

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

### **Decision notice**

**Date:** 14 December 2021

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

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

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1. The complainant has requested information relating to the bids submitted for the purchase of a particular site owned by Birmingham City Council (the council).
2. The council initially refused the request in its entirety, citing section 43(2) of the FOIA - commercial interests. However, at the internal review stage, it released some information to the complainant. During the Commissioner's investigation, the council then agreed to release some additional information.
3. The Commissioner is satisfied that the council is entitled to rely on section 43(2) of the FOIA, in respect of the remaining information that has been withheld.
4. However, as a result of the late disclosure of information, and the time it took the council to issue a refusal notice, the Commissioner has found a breach of sections 1, 10, and 17 of the FOI.
5. Furthermore, the council failed to release a full set of redacted letters which it held that were relevant to the complainant's request, which is a further breach of section 1 of the FOIA. However, after redaction, the letters become identical in content to those that have already been released; therefore, the Commissioner does not require the council to take any further steps in this regard.

6. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
  - Release the information set out in paragraph 26 of this decision notice (in the redacted format it proposed to the Commissioner), if it has not already done so.
7. The council 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**

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8. On 10 February 2020, the complainant wrote to the council and requested information in the following terms:

*'Thank you for your response to the attached Freedom of Information Request (10447801) where I asked for the identities of the companies involved in the bidding process for the sale of Montgomery Business Centre in January 2019.*

*According to your response four companies were involved in the bidding process. You listed those companies in your response as; Euro Property Investments Limited, RCPI Limited, Oval Real Estates Limited, and Colmore Capital Ventures Limited.*

*Request: I would like to request evidence of tenders and bids associated with Montgomery Street Business Centre. Can you also include any communications, including meetings, associated with those bidders. If there is any information you deem to be commercially sensitive, please feel free to redact that information from the relevant documentation.'*

9. On 2 December 2020, the council issued a refusal notice to the complainant, citing section 43(2) of the FOIA.
10. On 3 December 2020, the complainant requested an internal review. The council responded on 19 January 2021, now providing copies of three letters that had been sent out to the bidders, with the name and address of the recipient redacted.
11. The council went on to advise the complainant that it still considered the remaining information held relevant to the request to be exempt from disclosure under section 43(2) of the FOIA.

## Scope of the case

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12. The complainant initially contacted the Commissioner to complain about the council's failure to respond to his request. On 11 December 2020, he then raised concerns about the council's failure to carry out an internal review. He contacted the Commissioner again after receiving the council's internal review response, expressing his dissatisfaction at the way his request had been handled.
13. The complainant does not believe that the council is correct to rely on section 43(2) of the FOIA in respect of all the information it has withheld that is relevant to his request.
14. With regards to the three letters provided to him at the internal review stage, the complainant has also stated that he believes that the council would hold further letters; this is because there were more than three companies involved in the bidding process for the relevant site.
15. The Commissioner's analysis below considers the following:
  - whether there are any additional letters held that are relevant to the complainant's request.
  - whether the council was entitled to rely on section 43(2) of the FOIA when withholding any remaining information held that is relevant to the request.
  - the procedural handling of the request.

## Reasons for decision

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### **Section 1 – general right of access to information**

16. Section 1(1) requires that any person making a request for information to a public authority must be informed in writing by that public authority whether it holds information relevant to the request, and if so, to have that information communicated to them. This is subject to any exclusions or exemptions that may apply.
17. The complainant has raised concerns relating to the three letters provided to him at the internal review stage; he believes that as there were a number of bidders, further letters must have been issued.
18. The name and address of the recipient had been redacted from each of the letters before their release to the complainant. The first letter, dated 8 January 2019, acknowledged receipt of a tender. The second letter,

dated 13 March 2019, stated that the council did not intend to proceed with that company's tender. The third letter, dated 17 July 2019, advised that the agreed sale had not progressed, and that the council was seeking the best and final unconditional offers from '*selected under bidders*'.

19. The council has advised that the complainant was provided with confirmation that six bids were received for the site in response to a previous information request that he had made. He was also provided with the names of the four companies who had submitted bids. However, he was advised that the details of the two other bidders were to be withheld as the council had regarded this information to be third party personal data which, if disclosed, would breach the Data Protection Act 2018. As far as the Commissioner is aware, the complainant did not contest the council's decision to withhold details of two of the bidders in response to that request.
20. The council has gone on to say that the three letters disclosed in response to the current request were sent to the relevant bidders at different stages of the bidding process. Once the name, and address, of each recipient had been redacted from the letters, the council states that they became identical in content and therefore, it saw no value in sending the complainant multiple copies of the same letter. However, it has said that it now acknowledges that it would perhaps have been helpful to have confirmed this when it released the copies of the letters to him.
21. The Commissioner is satisfied that there are no additional letters held by the council which would differ in their main content to those three letters already been released to the complainant. However, prior to the redactions, the letters sent to each bidder are not identical (as they are addressed to different recipients). Therefore, the council should have considered the release of all the letters that it holds which were sent to the bidders. As that information was within the scope of the request regardless of the council's view as to its 'value', its failure to do so is a breach of section 1 of the FOIA.
22. Furthermore, it is the Commissioner's view that if a copy of every letter had been supplied without redactions, it would have provided the complainant with some additional information that was relevant to his request. Most importantly, it would have allowed him to determine which bidder had their offer accepted, which bidders had been invited to increase their bid, and which had not been successful.
23. Given this, the Commissioner will consider whether the council was entitled to redact the names and addresses of the recipients from the

letters within his analysis of the council's application of section 43(2) of the FOIA to the remaining withheld information.

**Section 43(2) – commercial interests**

24. Section 43 states that a public authority may refuse to disclose information if its disclosure would or would be likely to prejudice the commercial interests of the public authority itself and/or a third party.
25. As section 43 is a qualified exemption, the council must also demonstrate that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.
26. The council has recently confirmed to the Commissioner that an additional document which had previously been withheld, '*Sites Prospectus 1 Tender Evaluation – Montgomery Street Business Centre Sparkbook Birmingham*', can be released, in a redacted format, to the complainant.
27. With regards to the remaining withheld information, the council has maintained that this is still subject to the exemption at section 43 of the FOIA, and that its own commercial interests would be prejudiced, should this information be released. As mentioned at paragraph 23 above, this analysis also covers the names and addresses redacted from the letters within the scope of the request.
28. The council states that commercial interests relate to the ability to participate competitively in commercial activity with the underlying aim of being able to make a profit, and for the council this means protecting the public purse.
29. It has confirmed that whilst the tendering process had closed at the time of the complainant's request, the process of selling the site was (and still is) ongoing. The council argues that the integrity of future tender exercises would be severely undermined if the withheld information was to be released into the public domain. Interested parties would have an unfair advantage of knowing which bids had been successful and which had not, and that this would seriously impede the ability of the council to negotiate best value, and would impact on the public purse. The council has also stressed the importance of being able to negotiate fairly in a commercial environment.
30. The Commissioner considers that the withheld information relates to a commercial interest, that being the sale of an asset owned by the council for a potential profit.
31. When considering whether the disclosure of the information has the potential to harm the council's commercial interests, the Commissioner

regards it to be of some relevance that the site was (and still is) for sale at the time of the request. Given the circumstances, he is of the view that the disclosure of the information, which would be to the world at large, could provide third parties with critical commercial information which may weaken the council's negotiating position. This would be likely to give future bidders an unfair advantage which, in turn, would have a negative impact on the council's ability to obtain value for money, achieve the best commercial position, and maximise the potential return on public investment. The Commissioner's view extends to that information which was redacted from the letters supplied to the complainant at the internal review stage.

32. The Commissioner is therefore satisfied that disclosure of the withheld information would be likely to prejudice the council's commercial interests, and the exemption at section 43(2) is engaged. He has therefore gone on to consider the public interest test.

### **Public interest test**

#### The council's position

33. The council has advised that it recognises that there is a public interest in ensuring transparency in the activities of public authorities, ensuring that public funds are being protected; it states that it strives to be open and transparent in all of its 'dealings'.
34. However, it has said that there is a strong public interest in fostering confidence within the business community that commercially sensitive information will only be disclosed in compelling circumstances; without this confidence, commercial activity may be seriously impeded, and this would not be in the public interest.
35. The council also argues that withholding details of successful, or unsuccessful bids, protects the integrity of future tendering processes, and maintains the concept of fairness, which is in the public interest to uphold.
36. The council goes on to say that disclosure of the withheld information to the world at large would place it at a distinct disadvantage to negotiate the best deal that would protect the public purse.
37. The council concludes by saying that in all the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### The complainant's position

38. The complainant has argued that the release of the information requested would indicate whether the processes which have been followed by the council with regard to the sale of the Montgomery site have been fair and proper, and that the correct procedures were followed when the preferred bid was selected, and that this was the highest bid.
39. The complainant has advised the Commissioner that, during a telephone conversation with an officer at the council, he was informed of a bid made by a particular company during the tender process. He is of the belief that this was the bid accepted by the council and argues that as this information has already been released, the withheld information relating to the bids cannot be subject to any commercial confidentiality or exemption under the FOIA.

### The Commissioner's view

40. The Commissioner considers that there is always some public interest in the disclosure of information. This is because it promotes the aims of transparency and accountability which, in turn, promotes greater public engagement and understanding of the decisions taken by public authorities. He is also mindful that the disclosure of the withheld information could improve the wider public's confidence in the tendering process and sale of assets by the council.
41. The Commissioner has taken account of the telephone conversation between the complainant and a council officer, where matters relating to the bids were discussed. In particular, he has considered whether this would amount to a disclosure of information to the 'world at large' and would diminish those arguments presented by the council in support of withholding the information.
42. In the Commissioner's opinion, the telephone conversation between the two parties did not constitute a release of information into the public domain. In the circumstances of this case, he is satisfied that this would not have been the intention of the officer at the council; it appears to have been an open and informal conversation solely intended to be between the two parties only, and not the 'world at large', and was therefore done in good faith. Given this, he does not regard this, in itself, to be sufficient to tip the balance in favour of disclosure of the information.
43. The Commissioner is satisfied that the council has now (with the inclusion of that information which it has recently agreed to release) disclosed information where it would not result in prejudice to its

commercial interests. In addition, he is of the view that the information that has been released provides a good insight into the processes which have been followed with regard to the sale of the relevant site.

44. In the Commissioner's opinion, there is a very strong and inherent public interest in ensuring fairness of competition, and it would be firmly against the public interest if the council's commercial interests are harmed. This would be of detriment to the council and the public purse. He is satisfied that, in this instance, there is a stronger public interest in protecting the commercial interests of the council and ensuring that it is able to achieve best value for money in any future bidding for the site.
45. Therefore, it is the Commissioner's decision that the public interest in maintaining the exemption at section 43(2) of the FOIA outweighs the public interest in disclosure in this case.

### **Procedural matters**

46. Section 10 of the FOIA requires a public authority to disclose non-exempt information within 20 working days of receiving a request.
47. In this case, the council only disclosed information to the complainant at the internal review stage. During the Commissioner's investigation, it also agreed to release some additional information. As this is information that falls within the scope of the complainant's request, and should have been communicated to him under section 1 of FOIA within 20 working days of his request (by the timeframe specified in section 10 of the FOIA), the Commissioner has recorded a breach of section 1 and 10 of the FOIA.
48. Furthermore, section 17(1) provides that if a public authority wishes to refuse a request, it must issue a refusal notice within 20 working days, citing the relevant exemption(s).
49. The council issued its refusal notice some 10 months after receiving the request, and has therefore also breached section 17(1) of the FOIA.

## Right of appeal

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50. 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](mailto:grc@justice.gov.uk)

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

51. 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.
52. 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 .....**

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