

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 March 2020

Public Authority: Manchester City Council

Address: Town Hall
Manchester
Lancashire
M60 2LA

Decision (including any steps ordered)

1. The complainant has requested information relating to tendering bids made for a procurement exercise carried out by the council. The council disclosed some information, however, it withheld other information on the basis that the exemptions at section 43(1) (trade secrets), section 41 (information provided in confidence) and section 40(2) (personal data of third parties) applied. It later changed its position to rely upon sections 43(2) (commercial interests), and 40(2).
2. The Commissioner's decision is that the council was not correct to apply section 43(2) to withhold the information. She has however decided that the council was correct to apply section 40(2) to withhold personal data from disclosure. She has also decided that the council did not comply with the requirements of section 10(1).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose a complete copy of table which was previously partially withheld under section 43 to the complainant.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 28 June 2018 the complainant wrote to the council and requested information in the following terms:

"In accordance with the Protocol and the Freedom of Information Act 2000, we make the following requests for documentation and information.

(a) Steps taken by MCC in accordance with the requirements of Regulation 21 (obligation to protect the confidential information of bidders) and all associated documentation;

(b) Steps taken by MCC in accordance with the requirements of Regulation 24 (obligation to prevent, identify and remedy conflicts of interest which do or might be perceived by an economic operator to compromise impartiality and fairness) and all associated documentation;

(c) All documentation and information held by MCC in accordance with the requirements of Regulation 84, including documentation showing decisions made during the procurement process, including all communications with economic operators and internal deliberations, documents dealing with the preparation of the tender documents and any dialogue or negotiation with bidders. For the avoidance of doubt, our client is content to set up a Confidentiality Ring if any such documentation is confidential, so that any such information is protected and viewed by Mear's legal team only; and

(d) All information and documentation relating to Mears and the discussions had by MCC personnel regarding the circumstances described at paragraph 27 above."

6. The council responded on 26 July 2018. It provided some of the information falling within the scope of the request, however it withheld other information on the basis that the exemptions in section 43(1) (trade secrets), section 41 (information provided in confidence) and section 40(2) (personal data of third parties) applied.
7. Following an internal review, the council wrote to the complainant on 15 February 2019. It maintained its position that the above exemptions applied.

Scope of the case

8. The complainant contacted the Commissioner on 2 July 2019 to complain about the way his request for information had been handled.
9. He considers that the council should have disclosed the information which he requested. In addition, he raised some other concerns which fall to be considered under the provisions of the Data Protection Act 2018. These matters are being considered separately to this decision notice, however.
10. During the course of the Commissioner's investigation the council withdrew its reliance upon section 41 and 43(1). The application of these exemptions is not therefore considered further in this decision notice. The council retained its reliance upon the application on section 40(2), and also applied section 43(2) to withhold information.
11. It clarified that the names and identities of some individuals had been redacted under section 40(2) from its response in relation to parts (a) and (d) of the request, and that the names of the companies concerned had been redacted under section 43(2) as regards part (c) of the request. It also initially argued that no information was held in respect of part (b) of the request, however during the course of the Commissioner's investigation it reconsidered its response and provided information in respect of this part of the request on 24 February 2020.
12. The Commissioner has therefore considered below whether the council was correct to withhold information in the basis that section 43(2) and section 40(2) applies.

Reasons for decision

Section 43(2)

13. Section 43(2) of the FOIA states that information is exempt if its disclosure *would or would be likely to prejudice the commercial interests of any person, including the public authority holding it.*
14. Section 43(2) is a qualified exemption and is, therefore, subject to the public interest test.
15. The exemption can be engaged on the basis that disclosing the information either "would" prejudice commercial interests, or the lower threshold, that disclosure "would be likely" to prejudice those interests.

16. The council argued that a disclosure of the information 'would be likely' to prejudice its, and the companies' commercial interests.
17. The information that the council has withheld is the names of companies from a table identifying the names and scores of companies who bid for one of its tenders. The names and scores are ranked according to the council's bid evaluation criteria.
18. The council recognised that the complainant was making a request on behalf of one of the companies who took part in the tender. It said that *"The redacted information relates to the names of applicant firms at the qualification stage of the procurement process against their respective scores and rankings at that stage of the process. The names of the successful applicants had previously been disclosed and were known to the complainant"*.
19. It said that its view was that disclosing the names of the companies against their relevant evaluation scores would be likely to prejudice the council's, and the companies' commercial interests.

The Commissioner's analysis

20. The Commissioner's guidance on section 43¹ states:

"A commercial interest relates to a person's ability to participate competitively in a commercial activity. The underlying aim may be to make a profit however it could also be to cover costs or to simply remain solvent."

21. The withheld information relates to the activity of seeking to procure services. It is the names of companies which tendered for a contract. The names have been redacted from a table which sets out the total evaluation scores of the companies as regards their bids.
22. The council clarified that it has withheld this information *within the context of the table*. It explained that although the names are already known, it considers that disclosing the names of the companies within the context of the table would provide information on the companies' total evaluation scores, and the rating their bid was awarded by the council against the other bidders.

Would a disclosure of the information prejudice commercial interests?

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

23. Tendering to provide services for the purposes of obtaining a profit is a commercial activity, as is seeking such services. Any disclosure which affects a party's ability to successfully carry out such an activity in a competitive market therefore relates to the commercial interests of the party concerned.
24. The council argued that the *"disclosure of each applicant's combined name, score and ranking would provide bidders with information which would distort the procurement exercise and leave the Council at risk of not being able to comply with the procurement rules to achieve best value, which would be likely to prejudice its commercial interests"*.
25. It argued that *"...if organisations who are taking part in procurement exercises with the Council are aware that their scores and rankings during the process will be disclosed into the public domain this could discourage organisations (particularly those who are ranked the lowest/unsuccessful) from submitting further tender bids. This could mean a reduction in the number of organisations for the Council to choose from in future tenders. Less competition would be likely to prejudice the Council's ability to secure best value/value for money. Failure to secure best value would in turn be likely to prejudice the Council's commercial interests"*.
26. The council argues that although the tendering exercise took place some time ago, the risks it outlines above transfer to its current tendering exercises. It therefore argues that although the information is no longer live, a disclosure of the information at this point would have an ongoing and future prejudicial affect on its commercial interests.
27. The Commissioner's guidance on section 43 outlines *that "information about the procurement of goods and services by a public authority is usually considered to be commercially sensitive. This can include information provided during a tendering process"*
28. The Office of Government Commerce previously published guidance to public authorities on tendering information. The guidance outlines the likelihood as to whether relevant information can be disclosed at each section of a tender or not, and provides working assumptions as regards procurement information and the FOI Act.² Whilst this document was

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https://webarchive.nationalarchives.gov.uk/20100609095909/http://www.ogc.gov.uk/documents/OGC_FOI_and_Civil_Procurement_guidance.pdf

published for guidance only, it did provide a useful starting point for authorities considering the sensitivity of information received as part of a tendering process both during, and after the contract award phase has been completed.

29. The guidance suggests that, post tendering phase, (i.e. after the tendering process has been completed, and any analysis and review of the process has taken place), there is a general ability to disclose evaluation information, including the names of unsuccessful bidders, although the guidance does note that there may be less public interest in disclosing evaluation information relating to unsuccessful bids.
30. The council's central argument is that a disclosure of the names in association with the evaluation rankings may dissuade some companies from tendering with it (or other public authorities) in the future. It therefore argues that a disclosure of the information would reduce the amount of companies seeking to bid for its tenders, and that this would prejudice its own commercial interests.
31. The Commissioner presumes the council's argument to be that companies will not wish evaluation results on their unsuccessful bid to be made public and therefore to potentially reflect badly upon their company. They will therefore not bid for council contracts in the future if they believe that details of their evaluation scores and ranking may subsequently be disclosed to the wider public.
32. The Commissioner considers that the premise of such an argument is predicated on the suggestion that companies will not wish to contract with the council if commercially sensitive information about their bid may subsequently be disclosed in response to a request under the Act, or that a disclosure of information about a failed bid might prejudice their commercial interests in some other way.
33. Whilst the Commissioner understands this argument, she considers that the principle hinges around whether the evaluation ratings would be considered commercially sensitive by the companies themselves. If the companies consider that their evaluation ratings are commercially sensitive then it is possible this might provide a degree of reluctance to enter into bidding for public sector contracts with the council again for fear that the evaluation data on another failed bid might be disclosed. However, if the information is not commercially sensitive then the council's argument is generally unsupported and speculative.
34. The council has not provided any statements from the companies concerned expressing this point, nor any other issues they might have with a potential disclosure of the information.

35. In her guidance on section 43 the Commissioner states, at paragraph 27 that:

"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."

36. The Commissioner also notes that at page 27 of the councils 'Request to Participate', a document provided to all companies wishing to bid for the tender, the council specifically informs companies that:

"Disclosure pursuant to the Freedom of Information Act 2000

In accordance with the obligations placed upon public authorities by the Freedom of Information Act 2000 ("Act"), all information submitted to the Council may be disclosed by the Council in response to a request made pursuant to the Act.

In respect of any information submitted by Companies/Organisations, which they consider to be commercially sensitive, Companies/Organisations should:

- a) Clearly identify such information as commercially sensitive;*
- b) Explain the implications of disclosure of such information; and*
- c) Detail the envisaged timeframe during which such information will remain commercially sensitive.*

Please note, even where information is identified as commercially sensitive the Council may be required to disclose such information in accordance with the Act if a request is received. Receipt of any information marked "confidential" should not be taken to mean that the Council accepts any duty of confidence by virtue of the marking."

37. Therefore, any concerns the companies may have had regarding the potential disclosure of commercial sensitive information should already have been highlighted to the council by the companies, and should therefore have been provided to the Commissioner in evidence in order to support its argument. However, the Commissioner does note that the information under consideration is not information submitted by the bidders; it is information evaluating the information supplied by the bidders. Nevertheless it is apparent that the companies would have been fully aware of the potential for information relating their bid to be disclosed in response to an FOI request and the council has had the opportunity to ask them to provide any reservations they may have about any potential disclosure of this information.

38. The Commissioner therefore considers that the council has only provided a speculative viewpoint on the potential prejudice it envisages will occur to the companies' commercial interests. It has provided no evidence to the Commissioner demonstrating that it has sought or obtained the views of the bidding companies in this respect.
39. Considering the nature of the information itself, the evaluation markings reflect the strength of the bidder's proposals when compared to the evaluation criteria set by the council for the role. A lower evaluation figure does not, however, mean that the relevant bidder is a 'poor' company compared to the higher-ranking companies. It simply means that the details they provided in their bid did not match the council's evaluation criteria as well as the other companies' bids matched it. There may be a number of reasons for this which would not be apparent from the disclosed information, and a different, but similar tendering exercise of a similar nature might reach different conclusions. All organisations who issue such tenders would be fully aware that that is the case and will make tendering decisions based purely on the details of the bid as compared to the evaluation criteria.
40. It might be argued that the publication of a low evaluation score for a company for a particular tender might give rise to a public perception that the company itself is '*not as good*' the company which won the contract, or others who scored more highly than it. This is a relatively weak argument however, and as the council has not provided any statements from third parties supporting the point, she cannot place any great weight on this argument in any event.
41. The Commissioner also considers that a key point is that the table, even when fully disclosed, only provides the name of the company, its total evaluation score and its rating within the council's evaluation process. The withheld information does not provide a breakdown of the evaluation scores as compared to the evaluation criteria. A disclosure of the information would not therefore allow competitors of the companies involved to understand how the companies have scored differently against the set criteria, and in what areas some companies have scored more highly than others in matching the criteria set by the council for the tender. The Commissioner therefore recognises that competitors would not be able to identify areas where they need to improve their bids in future, similar, tendering opportunities against more successful companies. The successful company would not therefore lose any competitive advantage it has over their rivals through a disclosure of these total evaluation scores. She considers that this significantly weakens the potential for prejudice to occur to the companies' commercial interests, and therefore the council's arguments surrounding prejudice to its own commercial interests lack support in this respect.

42. The Commissioner therefore considers that the council has failed to demonstrate that a disclosure of this information would be likely to be prejudice the companies' commercial interests. It has provided no specific evidence to that effect, nor has it provided statements from the companies concerned demonstrating the commercial prejudice they perceive would occur.
43. Additionally, in considering the argument that companies might be dissuaded from bidding for public authority tenders more closely, she has also considered the nature of public authority contracts. Such contracts are generally lucrative for successful companies and will also generally provide the company with a degree of confidence that payments will be made, and at the amount agreed for the work carried out. The competition for contracts of this nature with public authorities will therefore generally be fairly strong.
44. As such, the Commissioner considers that the companies would not be dissuaded from seeking future contracts with the council purely as a result of the disclosure of this information.
45. The Commissioner has not therefore been persuaded by the council's submissions in respect of the application of section 43(2). She therefore considers that the council was not correct to apply section 43(2) to withhold the information in this instance, and requires the council to disclose a full, unredacted copy of the relevant table to the complainant.

Section 40(2) – personal data of third parties

46. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
47. In this case the relevant condition is contained in section 40(3A)(a)³. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
48. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection

³ As amended by Schedule 19 Paragraph 58(3) DPA.

Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.

49. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

50. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

51. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
52. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
53. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
54. The withheld information relates to the names of company representatives who signed a confidentiality agreement with the council relating to specific information available to bidders. The withheld information provides the name and the signature of the individual. Details of the companies they work for have not been redacted.
55. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the individuals. She is satisfied that this information identifies the individuals concerned and identifies them in relation to their employment with their individual companies. The information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
56. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
57. The most relevant DPA principle in this case is principle (a).

Would disclosure contravene principle (a)?

58. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

59. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

60. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

61. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.

62. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"⁴.

⁴ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

63. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test: -
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
64. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

65. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
66. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
67. The council recognised that there is a legitimate interest in the information being disclosed. It recognised that the legitimate interests relate to creating greater accountability and transparency in the procurement process.

Is disclosure necessary?

68. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
69. The council argued that a disclosure of the information is not necessary in this instance. It argues that, as the company names and all of the other information has been disclosed in response to the request,

sufficient information has already been disclosed to meet the legitimate interests in creating transparency and accountability. It argues therefore that there is no need for the names and signatures of the individuals to be disclosed in order to meet the legitimate interests it has identified.

70. The Commissioner has considered this argument. The central legitimate interest relates to creating transparency over the procurement process. The council has provided all of the other information contained in the redacted documents, and it is clear exactly what action is being taken is in respect of the agreement, and why it is being taken. Effectively representatives of the companies are accepting and signing a confidentiality agreement in order that they may receive information from the council under the Transfer of Undertakings, Protection of Employment procedure (TUPE).
71. The Commissioner accepts that the information which the council has already disclosed provides a clear and transparent record of the events which occurred. The additional disclosure of the redacted information would add no additional value other than allowing readers to identify which representatives of the companies signed the nondisclosure agreement.
72. From the point of view of creating public transparency and accountability, the essential information has already been disclosed. The public are aware that a confidentiality agreement has been signed in order to allow the companies to receive the TUPE information, they are aware of which companies accepted the agreement in order to obtain that information, and they are therefore able to deduce whether the process was carried out appropriately. There is no requirement to know which individuals within the company signed the confidentiality agreement. They were merely acting as representatives of the companies, which are the legal entities which are liable to maintain the confidentiality of the information they have received. Barring the suggestion of criminal activity by one of the signatories, it would be the company, rather than an individual, who would be responsible for any inappropriate breach of the confidentiality.
73. The Commissioner has therefore decided that it was not necessary for this information to be disclosed.
74. As the Commissioner has decided that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

The Commissioner's view

75. The Commissioner has therefore decided that the council was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Other information withheld under section 40(2)

76. The council initially argued that it holds no information in respect of part (b) of the complainant's request. However, during the course of the Commissioner's investigation, it changed its opinion to state that it had made an error and that information was held.
77. It said that it had initially looked at the request taking into account the complainant's wider issues and his reason for requesting the information. In doing this it had considered the nature of the complaint subjectively rather than objectively, and on this basis, concluded that no information was held.
78. In reconsidering its position, however, it recognised that FOI requests are intended to be considered without reference to the applicant or their reason for asking for the information. After reconsidering its response from an objective viewpoint, it said that it does hold evidence of the steps it has taken in accordance with Regulation 24 of the Public Contracts Regulations 2015.
79. The council therefore disclosed copies of forms signed by officers and Members in respect of the measures required by Regulation 24, with the signatures and private addresses of relevant individuals redacted under section 40(2).
80. The Commissioner has not therefore considered the council's response that no information was held further within this decision notice, other than to find that the disclosure does not comply with the requirements of section 10(1) of the Act in that it falls outside of the 20 working days required by that section. She has however considered the redaction of the signatures and home addresses of the individuals signing the form under section 40(2) of FOIA.

The redaction of signatures and home addresses withheld under section 40(2)

81. As noted in the Commissioner's consideration of section 1(1) above, the council has also withheld the information relating to individuals who signed conflict of interest forms as regards part (b) of the request. The information is the home addresses and signatures of the individuals who were on the evaluation team, responsible for making decisions on the

tendering process. The Commissioner is therefore satisfied that this information is personal data relating to those individuals.

82. Following the above criteria as regards the requirement for Lawful processing: Article 6(1)(f) of the GDPR, the Commissioner is satisfied that the public does have a legitimate interest in having access to the withheld information, on the basis of creating greater transparency and allowing a greater degree of scrutiny as regards the measures taken by the council to protect against conflicts of interest occurring which might affect the evaluation and contract award process.
83. However, the Commissioner is satisfied that, with a disclosure of the signed forms, together with the names of the individuals who signed these forms, a disclosure of their home addresses and signatures is not necessary in order to meet the public's legitimate interest in ensuring the council acted appropriately in the measures it took to protect against conflicts of interest occurring which might affect the evaluation and contract award process.
84. As the Commissioner has decided that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
85. She has therefore decided that the council was correct to withhold this information under section 40(2), by way of section 40(3A)(a).

Section 10(1)

86. Section 10(1) of the Act provides that:

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

87. The council received the request for information on 28 June 2018. The council did not disclose the information relating to steps it undertook in accordance with Regulation 24 of the Public Contracts Regulations 2015 until 24 February 2020.
88. The Commissioner has therefore decided that the council did not comply with the requirements of section 10(1) in that it did not disclose the information it held to the complainant within 20 working days.

Right of appeal

89. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

90. 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.
91. 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
Wilmslow
Cheshire
SK9 5AF