

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 September 2023

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

Decision (including any steps ordered)

1. The complainant requested information from Birmingham City Council ("the Council") about some renovation works at a Council property. The Council withheld some of the requested information, citing section 43(2) of FOIA (prejudice to commercial interests) as its basis for doing so.
2. The Commissioner's decision is that the Council has correctly relied on section 43(2) of FOIA and that the balance of the public interest favours maintaining this exemption.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 3 January 2023, the complainant wrote to the Council and requested information in the following terms (numbering added for ease of reference):

"1. Please confirm the recent renovation of the communal area of, [address redacted], and, installation of fire alarms and fire doors are classed as 'routine work'. If not routine works, please supply me with the classification of this type of work on Council property.

2. Further to the replacement of fire doors and painting. And, further to the installation and testing of fire alarms. And, further to the partial electrical re-wiring of the communal area to this address. Can you please give me the financial costs of the work described above.”
5. The Council provided some information in relation to the first part of the request, but withheld the information requested in part two of the request under section 43(2) of FOIA (prejudice to commercial interests). It upheld this position at internal review.

Scope of the case

6. This notice considers whether the Council was entitled to rely on section 43(2) of FOIA to withhold the costs of the works requested in part two of the request.

Reasons for decision

Section 43(2) – prejudice to commercial interests

7. Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

8. In order for a prejudice-based exemption, such as section 43, to be engaged the Commissioner considers that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice, which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e., disclosure ‘would be likely’ to result in prejudice or disclosure ‘would’ result in prejudice. In relation to the lower threshold, the

Commissioner considers that the chance of prejudice occurring must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

Does the information relate to a person's commercial interests?

9. The Council argues that disclosure of the withheld information would prejudice the commercial interests of its external housing repairs and maintenance contractor, Equans, and its own commercial interests.
10. The term 'commercial interests' is not defined in FOIA; however, the Commissioner has considered his guidance on the application of section 43¹, which clarifies that: "A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent."
11. The withheld information constitutes the costs of fire prevention works carried out at a specific Council property. These costs were paid to Equans by the Council. The Council has explained that at the time of the request this information was held in the form of a quote received from Equans but the actual payment of the same amount was not made until June 2023.
12. The Commissioner accepts that the interests in question are the commercial interests of the Council and of Equans.

The causal relationship

13. The Council argues that disclosure would undermine the current live procurement of its new Housing Revenues Account repairs and maintenance contracts and that this would harm current contractor Equans's competitive advantage and the Council's ability to achieve value for money on future repairs and maintenance contracts.
14. Regarding this procurement process the Council stated that this process formally commenced on 16 January 2023 when it published the Contract Notice. Therefore on the date that the request was received the procurement process was due to commence in just under two weeks.

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

The Council added that the procurement process is still live and the anticipated timeframe to conclude the procurement is December 2023 .

15. The Council states that although the complainant wants to know the overall cost of the package of works, "as he has detailed the scope of the works carried out and identified the type of property by including the address, disclosing the cost of those works would inadvertently reveal the rates from the current contract that the Council is in the process of replacing." This is because the quote was received as part of a pricing/payment mechanism within the main repairs and maintenance contract called Cost Collection Work Book (CCWB).
16. The Council also argues that as this pricing information for fire prevention works carried out at the address is directly linked to the existing contract with Equans, it has a value to competitors who would use it to undercut or overprice as they would know what the cost of materials is in the open market and calculate what the cost of labour and pricing benchmark is. They could use this information to work out Equans's overheads and profit from the current contract.
17. The Council also stated in its submissions to the Commissioner that it had consulted with Equans and it had confirmed that it did not want financial information related to the details of their contract or works they carry out to be put into the public domain due to the market sensitivity of that information.
18. The Council argues that, disclosure would therefore cause reputational damage for the Council with both this contractor and other potential contractors that may choose not to bid for contracts if they believe their market sensitive information will be put into the public domain by the Council without their consent.
19. Finally, the Council argues that, "all of the above will consequently undermine the Council's ability to achieve value for money as the information can be used by competitors to benchmark against and the Council would have a smaller pool of potential, high quality contractors to choose from".
20. The Commissioner is satisfied that a causal relationship exists between the disclosure of the cost of the works and the prejudice to commercial interests of the Council and Equans that the council described.

The likelihood of the prejudice occurring

21. The Council argues that a disclosure of the information 'would' cause the prejudice it has foreseen. The Commissioner has therefore considered whether the chance of prejudice occurring meets the threshold of being more probable than not.
22. The Commissioner has considered the commercial interests of each relevant party and considers that the Council's arguments are persuasive. He accepts that, given the procurement process was due to start shortly after the request was received, the prejudice foreseen by the Council would be more likely to occur than not if the cost of the works were to be disclosed.

The Commissioner's conclusions

23. The Commissioner has decided that the Council is correct in that section 43(2) is engaged by the withheld information. Since it is a qualified exemption, he must therefore go on to consider the public interest test required by section 2 of the Act.

The public interest

24. The test, as set out in section 2(2)(b), is whether "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information".
25. The Council took into account the following public interest arguments in favour of disclosing the information:
 - "Openness and transparency in the council's affairs and accountability for the spending of public money. Access to this information may give interested parties a better understanding of and confidence in how money is spent. The council does this under the local government Transparency Code which requires publication of expenditure of over £500 and via the procurement regulations."
 - "Promoting competition and transparency."
26. The Council took into account the following public interest arguments in favour of maintaining the exemption:
 - "Competition/impact on other negotiations. There is a public interest in withholding this information on the grounds of maintaining a competitive environment in the current ongoing tendering process for new housing repairs and maintenance contracts (and future tendering) and being able to demonstrate

best value for money. A potential bidder with information about what price the Council would bear may bid a price higher than what they would normally have tendered to exploit profit, which would deny the Council a cost saving and money that could be deployed elsewhere.

- “Reputational damage will also occur for the Council. Disclosure would discourage potential repairs contractors from bidding for future contracts if the Council holds a reputation for releasing market sensitive information.”

27. The Council provided the following information to the Commissioner regarding why it considers that on balance the public interest in maintaining the exemption outweighs that in disclosing the withheld information:

“The balancing exercise was included in our original FOI exemption response (attached) and we concluded that there is a very strong public interest in protecting sensitive information when disclosure would upset the current level playing field in any tendering situation and may prevent it from demonstrating best value for money in future dealings. Other contractors/competitors might use this information for price increases or to gain an advantage by undercutting their competitor’s prices.

The Council is already transparent about its expenditure by publishing payments over £500 every month under the local government Transparency Code. However, this payment will not be published as it is not invoiced in the usual way for services/goods supplied. Quotes and payments for additional capital works are made via a Cost Collection Work Book payment mechanism for our repairs contractors to be paid within their main repairs and maintenance contract framework. This type of system is commonly used in the construction industry to process additional costs/works as part of an existing contract.

In all the circumstances of the case, the public interest in withholding the information outweighs the public interest in disclosing the information.”

The Commissioner's analysis

28. The Commissioner recognises that there is a general public interest in the disclosure of information in order to provide transparency to the public about how public money is being spent.

29. However, the Commissioner has already acknowledged that the envisaged prejudice would be likely to occur. He considers that the Council's arguments are strong in identifying likely issues which would arise from a disclosure of the withheld information. These issues would be likely to affect its commercial negotiations in the current procurement process and in the future, and as a result, would be likely to be detrimental to its ability to achieve best value for money in current and future negotiations. This would not be in the public interest.
30. For this reason, the Commissioner's decision is that the public interest in the exemption being maintained outweighs that in the information being disclosed on this occasion. The council was not, therefore, obliged to disclose the requested information.

Right of appeal

31. 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

32. 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.
33. 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

Victoria James
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF