

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

### **Decision notice**

**Date:** 31 October 2022

**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 requested information from Birmingham City Council ("the Council") about a contract for the provision of international genealogy services and the associated procurement process.
2. The Council disclosed some information within the scope of the request but withheld some information under section 40(2) of FOIA (the personal information exemption), section 42(1) of FOIA (the legal professional privilege exemption) and section 43(2) of FOIA (the commercial interests exemption).
3. The Commissioner's decision is that:
  - the Council has correctly applied section 40(2) to some, but not all, of the information withheld on this basis,
  - the Council has correctly applied section 42(1) to some, but not all, of the information withheld on this basis,
  - the Council has failed to demonstrate that section 43(2) is engaged in respect to the information withheld on this basis.

4. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
  - Disclose the information withheld under section 40(2) which is already in the public domain (the names of the relevant Assistant Procurement Manager and the Service Manager for the relevant Council service area).
  - Disclose the information withheld under section 42(1) which the Commissioner has decided, as indicated in paragraph 49 of this notice, is not exempt under section 42(1).
  - Disclose the information withheld under section 43(2).
5. 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 FOIA and may be dealt with as a contempt of court.

## **Request and response**

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6. On 29 January 2021, the complainant wrote to the Council and requested information in the following terms:

“Please provide all information held in relation to this contract, and the associated procurement process. Details can be found via the link below (as of today). I can provide a pdf version if needed:

<https://www.contractsfinder.service.gov.uk/Notice/84fb53ac-41bc-4ca9-817b-57122f696fb0?origin=SearchResults&p=1>

If there is information which should be exempted, please attempt to provide all information which is not directly impacted via any methods available to you - e.g. redaction, summaries, etc.”
7. The Council responded on 4 May 2021 and provided some information within the scope of the request.
8. The complainant requested an internal review on 6 May 2021, explaining they believed that further information was held by the Council.
9. Following an internal review the Council wrote to the complainant on 2 March 2022. It revised its position. It disclosed some further information within the scope of the request but withheld some information under section 40(2) of FOIA (the personal information exemption), section

42(1) of FOIA (the legal professional privilege exemption) and section 43(2) of FOIA (the commercial interests exemption).

## **Scope of the case**

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10. The complainant contacted the Commissioner on 23 August 2021 to complain about the way their request for information had been handled.
11. The following analysis considers whether the Council is entitled to rely on section 40(2) (the personal information exemption), section 42(1) (the legal professional privilege exemption) and section 43(2) (the commercial interests exemption) as bases for refusing to provide the withheld information.

## **Reasons for decision**

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### **Section 40 personal information**

12. Section 40(2) of 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.
13. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. 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 UK General Data Protection Regulation ('UK GDPR').
14. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
15. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

### **Is the information personal data?**

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

“any information relating to an identified or identifiable living individual”.

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

18. 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 or an online identifier, or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

19. 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.

20. In this case the withheld information comprises the names of a range of council staff who exchanged emails in relation to the procurement process and the contact details of some of these staff. These staff include an Assistant Procurement Manager and the Service Manager for the relevant Council service area, Funerals and Protection of Property and Transport Operations.

21. The Commissioner is satisfied that the information both relates to and identifies the council staff members. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.

22. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

23. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

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

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

25. In the case of a 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.

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

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

27. 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”<sup>2</sup>.

28. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under 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.

29. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

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<sup>2</sup> 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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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”.

### Legitimate interests

30. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
31. The Commissioner accepts that there is a legitimate interest in understanding who is involved in making decisions about the Council's procurement process and contracts.

### Is disclosure necessary?

32. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
33. The Commissioner accepts that disclosure of names of the Council staff who exchanged emails in relation to the procurement process is necessary in order to meet the legitimate interest of understanding who is involved in making decisions about the Council's procurement process and contracts. However, he does not accept that the disclosure of their contact details is necessary to meet this legitimate interest.
34. His decision is therefore that there is no lawful basis for the disclosure of the staff members' contact details under FOIA. He has gone on to consider the balancing test in relation to the names of council staff.

### Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

35. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

36. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
37. In the Commissioner's view, a key issue is whether the individual concerned has a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
38. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
39. In the Council's submissions to the Commissioner it argued that the individuals concerned would not expect and have not consented to their personal information being disclosed. It argued that the staff named in these documents are junior officers, not senior public facing officers used to having their personal details disclosed and that they have a reasonable expectation of privacy. The Council therefore argued that the interests of the staff members outweigh the legitimate interests of the requestor.
40. However, during the course of the Commissioner's investigation, the Council has since confirmed, that the names of the relevant Assistant Procurement Manager and the Service Manager for the relevant Council service area, Funerals and Protection of Property and Transport Operations were already in the public domain as this information was included in a public report with the subject "Contract Award for a Genealogy Service".

### **The Commissioner's view**

41. The Commissioner's view is that, given the information is already in the public domain, the Council's arguments regarding an expectation of privacy does not apply to the names of the Assistant Procurement Manager and the Service Manager for the relevant Council service area. The Commissioner's view is therefore that the interests of the relevant Assistant Procurement Manager and the Service Manager for the relevant Council service area do not outweigh the legitimate interest in the disclosure of their names. The Commissioner has therefore decided

that the Council was not entitled to withhold this information under section 40(2), by way of section 40(3A)(a).

42. However, with respect to the names of staff members not named in the public report, the Commissioner accepts the Council's arguments that these are junior staff members with a reasonable expectation of privacy. The Commissioner's decision is that the interests of these staff outweigh the relatively limited legitimate interest in disclosure of their personal data. The Commissioner has therefore decided that the Council was entitled to withhold this information under section 40(2), by way of section 40(3A)(a).

## **Section 42 – Legal Professional Privilege**

43. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings. LPP protects the confidentiality of communications between a lawyer and client.
44. The two categories of LPP are litigation privilege and legal advice privilege.
45. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is litigation in prospect but where legal advice is needed.
46. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
47. In this case, the Commissioner accepts that the majority of the information that the Council has withheld under section 42(1) is subject to legal advice privilege as it consists of requests for and the provision of legal advice from a Council solicitor to the relevant Council service areas about the contract.
48. Furthermore, the Commissioner is satisfied that this withheld information is not in the public domain and remains confidential. Therefore, the privilege attached to this information has not been lost.
49. However, the Commissioner is not satisfied that all of the information submitted to the Commissioner as having been withheld under section 42(1) meets the criteria set out in paragraph 46. Therefore, in respect to that information the Commissioner finds the exemption is not engaged. The information to which this applies are:



- emails between the relevant Assistant Procurement Manager and the Service Manager for the relevant Council service area, Funerals and Protection of Property and Transport Operations,
  - emails between the relevant Assistant Procurement Manager and a Council solicitor regarding booking a meeting room.
50. As the Commissioner is satisfied that the exemption at section 42(1) is engaged with respect to some of the information and this is a qualified exemption, he will go on to consider the public interest test with respect to the information for which the exemption is engaged.

### Public Interest Test

#### The Council's position

51. The Council states that it took into account the following public interest factors in favour of the disclosure of the information:
- promoting openness and transparency,
  - furthering understanding of council processes in decision making.
52. The Council states that it took into account the following public interest factors in favour of withholding the information:
- The concept of LPP reflects the strong public interest in protecting the confidentiality of communications between lawyers and their clients.
  - Such confidentiality promotes respect for the rule of law by encouraging clients to seek legal advice and allowing for full and frank exchanges between clients and their lawyers.
52. The Council's position is that the public interest in withholding the information outweighs that in disclosure.

#### The Commissioner's view

53. In the Commissioner's opinion, the general public interest inherent in the exemption at section 42 of the FOIA will always be strong due to the importance of the principle behind legal professional privilege, that is, safeguarding openness in all communications between a client and their lawyer to ensure access to full and frank legal advice.
54. The Commissioner accepts that there is a legitimate public interest in ensuring that public authorities are transparent in their actions, including those around procurement and contracts.

55. However, having viewed the withheld information the Commissioner does not believe the public interest in it is particularly weighty. The strong public interest in maintaining LPP outweighs the limited public interest in favour of disclosure in this case. The Commissioner therefore finds that the public interest in maintaining the exemption at section 42(1) outweighs the legitimate public interest in disclosure of the withheld information in this particular instance. The Council was not, therefore, obliged to disclose the withheld information.

### **Section 43(2) – prejudice to commercial interests**

56. 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).”

57. In order for a prejudice-based exemption, such as section 43, to be engaged the Commissioner believes 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.

58. The Council’s position is that to disclose the information it has withheld under section 43(2) would be likely to prejudice the commercial interests of both the Council and its contractors.

59. In its submissions to the Commissioner the Council provided arguments relating to the prejudice that would be likely to be caused to the commercial interests of both the Council and its contractors should

information about pricing be disclosed. However, the information submitted to the Commissioner as having been withheld under section 43(2) is much wider ranging than pricing information.

60. The Council has seemingly applied section 43(2) to the information simply on the basis that it relates to the procurement process and/or contract. Very limited distinction has been made between the content and sensitivity of the information, and no clear explanation has been provided in respect of the claimed prejudice and how, in the circumstances of this matter, that prejudice would occur in respect of the various information that the Council has applied the exemption to.
61. It is evident to the Commissioner that, due to the subject matter, some of the information may cause prejudice to the commercial interests of the Council and its contractors. However, having had regard to the narrow arguments made by the Council – in conjunction with the Council applying the exemption so widely to a substantial volume of information – the Commissioner is not satisfied that the Council has demonstrated the claimed prejudice.
62. For the above reasons, the Commissioner does not consider that the Council has provided compelling evidence that prejudice would be likely to occur. As this test is not met, there is no requirement for the Commissioner to proceed any further. On this basis he finds that the exemption is not engaged.

## Right of appeal

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

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

64. 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.
65. 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**