

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

### **Decision notice**

**Date:** 14 April 2014

**Public Authority:** Birmingham City Council  
**Address:** Council House  
Victoria Square  
Birmingham  
B1 1BB

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

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1. The complainant has requested information relating to a procurement exercise by Birmingham City Council ('the council') for the operation of the Library of Birmingham. The council withheld the names of bidders who had submitted Pre-Qualification Questionnaires under the exemption for commercial interest at section 43(2) of the FOIA as the procurement had not reached the tender stage due to it being suspended. The Commissioner's decision is that the council has correctly applied section 43(2) in this case. He does not require any steps to be taken.

## Request and response

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2. On 24 May 2013, the complainant wrote to the council via the WhatDoThey Know website<sup>1</sup> and requested information in the following terms:

"This is a follow up request for information to Birmingham City Council's response to FOI 8618 dated 22nd May 2013.

1. Can you please explain what you consider a bidder to be?  
Response 3

2. Can you disclose the names of the bidders referred to your response 3  
Response 4

3. Can you detail and explain each of the areas of clarification identified:

- budget position
  - scope/specification of the contract
  - alignment the contract and lease terms with other contracts that are in place to undertake certain elements of service delivery
- On the final point above can you additionally specify the other contracts and the elements of service delivery referred to.

Response 5

4. An Invitation to tender was published on 11th February 2013 can you therefore explain in detail your answer that 'the Procurement process was suspended before tenders had been invited?

5. Can you provide a copy of the BCC Procurement policy and procedure?

6. Can you identify and provide copies of all policy and procedure relating to Transparency in procurement?"

3. The council responded on 10 June 2013. It provided some narrative information, provided links to an external organisation's website and cited the exemption at section 43 of the FOIA in response to point 2 of the request.
4. The complainant requested an internal review on 10 June 2013 in relation to the responses provided for points 2, 3, 5 and 6. The council informed the complainant on 4 July 2013 that the internal review panel

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[https://www.whatdotheyknow.com/request/follow\\_up\\_request\\_on\\_procurement#outgoing-298508](https://www.whatdotheyknow.com/request/follow_up_request_on_procurement#outgoing-298508)

upheld the appeal and the request had been referred back to the service area to provide a revised response.

5. The complainant contacted the council on 15 July 2013, 12 August 2013 and 11 September 2013 to chase the revised response. Following the intervention of the Information Commissioner on 14 October 2013, the council provided its revised response on 15 October 2013. It provided further narrative information and a link to the council's website but maintained its original position regarding section 43 of the FOIA, despite the outcome of the internal review.

### **Scope of the case**

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6. The complainant initially contacted the Commissioner on 19 September 2013 to complain that the council had;
  - withheld some of the information requested,
  - failed to process the complaint about the handling of the request under the council's internal complaints procedure, and
  - failed to respond to the recommendations of the internal review and within a reasonable timescale.
7. Following the internal review response, the complainant contacted the Commissioner again on 19 October 2013 stating that there has been no resolution to the substantive point of his complaint.
8. The Commissioner wrote to the complainant on 29 January 2014 stating that the investigation would specifically focus on whether the council is entitled to rely on the exemption at section 43 as a basis for refusing to provide the information withheld at point 2 of the request.
9. On 30 January 2014, the complainant contacted the Commissioner to inform him that the status of the information which was the subject of the request has changed as the procurement process has ended. He noted the Commissioner's comments regarding resolving the issue informally and seeking compromise between parties and asked that the council now provide the information, as the procurement is not being proceeded and therefore the section 43 grounds no longer apply.
10. In his letter of enquiry to the council dated 27 January 2014, the Commissioner asked the council to revisit the request stating that in light of the passage of time the council may decide to reverse or amend its position.

11. The council's response to the Commissioner's enquiries stated that pursuant to section 1(4) of the FOIA, its response sets out the factors that the council consider were relevant to the information that was held at the date of receipt of the request.
12. The Commissioner has therefore considered the council's application of section 43(2) of the FOIA to point 2 of the request as at the time the request was made.

## **Reasons for decision**

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### **Section 43(2)**

14. Section 43(2) FOIA provides an exemption from disclosure of information which would or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption, and is therefore subject to the public interest test.
15. In this instance the council has applied the exemption at section 43(2) to the names of bidders who had submitted Pre-Qualification Questionnaires in response to an advert seeking tender submissions for the operation of the new Library of Birmingham ('LoB') which was due to open (and did indeed open) in September 2013. It said that disclosure would be likely to prejudice the council's own commercial interests as well as the commercial interests of the bidders.
16. The council explained that the procurement is for a Part B service which has been undertaken following a 2 stage process which broadly follows the Restricted Procedure for Part A services. The 2 stages are:
  - 1) Pre-Qualification  
During this stage, organisations express an interest in the contract and if they wish to be part of the subsequent tender process, submit a Pre-Qualification Questionnaire ('PQQ'). A shortlist of bidders is then created once PQQ's have been evaluated.
  - 2) Tender  
Those organisations which make the shortlist of bidders in stage 1 are invited to submit a tender for the service, i.e. this is where information on service delivery and costs is provided.

17. The term 'commercial interests' is not defined in the FOIA. However the Commissioner has considered his awareness guidance on the application of section 43<sup>2</sup>. This comments that;

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."

18. The Commissioner considers that making a request to participate in a tendering process is a commercial activity, because the procurement was a competitive process by which the council intended to select a provider to deliver a service, and therefore the requested information does fall within the remit of section 43(2) FOIA.

19. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.

20. In this case, the council considers that the prejudice "would be likely" to occur.

21. In its response to the Commissioner, the council said that in order to properly explain the application of the exemption, it is necessary to outline the context in which the request was received. It provided the Commissioner with the following information:

"The procurement of the service was being managed by the Council's Corporate Procurement Service ("CPS") and a two stage process was being followed. The deadline for submission of PQQs was 8 March 2013.

CPS were in the process of short-listing the PQQs during March 2013 when it became apparent that the Council would not be able to fully specify the requirements for proceeding to the tender stage or set a budget in time to run the tender stage, evaluate bids and appoint a

provider, who would then have enough of a lead-in time, to enable them to open the LoB in September 2013.

The Leader and Deputy Leader then began to revisit whether the Council would continue the going to market stage at all, and the decision was taken to put the procurement on-hold until the LoB was opened and operational. It was the intention at that time that the position would be reviewed at some point in the future.

On 22 April 2013, the following statement was issued to bidders:

*"Birmingham City Council is not proceeding to the next stage of this procurement at this time in order to enable clarification of the budget position and scope/specification and to align the contract and lease terms with other contracts that are in place to undertake certain elements of service delivery. We anticipate being in a position to update bidders by the end of the year.*

*We would like to thank all bidders for their time and contribution to the process to date."*

At the time of receipt of the request, CPS took the view that should the Council have decided to go back to the market, where only a relatively short period of time had elapsed, it would still have been possible to resurrect the suspended process and accordingly, that the [number] bidders would have been in a position to be considered for short-listing."

22. The Commissioner has gone on to consider how any prejudice to the commercial interests of the bidders or the council would be likely to be caused by the disclosure of the requested information.
23. In relation to the council's own commercial interests, the council said that given that the first stage of the procurement process had not been finalised, in the event that the procurement was reinstated, it would have saved the council time and money to continue with the halted process rather than having to instigate a completely new process. It also said that when a procurement exercise is in the early stages as in this case, its own commercial interests would be likely to be prejudiced if it disclosed the identities of the bidders that were still under consideration because it would be likely to deter potential bidders in the future from competing for contracts and from providing the level and quality of information that they would need to submit in order for the council to properly determine which bidders had the necessary expertise and capacity to deliver a contract, which would in turn prejudice the council's ability to achieve quality and value for money in respect of goods and services.

24. In relation to the bidders commercial interests, the council said that as these third parties are engaged in a competitive marketplace and their success is determined, at least in part, by any competitive advantage they may have, if the council disclosed the requested information it may have a negative impact upon the third parties positions in the marketplace because it would reveal to their competitors strategic information about their business which could be of benefit to their competitors. The council also said that in the event that it disclosed the names of all the bidders, proceeded with the procurement process, and rejected some of the bidders at the shortlist stage, this may prejudice the bidder's commercial interests due to the negative impact upon their reputation in the marketplace.
25. The council informed the Commissioner that in this case it did not consult with the bidders to determine their views about disclosure. It said that consultation was not undertaken because the council was of the view that this was not strictly necessary based upon a working assumption that during a tender process, even one that is suspended, bidders names would not ordinarily be disclosed whilst they are under evaluation. It explained that the assumption is based on the Ministry of Justice document 'Freedom of information guidance Working assumptions – procurement Annex A'<sup>3</sup> which confirms that the working assumption in respect of all information received from tenderers (which the council considers includes the identity of the bidder) will not be released in phase<sup>4</sup> and which also confirms that the working assumption in respect of the identity of unsuccessful bidders is that it would be disclosable only once the successful bidder has been notified.
26. When claiming that disclosure would prejudice the commercial interests of a third party, the Commissioner would normally expect a public authority to obtain arguments from the third parties themselves and not

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<sup>3</sup> <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-assumption-procurement-annex-a.pdf>.

The council also said it had regard to the following documents:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/61198/Guidance\\_20-20Publication\\_20of\\_20new\\_20central\\_20government\\_20tender\\_20documents.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61198/Guidance_20-20Publication_20of_20new_20central_20government_20tender_20documents.pdf)

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/61200/guidance-publication-of-new-central-government-contracts.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61200/guidance-publication-of-new-central-government-contracts.pdf)

<sup>4</sup> The Commissioner has examined the document referred to and notes that the 'phase' is 'Tender information (release of tender documents up to selection of preferred bidder)'.

accept speculative arguments from the public authority. However, in this case, the Commissioner accepts that the council's arguments in respect of the bidder's commercial interests are based on government guidance on the issue along with the council's knowledge of the procurement process and competitive marketplace. The Commissioner accepts that this is akin to representing the council's prior knowledge of the bidder's concerns.

27. The Commissioner must now determine whether the prejudice claimed is "real, actual or of substance". In relation to the council's own commercial interests, the Commissioner considers that it is clear that such interests would be harmed if the council had had to recommence the procurement from afresh rather than being able to reinstate the procurement from the point at which it was suspended. He also considers that potential bidders could be deterred from competing for contracts in the future which would in turn prejudice the council's ability to achieve quality and value for money in respect of goods and services.
28. In relation to the bidders' commercial interests, the Commissioner considers that if the names of the companies who expressed an interest in the contract at the PQQ stage were disclosed, it would be likely to undermine confidence in the unsuccessful bidders. The Commissioner considers that the bidders are competing against one another in a competitive market and there may be a perceived weakness in the unsuccessful bidders who submitted a request to participate if this information were publicised. If the council were to disclose the names of bidders who registered an interest at a very early stage in the process, it would be likely to undermine confidence in the council and therefore may impact upon a company's decision to make a request to participate in future tendering exercises.
29. The Commissioner therefore considers that the prejudice claimed is real, actual and of substance and that section 43(2) of the FOIA was correctly engaged. As section 43(2) is a qualified exemption, the Commissioner has gone on to consider the public interest arguments in this case.

### **Public interest arguments in favour of disclosing the requested Information**

30. The council said that it accepts there is a general public interest in transparency, and further, that there is a strong public interest in openness surrounding public sector contracts and that expenditure of public funds.
31. The Commissioner agrees with the above position and considers that the public interest in disclosing the requested information relates to the

council's ability to demonstrate that it is obtaining value for money when tendering for the operation of the Library of Birmingham.

### **Public interest arguments in favour of maintaining the exemption**

32. The council pointed out that at the date of the request, it had not made any decision about which, if any, of the bidders would be awarded the contract because it had not even completed the short-listing process. It also said that whilst it had spent officer time in respect of the procurement process, it had not awarded any sum of money in relation to the service being procured.
33. The council considered that because of the suspension of the procurement process, there was a public interest in withholding the identities of the bidders in order to ensure that the council could reinstate the existing procurement rather than having to go the time and expense of starting the process again. It said this was particularly pertinent because of the time scales involved, with the LoB being scheduled to open in September 2013. It also said that in light of its financial position at the time, it was in the public interest to avoid further expenses being incurred in starting a new procurement if that could possibly be avoided.
34. In addition, the council said that it is in the public interest for relationships between it and the bidders to be maintained so that in the event of the procurement being reinstated the bidders who had submitted PQQs would still want to proceed to the short-listing stage. It said that in the event of the bidders' identities being disclosed, their confidence in the council and the procurement process may have been undermined to such an extent that they may not have continued with the process.

### **Balance of the public interest**

35. The council said that, at the date of the request, the public interest factors in favour of withholding the information outweighed the public interest factors in favour of disclosing the information.
36. The Commissioner considers that there is a public interest in openness and transparency, and in accountability in relation to the carrying out of a tendering process to ensure it is undertaken fairly and that the council is obtaining value for money. The Commissioner also considers that there is a public interest in disclosure of information which will inform the public about how decisions are made. However, he acknowledges however that disclosing the names of bidders that registered an interest to participate at a very early stage of the procurement process would

only go a very limited way to meeting the public interest arguments in favour of disclosure.

37. The Commissioner considers that there is a strong public interest in not disclosing information which would be likely to commercially disadvantage private companies nor disclosing information which would be likely to have a negative impact on the council's financial position, its suspended procurement process, and future tendering processes.
38. On balance, the Commissioner considers that in this case the public interest arguments in favour of disclosing the information are outweighed by the public interest arguments in favour of maintaining the exemption.

## **Other matters**

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### **Internal Review**

39. As he has made clear in 'The Guide to Freedom of Information'<sup>5</sup>, the Commissioner considers that internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner's view of a reasonable time for completing an internal review is 20 working days from the date of the request for review, or 40 working days in exceptional cases. In this case the Commissioner notes that complainant first requested an internal review on 10 June 2013 but the council did not provide an internal review response until 15 October 2013, some four months later. The council should ensure that internal reviews are carried out promptly in future.

## Right of appeal

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40. 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: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

41. 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.
42. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

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