complainant requested an internal review of the council's decision. The council (in correspondence dated 15 April 2011) wrote to him with the details of the result of the internal review it had carried out. The result being that it released some of the requested information (including the annual cost of engaging the company) but withheld the remainder and relied on section 43(2) to do so. Particularly, the council said, the withheld information consisted of the day rate and any other rates in the contract with the company, including details about insurance.

### Scope of the case

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7. The complainant contacted the Commissioner, on 24 May 2011, to complain about the council's handling of his request for information in respect of its withholding of information relating to the daily rate. He said that while the yearly cost had been disclosed there was no way of knowing how many days this constituted. Further, he said, a breakdown of costs per day is essential for transparency and for ensuring that the council's residents are getting value for their money.
8. **The public authority, on 31 October 2011, provided the Commissioner with a copy of the withheld information to assist him in determining this matter.** It also said that as well as disclosing the total values paid under the contract it also published any payments over £500 on its website so the public could see how much any company was receiving over a given period.

### Reasons for decision

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9. Section 43(2) states that information is exempt information if its disclosure under FOIA would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). The Commissioner will first consider this matter as regards

the company and then, if necessary, the situation regarding the commercial interests of the council.

10. When considering a prejudice based exemption the Commissioner's approach is to decide whether the exemption applies by applying a three part prejudice test. The Information Tribunal in *Hogan v Information Commissioner*<sup>1</sup> described this as follows:

*"The application of the 'prejudice' test should be considered as involving a numbers of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption.....Second, the nature of 'prejudice' being claimed must be considered .....A third step for the decision-maker concerns the likelihood of occurrence of prejudice."*

#### The applicable interest

11. Identifying the applicable interests involves considering the wording of the exemption and ensuring that the prejudice claimed is relevant to the interest stated. In this case, the public authority said that the exemption engages because disclosure would prejudice the commercial interests of the company as well as its own. The Commissioner is satisfied that the council has identified applicable interests relevant to section 43(2).

#### The nature of the prejudice

12. As regards the nature of the prejudice, the Information Tribunal in *Hogan* commented that to meet this element of the test "an evidential burden rests with the decision-maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice". The Commissioner therefore expects public authorities to contact third parties (who they say will be harmed commercially) for their comments in such circumstances rather than supply speculative arguments.
13. The council explained that companies compete by offering something different from their rivals. The difference will often be the price at which the goods or services are delivered. Largely, with the provision of consultants, this will be the day rate charged. As the key representative for the company was regularly on site it had liaised with the company on a number of occasions, about these types of information requests and they have confirmed that they felt day rates were commercially sensitive. The council further explained that a number of its other suppliers have taken this view previously when it consulted them about

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<sup>1</sup> EA/2005/0005

day rate or hourly rate information requests. The Commissioner has no grounds to doubt the veracity of these assertions and therefore the council has shown, on a balance of probabilities, that releasing the information could harm the commercial interests of the company.

The likelihood of prejudice

14. The Commissioner then considered the likelihood that disclosure would, or would be likely to, result in the prejudice identified by the public authority. The council, in correspondence to the Commissioner clarified that it considered that disclosure *would* likely prejudice the commercial interests of the company.
15. When discussing the prejudice test the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* confirmed that:

“the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.”
16. This in turn follows the judgement of Mr Justice Munby in *R (on the application of Lord) v Secretary of State for the Home Office*. In that case, the view was that: *“Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there ‘may very well’ be prejudice to those interests, even if the risk falls short of being more probable than not.”*
17. The council, in its letter dated **31 October 2011**, said:

“The company operates in a competitive environment providing consultancy services to other organizations and may choose to charge different day rates depending on the organization to which consultants are supplied. In addition, given that the company bids for the delivery of services through the council's and other organizations' tendering processes, they would not want their day rates to be released into the public domain as they feel that this would undermine their commercial position during the bidding process.”
18. The Commissioner accepts the merit in the council's assertion that releasing the withheld information would be likely to harm the company's commercial activities. That is, the Commissioner appreciates that providing the company's competitors with an insight into how much it charged the council for its services (in respect of the information which continues to be withheld) would allow them to adjust their bids for future similar contracts, to the detriment of the company. Additionally

the Commissioner accepts that releasing the withheld information would fetter the ability of the company when seeking contracts with other potential clients. The company would not benefit by its potential clients knowing the daily rate that it had charged another client. Accordingly, the Commissioner finds, on balance, that there would likely be prejudice to the company's commercial interests by releasing the withheld information.

19. Having found that the information was withheld correctly as regards the company's commercial interests the Commissioner did not go on to consider the situation as regards the council's commercial interests. Therefore the Commissioner, for the reasons given above, is satisfied that the information is exempt under section 43(2) on the basis that disclosure would be likely to prejudice the commercial interests of the company.

### **Public Interest Test**

20. Section 2(2)(b) provides that where a qualified exemption applies information shall only be withheld where the public interest in maintaining that exemption outweighs the public interest in disclosure. In doing so, the Commissioner can take into account factors favouring the maintenance of the exemption which include - and go beyond - the company's commercial interests and balance these against those factors which favour disclosure of the information.

21. **Public interest arguments in favour of disclosing the requested information:**

- Promoting transparency and the accountability of use of public funds, ensuring that public money is being used effectively, and that the local authority is obtaining value for money when purchasing goods and services.

22. **Public interest arguments in favour of maintaining the exemption:**

- The need to attract a wide range of bidders confident with the way in which the council would handle their information and how this may affect the price the council (and therefore the public) would have to pay for its services.

23. In considering the public interest test, the council had regard to the benefits of maintaining a healthy bidding position during any procurement process.
24. In considering the public interest test, the Commissioner takes cognisance that he has found that the exemption engaged. That is, releasing the withheld information would harm the commercial interests of the company. However, the Commissioner appreciates that public access to information held by public authorities engenders the desirable transparency and accountability of those authorities. On the facts of this matter, the council has already provided the actual price paid to the company for its services. This goes some way in facilitating transparency and accountability of the council's action. While knowing the actual day rate would increase the degree of transparency and aid accountability, the likely consequence will be the damaging of the commercial activity of the company.
25. On the facts of this matter, the Commissioner has concluded that the public interest in the small increase in transparency and accountability, by releasing the withheld information, does not justify the likely damage that would be caused to the commercial activities of the company. Furthermore, the Commissioner does not consider that the public interest factors favouring disclosure outweigh the effects on the council by disclosure on being able to negotiate day rates as favourable to it as is presently the case. Consequently, the Commissioner is satisfied that, in the circumstances of this case, the balance of the public interest favours the maintenance of the exemption.

## Right of appeal

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26. 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)

27. 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.
28. 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** .....

**Alexander Ganotis**  
**Group Manager – Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**