

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 October 2024

Public Authority: Bristol City Council
Address: The Council House
College Green
Bristol
BS1 5TR

Decision (including any steps ordered)

1. The complainant has requested information from Bristol City Council (the Council) relating to a tender to become the Council's 'Digital Strategic Partner' (DSP). The Council disclosed information with redactions made under sections 41 (information provided in confidence) and 43(2) (commercial interests) of FOIA.
2. The Commissioner's decision is that the Council was correct to refuse the request under section 41 of FOIA.
3. The Commissioner does not require further steps.

Request and response

4. On 13 January 2024, the complainant wrote to the Council and requested information in the following terms:

"Under the Freedom of Information Act 2000 I wish to see the following:

The tender documents for the 'digital strategic partner' contract with Fujitsu Services Ltd. Both the offer to tender, any tender documents

received from the bidding parties along with the procurement bid scoring documents.”

5. The Council responded on 12 February 2024, explaining that there were three bidders for the tender. It withheld all the information from two unsuccessful bidders, but provided information from the successful bidder (Fujitsu) which fell within the scope of the request. It stated that some information was redacted under the following sections of FOIA:
 - section 40(2) (personal data);
 - section 41 (information provided in confidence);
 - section 43(2) (commercial interests).
6. Following an internal review the Council upheld its original response.

Scope of the case

7. The complainant contacted the Commissioner on 16 April 2024, to complain about the way their request for information had been handled.
8. In particular they complained about the level of redactions carried out under sections 41 and 43(2). They did not raise the redactions carried out under section 40(2), or the withholding of information from the two unsuccessful bidders.
9. Within their internal review request to the Council, and within their complaint to the Commissioner, the complainant listed 10 documents where they are unhappy with the redactions. However, three of these documents are duplicated, and one was released in an unredacted form, leaving six documents.
10. The scope of the following analysis is to determine if the Council was correct to apply sections 41 or 43(2) of FOIA to withhold the redacted information from these [six] documents.

Reasons for decision

Section 41 – information provided in confidence

11. Section 41(1) of FOIA provides that information is exempt if, under subsection 41(1)(a) the public authority obtained it from any other person and, under subsection 41(1)(b), disclosure would constitute a breach of confidence actionable by that person or any other person.

Was the information obtained from another person?

12. The withheld information in this case is information submitted to the Council as part of Fujitsu's application to tender for a 'Digital strategic Partner' for technology services. The Commissioner is satisfied that the tender documents were obtained from another person (Fujitsu).

Would disclosure constitute an actionable breach of confidence?

13. In considering whether disclosing the information constitutes an actionable breach of confidence the Commissioner must consider the following:
- whether the information has the necessary quality of confidence
 - whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.

Necessary quality of confidence.

14. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
15. The Council has explained that the withheld information was provided in confidence as part of an application to tender to provide services and expertise to Bristol City Council.
16. The Council stated that, other than through an FOI disclosure, the information is not otherwise accessible. It states that it is more than trivial, as it relates to the core business of those submitting tenders to the Council.
17. Further, it explained that Fujitsu believed that this confidence is important enough for the information not to be shared, either in full or in part, and have identified the prejudice it would cause themselves if it were.
18. On the basis of these representations the Commissioner accepts that the withheld information is more than trivial to the confider (Fujitsu).
19. As his view is that this information is non-trivial and is not otherwise available, the Commissioner accepts that this information has the necessary quality of confidence.

Circumstances importing an obligation of confidence

20. This limb is concerned with the circumstances in which the confider of information passed the information on. The confider may have attached specific conditions to any subsequent use or disclosure of the information (for example in the form of a contractual term or the wording of a letter). Alternatively, the confider may not have set any explicit conditions but the restrictions on use are obvious or implicit from the circumstances (for example information a client confides to their counsellor).
21. The Council stated that, "Our considered view is that any information, provided by contractors or tenderers as part of any tendering process or contract negotiations is implicitly shared in confidence. When these tenderers and contractors explicitly confirm that their information was provided in confidence, then it our view that such comments should be treated with respect and such information should be exempt under FOI. This would be in keeping with current legal practice and standard protocols."
22. The Commissioner is satisfied that, given the nature and context of the information, there would be an implied expectation of confidence and hence the circumstances in which the information was shared did import an obligation of confidence.

Detriment to the confider

23. The Council has argued that disclosing the information to the public would be likely to provide an unfair advantage to other parties with an interest in the tendering process.
24. The confider has expressed concern that disclosure of the withheld information would expose their intellectual property, know-how and experience to the market, disadvantaging their ability to win new contracts.
25. This is because information disclosed under FOI is disclosed to the world at large, including their regular competitors who could use the disclosed information to their advantage.
26. On the basis of these representations the Commissioner is satisfied with the Council's position that disclosure would result in detriment to the confider of the withheld information.
27. Although section 41 is an absolute exemption, it is accepted that if there is an overriding public interest in disclosure, this can be used as a defence against any breach of confidentiality that might be brought against a public authority disclosing information under FOIA. In other

words, the Commissioner must balance the public interest in the information with the inherent public interest in preserving the principle of confidentiality.

28. The Council have argued that disclosing confidential tender documents would not be in the public interest as it would prejudice the ability of the Council to secure best value for money in future procurement exercises.
29. This is because organisations would be discouraged from confiding in the Council if they do not have a degree of certainty that any confidences would be respected.
30. This could lead the Council to have a smaller range of contractors and suppliers to do business with, which would result in less competition and less opportunity for it to obtain best value for its citizens.
31. Within their correspondence to the Commissioner the complainant has stated "... given the recent reporting about Fujitsu's role in the Post Office Horizon IT scandal it is vital to have maximum possible transparency about any dealings that public bodies undertake with the company going forward."
32. However, the Council has confirmed that, "The Digital Strategic Partner (Fujitsu) is not providing any systems to the council and the council has not purchased any software from Fujitsu, proprietary or otherwise."
33. The Commissioner is mindful of the high public interest in the role of the Horizon software as part of the 'Post Office scandal'. However, given that the software does not form part of the services provided to the Council, the Commissioner is not satisfied that the complainant's argument adds to the public interest in disclosure.
34. The Commissioner has considered the circumstances of the case and the nature of the information that has been withheld under section 41(1) of FOIA. He has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Therefore the Commissioner finds that the condition under section 41(1)(b) is met, and that the council was correct to withhold the information under section 41(1) of FOIA.
35. As the Commissioner has found that section 41 of FOIA applies to the redacted information he has not gone on to also consider the application of section 43(2).

Right of appeal

36. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

37. 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.
38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Ben Tomes
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF