

# Decision Notice

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## Decision 178/2016: Equal Say Advocacy and Glasgow City Council

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### Framework Agreement for social care services

Reference No: 201600724

Decision Date: 22 August 2016



Scottish Information  
Commissioner

## Summary

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On 15 February 2016, Equal Say Advocacy asked Glasgow City Council (the Council) for information about the Framework Agreement for social care services in Glasgow, including the cost of these services.

The Council provided some information and told Equal Say Advocacy that some information was already publicly available. It withheld information on service costs, which it believed would damage the commercial interests of the care providers and the Council. Following a review, Equal Say Advocacy remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner found that that the Council had correctly withheld information in terms of section 33(1)(b) of FOISA. She did not require the Council to take any action.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions); 33(1)(b) (Commercial interests and the economy)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 15 February 2016, Equal Say Advocacy made a request for information to the Council. It asked for information about the Framework Agreement for social care services in Glasgow, including the cost of these services.
2. The Council responded on 14 March 2016. The Council withheld information about the cost of the care services in terms of section 33(1)(b) of FOISA (Commercial interests and the economy). It stated that disclosure would, or would be likely to, prejudice substantially the commercial interests of the care providers and the Council. The Council explained that “sensitive pricing information” was obtained through a confidential tendering process. Disclosure would undermine faith in that process and affect future tendering processes. The Council explained why it believed the public interest favoured withholding the information.
3. The Council also refused to provide information about the Framework Agreement which was available on its website, relying on section 25(1) of FOISA (Information otherwise available).
4. On 15 March 2016, Equal Say Advocacy wrote to the Council requesting a review of its decision on the basis that the public interest favoured disclosure. Equal Say Advocacy questioned whether section 33(1)(b) of FOISA applied to the price information. It asked why the information was provided to individual service users, but was not provided to an independent organisation that seeks to assist people make choices about their care and support provision.
5. The Council notified Equal Say Advocacy of the outcome of its review on 11 April 2016. The Council continued to withhold information about the care service prices under section 33(1)(b) of FOISA. While the Council recognised the general public interest in openness and

transparency, it took the view that the public interest in protecting its own commercial interests, and those of the care providers, outweighed the public interest in disclosing the information.

6. On 26 April 2016, Equal Say Advocacy applied to the Commissioner for a decision in terms of section 47(1) of FOISA. It was dissatisfied with the outcome of the Council's review, believing that the Council was incorrect to withhold the price information.

## **Investigation**

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7. The application was accepted as valid. The Commissioner confirmed that Equal Say Advocacy made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. On 16 May 2016, the Council was notified in writing that Equal Say Advocacy had made a valid application. The Council was asked to send the Commissioner the information it had withheld from Equal Say Advocacy. The Council provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested. Equal Say Advocacy was also invited to provide comments to support its case.
10. In its response of 21 June 2016, the Council indicated that it also wished to rely on section 36(2) of FOISA (Confidentiality).

## **Commissioner's analysis and findings**

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11. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Equal Say Advocacy and the Council. She is satisfied that no matter of relevance has been overlooked.
12. By way of background, the Council explained that the 2015 Social Care Framework Agreement supports a person-centred and proactive approach to the commissioning and procurement of selected purchased social care for all service users within the Glasgow area who require this provision. The Social Care Framework Agreement delivers Care and Support Services, Day Opportunities and Employability Services and Short Breaks Services to adults with mental health issues, adults with disabilities, older people and children affected by disability. At the point of review, service users are made aware of the options available to them to choose support. Service users assessed via the personalisation process are offered a choice of the options available to them under the Social Care (Self-directed Support) (Scotland) Act 2013 ("the SDS Act").
13. Equal Say Advocacy is an independent advocacy organisation and helps their clients with matters such as choosing a care provider.

### **Section 33(1)(b) - Commercial interests and the economy**

14. Section 33(1)(b) provides that information is exempt from disclosure under FOISA if it would, or would be likely to, prejudice substantially the commercial interests of any person (including

a Scottish public authority). This is a qualified exemption and is subject to the public interest test in section 2(1)(b) of FOISA.

15. There are a number of elements an authority must demonstrate are present when relying on this exemption. In particular, it must show:
  - (i) Whose commercial interests would, or would be likely to, be harmed by disclosure;
  - (ii) The nature of those commercial interests; and
  - (iii) How disclosure would, or would be likely to, prejudice substantially those interests. The prejudice must be substantial: in other words, of real and demonstrable significance.
16. Where the authority considers that the commercial interests of a third party would, or would likely be harmed, it must make this clear: in such cases, consulting the third party is generally advisable.
17. "Commercial interests" are not defined in FOISA. The Council cited the Commissioner's guidance<sup>1</sup> on this exemption, which states that an organisation's commercial interests will usually relate to the commercial trading activity they undertake, e.g. the ongoing sale and purchase of goods and services, commonly for the purpose of revenue generation. Such activity will normally take place within a competitive environment.
18. The Council explained that the commercial interests identified in terms of section 33(1)(b) were its own and those of the respective care providers in the Framework Agreement. The Council said these interests were commercial because they related to social care services provided in a commercially competitive environment. The care providers had all tendered to be part of the framework by competitive process, and provide care services to the Council in exchange for remuneration. Price was an important part of the tender evaluation criteria.
19. The Council identified the commercial interests which would be affected by disclosure of the price information. It submitted that disclosure would lead to an increase in the amount the Council would pay to care providers for their services, and a reduction in best value for such services. In the case of the respective care providers, the Council argued that care service providers routinely charge different prices to different Councils or other customers, and disclosing these rates would put them at commercial disadvantage.
20. In light of the Council's arguments, the Commissioner is satisfied that the potential prejudice that it has identified relates to the commercial interests of the Council and the care providers.
21. The Commissioner will now consider whether the prejudice to those commercial interests that would, or would be likely to, follow disclosure is sufficient to engage the exemption.
22. Equal Say Advocacy submitted that the information it had requested was not commercially sensitive, and that disclosure would not cause harm to commercial interests. It argued that disclosure would help the Council to obtain better value, given the weighting in the tender process towards cost. Equal Say Advocacy commented that if the Council believed competitors might reduce rates only to gain business and then fail to deliver a quality service due to insufficient resources, this was a matter for the tender evaluation process, and not a reason to withhold pricing information. It commented that price was not the only determining

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<sup>1</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section33/Section33.aspx>

factor in awarding a ranking placement in the tender evaluation process: the quality of the service was also considered. It believed the Council was skilled enough to weigh both price and quality of service information in its commissioning processes.

23. Equal Say Advocacy provided the Commissioner with a document showing the rates charged by 58 care providers in Glasgow. It believed it had received this list from the Council following a previous information request, submitted before the current Framework was agreed. Equal Say Advocacy submitted that this was substantially the same information as it had requested on 15 February 2016. Given that some information about prices was already in the public domain, Equal Say Advocacy disputed that commercial interests would be harmed by disclosure of the information withheld in this case. It stated that it was already aware of much of the information, and argued:

*“...if [the Council] release the information in small pieces and to a variety of people over time then there is no point in maintaining a commercial confidentially exemption as this information is in effect in the public domain albeit not in a single place.”*

24. The Council stated that the prices were from a live contract of a relatively short term: the contract could be retendered from as early as January 2018, with the option to extend for two years. Due to the short length of the contract, the price information was likely to retain its relevance when the contract was being re-procured. The information could give competitors of the providers an unfair advantage as they would have details of the successful bids.
25. The Council explained that, additionally, it sometimes holds “mini-competitions”, tendering individual packages of care, and submitted that disclosure would similarly affect any mini-competition as well as the renewal of the whole framework in 2 – 4 years’ time.
26. The Council argued that disclosure of the price information would be likely to affect its ability to secure best value, as potential suppliers would have a strong indication of the level of bid which may secure the tender, and might submit a less competitive bid. Potential tenderers would have a strong indication of the price level which the Council would be willing to accept. Consequently, tenderers might submit a less competitive bid than they otherwise would, or “may selectively and artificially tailor their rates to appear more competitive”, impeding the Council’s ability to judge providers on quality and cost according to the pre-determined criteria. The tender evaluation was based upon identifying the most economically advantageous tender for the Council, based on criteria that included (as 40% of the weighting of the evaluation) price/lowest bid.
27. The Council submitted that disclosure of rates would open up the prices to scrutiny from their other customers, which could put the care service providers at a commercial disadvantage. In the process of tendering for the framework, all tenderers were asked what information they would consider to be confidential. Most providers who replied asked the Council to withhold financial information (including hourly rates) if it received a request for information. The Council consulted the providers for a second time during the Commissioner’s investigation. The Council supplied the Commissioner with the results of this consultation. It showed that, while some providers did not object to disclosure, many had expressed serious concerns about the effect that publication of this information would have on their business.
28. In addition, the Council argued that disclosure of the withheld information is also likely to undermine the provider’s faith in the procurement process. This could also lead to a reduction in the number of suppliers willing to bid for future work due to concerns about future disclosure of commercially sensitive information. This would be likely to substantially

affect the Council both during a retendering exercise of the contract in question and in other future tender exercises.

29. The Council was asked about the point made by Equal Say Advocacy that price information was put into the public domain through the process of providing such information to service users. The Council explained that at no point will any service user, or the outside world at large, have the comprehensive list of hourly rates for all services on the Framework Agreement. In practice, the service user and/or their legal representative will be provided with a list of hourly rates for providers relevant to the particular care service which they are entitled to receive. This information allows them to make an informed choice under the SDS Act.
30. The Council went on to explain that information about the individual rates of Framework Providers is shared with service users by individual care managers on a one-to-one basis. The conversation is supported by the care manager referring to a "Provider Selection Tool" on the care manager's mobile device. Care managers have been advised not to print the contents of the Provider Selection Tool and not to issue this information to service users. The Provider Selection Tool lists all framework providers and organises them into the relevant client groups and service groups. Prices are also listed.
31. The Council confirmed that service users are not asked to keep service provider prices confidential. However, in some cases a service user is provided with a list of service provider information, so that they can take advice from other parties before making a choice. At the top of this list, service users are asked not to share the information more widely.
32. Equal Say Advocacy put forward reasoned argument and evidence to support its view that at least some of the information was already in the public domain, implying that no harm had come from such information having been disclosed.
33. Although some information about care service prices has been shared with members of the public, such as the service users who must make their choice, the Commissioner agrees with the Council that this does not have the effect of putting the information, as a whole, into the public domain. The Council has shown that it views the care service prices as confidential information.
34. The Commissioner notes that the Framework Agreement is of relatively short duration, and could potentially be re-tendered within two years. She considers that this short timescale is relevant when assessing the potential harm that disclosure would, or would be likely to, cause to the Council's commercial interests. The fact that the Council also carries out "mini-tendering" exercises from time to time must also be considered in relation to this argument, although the Council did not indicate the likelihood or frequency of such competitions. As the Council says, the short length of the contract means that pricing information for the current contract will be even more relevant when re-tendering, or tendering for other contracts.
35. The care service providers were asked whether they would object to disclosure of the information. Some did not object, while some expressed strong objections. There was no consensus.
36. The Commissioner is not wholly convinced by the Council's argument that disclosure would deter potential service providers from tendering, or would cause potential tenderers to lose faith in the tendering process. The Council has not provided any evidence to support this assumption. There is an increasing expectation and awareness that information provided to

public authorities may at some time have to be considered and possibly disclosed in response to information requests made under FOISA.

37. However, the Commissioner accepts that the Council has shown why, in terms of its tendering processes, disclosure would be likely to prejudice substantially the Council's commercial interests and those of the current care service providers.

### **Public interest test**

38. As the Commissioner has found that the exemption in section 33(1)(b) of FOISA was correctly applied to the withheld information, she has gone on to consider the public interest test in section 2(1)(b) of FOISA. This requires consideration of whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption in section 33(1)(b).
39. Equal Say Advocacy believed that the public interest in disclosure outweighed that in maintaining the exemption. Its arguments focused on the public interest in making the information available to its own organisation, enabling it to assist people who wish to exercise choice over who provides their care. Equal Say Advocacy felt the public interest in disclosing the information which would enable it to provide this assistance outweighed any potential prejudice to the commercial interests of the Council or any service provider. Equal Say Advocacy explained that a key principle of the SDS Act was choice, and knowing how much a service costs is a crucial determining factor in how a person may choose to deploy their allocated budget for care and support.
40. Equal Say Advocacy were also of the view that  
*"... People making choices about which care provider they wish to shortlist must be able to refer to **all** the relevant information and not be fed small pieces of information by the social worker who happens to decide how much or how little to furnish them with at any one time."*
41. The Council acknowledged that there is a public interest in openness and transparency in local government, but submitted that, on this occasion, the public interest in openness and transparency was outweighed by the public interest in maintaining the exemption. The Council argued that there was a strong public interest in avoiding prejudice to its own commercial interests and in it being able to achieve best value in commercial matters. It stated that this was of particular relevance in view of the ongoing budget pressures across local government.
42. In addition, the Council argued that there is a substantial public interest in avoiding significant harm to service providers' commercial interests by withholding information which is likely to prejudice their ability to compete in future procurement exercises and to secure the best price from clients. The Council submitted that there was a strong public interest in ensuring that persons who tender for public work can do so on an equal footing with their competitors.
43. In considering the public interest in favour of disclosure, the Commissioner recognises the general public interest in disclosing information held by Scottish public authorities. She also accepts that disclosure in this case would contribute to the public's understanding of the care services provided through the Council, especially the price of those services. It is in the public interest to ensure effective oversight of public funds, and disclosure of the information withheld could enable such oversight.
44. The Commissioner accepts that the use which Equal Say Advocacy would make of the information, in assisting its clients, would be in the public interest.



45. The Commissioner accepts the argument from Equal Say Advocacy that there is a public interest in scrutiny of the Council's actions in respect of the SDS Act, which was intended to promote choice and independence in relation to care services.
46. Against this, the Commissioner has balanced arguments for withholding the information in the public interest. She has accepted that disclosure of the information in this case would, or would be likely to, prejudice substantially the commercial interests of the Council and the care service providers. She accepts that there is a public interest in avoiding such prejudice.
47. The Commissioner also recognises a public interest in ensuring that best value is achieved and seen to be achieved by Scottish public authorities. She accepts that full disclosure of the care service prices would allow more scrutiny of the Council's tender process and system, for example, by enabling a third party to see the spread of prices and assess whether the prices were close to what the providers offer in other contracts. She also accepts that it may assist care purchasers to have access to the full list of care service prices, while noting that not all services will be relevant to all care purchasers.
48. The Commissioner has considered all the factors set out above. She is aware that the Council has put other information into the public domain that does permit the assessment of its tender process. She also accepts that there is a strong public interest in ensuring that persons that tender for public work are able to compete on an equal footing with their competitors. She accepts that the blind bidding process is the optimal way to achieve best value, and that it would not be in the public interest to compromise this process.
49. While there will be circumstances in which the public interest requires the disclosure of information even if substantial prejudice to commercial interests may result, the Commissioner does not believe that this would be justified on public interest grounds in this case. On balance, the public interest in this case favours maintaining the exemption, as the public interest in disclosure is outweighed by the public interest in avoiding substantial prejudice to commercial interests.
50. The Commissioner therefore finds that the Council was correct to withhold information under section 33(1)(b) of FOISA.
51. The Council submitted that the information also fell within section 36(2) of FOISA. As the Commissioner has accepted that the Council was correct to withhold the information under section 33(1)(b), she will not go on to consider whether section 36(2) also applies to that information.

## Decision

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The Commissioner finds that Glasgow City Council (the Council) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Equal Say Advocacy. The Commissioner finds that, in respect of the matters specified in the application, the Council was correct to withhold the information requested.



## **Appeal**

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Should either Equal Say Advocacy or Glasgow City Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

**Margaret Keyse**  
**Head of Enforcement**

**22 August 2016**

### Freedom of Information (Scotland) Act 2002

#### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

#### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

#### 33 Commercial interests and the economy

- (1) Information is exempt information if-

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...

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