

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

### **Decision notice**

**Date:** 28 February 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 has requested information regarding the rates charged to Birmingham City Council for damage repairs on the road network, and details of claims.
2. Birmingham City Council withheld some information on the basis of section 43(2) (commercial interests), and stated that some information was not held.
3. The Commissioner's decision is that section 43(2) was correctly applied and the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner also finds that, on the balance of probabilities, no further information is held by the council.
4. No steps are required.

## Request and response

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5. On 2 November 2020, the complainant wrote to Birmingham City Council ("the council") and requested information in the following terms:

"I ask to be provided, with regard to damage to 'street furniture'

  1. a copy of the contract with Kier Highways Ltd for damage to street furniture attendance and repairs
  2. the schedule of costs for works on the highways i.e. staff, operatives, plant and materials charged to the Council and;
    - a. whether the Council is charged, for any works, by Kier Highways by using CECA rates
  3. the schedule of costs for works on the highways i.e. staff, operatives, plant and materials charged to Third Parties
  4. The basis upon which Kier Highways Ltd is to charge at-fault Third Parties for example:
    - a. cost-plus uplift
    - b. using the same base rates as charged to the Council in the event a culprit is unidentified
  5. The protection the council put in place to prevent Third Parties being overcharged i.e. the agreement that prevents the practice of Kier Highways profiting from claims - see:  
<http://www.englandhighways.co.uk/inflati...>
  6. a copy of any insurance you possess for damage to such property
  7. a copy of the authority in place permitting Kier Highways to commence proceedings in your name and
  8. the process agreed with Kier highways and/or their lawyers, for approaching Third parties, many of whom will be your constituents, for reimbursement such that they are treated fairly, reasonably and not subject to unreasonable processes or costs."
6. The council gave a response on 25 November 2020, providing some information within the scope of the requests.
7. The complainant responded to the council on 26 November 2020, asking for clarification in the following terms:

"1. please supply the full contract insofar as it relates to damage to property by drivers.

2.

- a. Please provide the schedule of rates. It appears this is 'actual costs'.
- b. How are actual costs arrived at and verified by the Council There are generally, two scenarios involving contractor assets (staff, labour, plant, materials) following an incident causing damage and reinstatement:
  - A negligent party is identified and pursued for attendance and repair costs
  - A negligent party is NOT identified and presumably either the contractor is compensated by way of fixed fee agreement or invoices the Council for the works
- c. Please explain the process and if the council is invoiced for the works per incident, provide the schedule of rates utilised by Kier. It is noted Kier Highways do not use CECA rates and the costs for staff and labour are predominantly those of the TUPE workforce.
- d. Please provide the rates utilised by the workforce pre-Kier appointment. It is understood this will be Amey rates

3. the schedule of costs for works on the highways i.e. staff, operatives, plant and materials charged to Third Parties. Please see '2a' above. response 2 does not provide the schedule of rates – see above.

4. The basis upon which Kier Highways Ltd is to charge at-fault Third Parties for example:

- a. cost-plus uplift, b. using the same base rates as charged to the Council in the event a culprit is unidentified

This request relates to damage/repairs resulting from drivers, not any fault, errors, negligence etc. by Kier i.e. Third-Party claims (as opposed to 'other than' or contractor negligence).

It is noted that this is a 'cost' process, not 'cost-plus'. In turn, Kier remits all / any costs recovered from at fault drivers, fleets.

- a. If I have misunderstood, please clarify
- b. Please provide a copy of the contractor's last notification to you of all Third-Party Claims, the last quarterly basis return (schedule 15, 3).

5. The protection the council put in place to prevent Third Parties being overcharged i.e. the agreement that prevents the practice of Kier

Highways profiting from claims -

see: <http://www.englandhighways.co.uk/inflati...>

- a. How do Kier profit from attendance/repair works?  
An element of business is profit and a reasonable uplift /return would be expected.
- b. What is the benefit to Kier if an 'at cost service is provided?
- c. In what respect (how) is the way Third Parties 'transparent'?

6. Request response was satisfactory

7. A copy of the authority in place permitting Kier Highways to commence proceedings in your name.

I note Kier have authority and permission to act on behalf of the Highway Authority regarding proceedings under the Contract (Schedule 29 as attached).

a. What section of 'schedule 29'. This does not appear to reference claims or proceedings.

8. the process agreed with Kier highways and/or their lawyers, for approaching Third parties, many of whom will be your constituents, for reimbursement such that they are treated fairly, reasonably and not subject to unreasonable processes or costs.

The request relates to Third-party claims/incidents.

Kier Highways handle claims. Indeed, Kier Highways:

- appoint lawyers to progress the claims for the outset
- add a 10% administration fee to claims
- charge interest on the claimed sums from the date of incident/loss

The above appears to be at odds with charging 'cost' and not profiting. Please:

a. confirm the above are authorised, agreed processes/charges and explain how they are consistent with a non-profit, at cost process.

With regard to Kier operating within standard industry practice in dealing with Third Parties. Please:

b. Provide the industry practice referred to."

8. The council responded to the complainant on 14 January 2021. It provided further information in response to the questions and stated some information was not held. The council withheld information on the basis of section 43(2) in relation to the following questions: 2a, 2d and 4b.

9. The complainant requested an internal review on 18 January 2021:

"I am seeking the rates Kier use to charge Third Parties and the Council for DCP works...DCP rates are NOT commercially sensitive... I ask to be

provided with the rates”

10. Following an internal review the council wrote to the complainant on 11 February 2021. It stated that it upheld its position to withhold the information on the basis of section 43(2).

### Scope of the case

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11. The complainant contacted the Commissioner on 16 February 2021 to complain about the way their request for information had been handled. Specifically that the council are withholding information regarding the rates they are charged for attendance and repair following emergency incidents on their roads.
12. The complainant agreed that the scope of the case is information withheld on the basis of 43(2) which is in scope of questions 2a and 4b, being:
  - 2a. Please provide the schedule of rates (Kier).

The complainant and the council confirmed that the information in scope of this request is the actual costs that the council is charged and not the “Kier Schedule of Rates” which is publicly available;

- 4b. Please provide a copy of the contractor’s last notification to you of all Third-Party Claims, the last quarterly basis return (schedule 15, 3);

and information in scope of 2d which the council says it does not hold:

- 2d. Please provide the rates utilised by the workforce pre-Kier appointment. It is understood this will be Amey rates.
13. The scope of this case is to decide whether the council was correct to withhold the information in scope of 2a and 4b on the basis of section 43(2), and whether any information is held which is in scope of 2d.

### Background

14. Birmingham City Council entered into a £2.3 billion 25-year highways management and maintenance contract with Amey Birmingham Highways Ltd, now Birmingham Highways Limited (“BHL”), in 2010 under the Government’s private finance initiative (PFI).
15. Kier Highways was appointed as the preferred bidder to manage the interim highway services contract for BHL from 1 April 2020.

16. A Private Finance Initiative (PFI) is a long-term contract between a private party and a government entity where the private sector designs, builds, finances and operates a public asset and related services. In a PFI contract the private party bears the risks associated with construction and maintenance and management responsibility, and remuneration is linked to performance.

## **Reasons for decision**

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### **Section 43(2) – Commercial interests**

17. Section 43(2) states 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).
18. The term 'commercial interests' is not defined in the FOIA; however, the Commissioner has considered her guidance on the application of section 43<sup>1</sup>, 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."

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

19. The withheld information in scope of questions 2a and 4b comprises rates and costs agreed with Kier ("Kier Actual Costs") and the Third Party Claims return ("Third Party Claims Return") under Schedule 15 paragraph 3 of the Interim Services Contract.
20. The information contains details such as the operating costs, commercial rates and commercial assessments of claims. The Commissioner accepts that the information is therefore commercial in nature.

### **The likelihood of the prejudice occurring**

21. In order for the exemption to be engaged it is necessary for it to be demonstrated that disclosure of information would result in some identifiable commercial prejudice which would, or would be likely to, affect one or more parties.

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<sup>1</sup> [Section 43 - Commercial interests | ICO](#)

22. The Commissioner has been guided on the interpretation of the phrase “would, or would be likely to” by a number of First-tier Tribunal (Information Rights) (“the Tribunal”) decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; either prejudice “would” occur, or prejudice “would be likely to” occur.
23. With regard to “would be likely to” prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that “the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk” (Tribunal at paragraph 15).
24. With regard to the alternative limb of “would prejudice”, the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that “clearly this second limb of the test places a stronger evidential burden on the public authority to discharge” (Tribunal at paragraph 36).

### **The council’s position**

25. The council states that disclosure of the Kier Actual Costs “would be likely to” prejudice the commercial interests of Kier and its suppliers, and the commercial interests of Birmingham Highways Ltd (“BHL”) for the following reasons:
  - BHL is in the process of re-procuring highway maintenance and management services that it supplies to the council. Kier, as incumbent, is expected to be a bidder in this process.
  - Disclosing information about Kier’s operating costs would prejudice Kier’s position in bidding. It would allow rival bidders and potential clients to have an insight on their pricing structure and manipulate this to hinder the ability of Kier to conduct their business as competitively as possible.
  - It would be likely to prejudice the position of Kier’s suppliers by disclosing the commercial rates that they have agreed with Kier.
  - It would also prejudice BHL’s ability to obtain a competitively procured price for the services it supplies to the council under that procurement.
  - The information contains individual salary information.
26. The council stated that disclosure of the Third Party Claims Return “would be likely to” prejudice the commercial interests of the council and BHL for the following reasons:

- The schedule contains details of highway claims to which the council is subject, together with the commercial assessment of the value of those claims and the value at which claims have been settled.
  - Disclosing this information will enable other parties to consider similar claims against the council and may encourage them to do so.
  - It will also provide details of the commercially assessed value of existing claims. This has the potential to undermine commercial settlement of claims, in that claimants would be able to assess the likely level at which claims would be settled by the council.
27. The council stated that release of the withheld information would be detrimental to the procurement exercise when the interim contract comes to an end in 2023, because:
- it would be likely to lead to a clustering of bids around the sums BHL and Kier has demonstrated a willingness to pay, thus impacting the overall competitiveness of the bids received into the procurement process. Any failure to obtain the optimum market rate would be met by costs passed on to customers, residents, visitors and taxpayers;
  - it would be likely to result in a commercial detriment to the council, BHL, Kier, and other contracting public bodies and other contractors. The council and public body contractors may be less able to secure competitively priced contracts in the future. New entrant contractors would be able to adopt the costing model in which the established contractors have invested and would perhaps not offer their best price for particular services if they are aware of what the council, BHL and Kier is prepared to pay.

**Is section 43(2) engaged?**

28. The Commissioner must be satisfied that the nature of the prejudice is “real, actual or of substance” and not trivial or insignificant. He must also be satisfied that some causal relationship exists between the potential disclosure and the stated prejudice.
29. The Commissioner accepts the council’s position that the Kier Actual Costs would be of use to competitors at the time of contract renewal and that this would be prejudicial to both the supplier and the council. He also notes that the current interim contract comes to an end in 2023, therefore information could be used in the forthcoming tendering process.



30. In terms of the Third Party Claims return the Commissioner accepts that disclosure of the information could have a prejudicial impact on the settlement of future claims or encourage further claims.
31. The Commissioner is satisfied with the arguments provided by the council regarding the nature of the prejudice to Kier, BHL and the council and the causal relationship to the proposed disclosures.
32. The Commissioner therefore finds that the section 43(2) exemption is engaged as prejudice to commercial interests would be likely to result through disclosure. As the exemption is engaged, the Commissioner must consider the balance of the public interests for and against disclosure.

### **Public interest test**

33. The exemption under section 43(2) is subject to the public interest test. This means that, even when a public authority has demonstrated that the exemption is engaged, it is required to consider the balance of public interest in deciding whether to disclose the information. The public interest is not a tightly defined concept, and can cover a range of principles including, but not limited to: transparency and accountability; good decision-making by public bodies; upholding standards of integrity; ensuring justice and fair treatment for all; securing the best use of public resources and in ensuring fair commercial competition in a mixed economy.

### **Public interest in favour of disclosure**

34. The council acknowledge the "general interest in terms of promoting transparency of the cost of public services."
35. The complainant states that there is a need for transparency because there are two sets of rates charged by Kier:
  - One is charged to the council, this being the withheld information which the complainant calls "cost".
  - The other is charged to drivers, fleets, hauliers or their insurers (Third Parties), this is the publicly available Kier Schedule of Rates ("KSoR").
  - The complainant argues that it is highly unlikely that the KSoR is at "cost" as if so, the rates would be the same to the council and to Third Parties.

- The complainant argues that it is highly unlikely that the KSoR is less than cost as if so, Kier would be operating at a loss.
  - Therefore, the complainant argues that it appears that the KSoR is higher than "cost".
  - The complainant contends that there should be transparency of the rates being charged to the council because Kier could generate a large profit from claims when compared to the actual costs charged to the council.
36. The complainant states they have an interest in the rates used in order to ensure that third parties are billed appropriately, as is the council.

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

37. The council states that the overall public interest in obtaining the best value for money services from such a significant services contract is considered greater than the benefit of providing transparency regarding precise cost details in relation to claims under that contract.
38. The council argues that the effect of publishing a breakdown of the prices charged under the contract would be likely to harm the commercial interests of both the contractors and the council. This would be likely to lead to increased costs being passed on to customers, residents, council tax payers and visitors.
39. The council contends that the public interest in securing the best value for money is greater than transparency arguments on this occasion
40. BHL is in the process of re-procuring highway maintenance and management services that it supplies to the council and Kier are expected to be a bidder in the process. Disclosing information about Kier's operating costs would prejudice Kier's position in bidding as well as prejudicing BHL's ability to obtain a competitively procured price for the services it supplies to the council under that procurement. Ultimately any failure to obtain the optimum market rate would be met by costs passed on to residents and taxpayers.
41. The council considers that releasing the withheld information would be likely to prejudice the commercial interests of many contractors and distort competition in that market, which in itself would not be in the public interest.
42. The council quoted from the Commissioner's guidance on s43(2), "If the commercial secrets of one of the players in the market were revealed then its competitive position would be eroded and the whole market would be less competitive with the result that the public benefit of

having an efficient competitive market would be to some extent eroded.” Willem Visser v Information Commissioner EA/2011/0188, (1 March 2012).

43. With regard to the Third Party Claims Return, the council states that the overall public interest in protecting the council from new claims and from increased cost resulting from claims is considered greater than the benefit of providing transparency regarding details of claims.

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

44. The Commissioner acknowledges the complainant’s arguments that the release of the information would increase transparency of Kier’s costs charged to the council.
45. However, the Commissioner also acknowledges that the release of such commercial information would be likely to harm the commercial interests of both the contractor and the council. This would hinder the council’s ability to secure best value for money with any increases in costs being passed on to tax payers and residents.
46. On balance the Commissioner finds that the transparency argument is outweighed by the need for the council to secure the best value for money with their contractors. This ability would be compromised if the Actual Costs were to be disclosed and this would be counter to the public interest.
47. The Commissioner also agrees with the council that there is greater public interest in protecting the council from increased costs of claims than in providing transparency of the Third Party Claims return.
48. The Commissioner therefore finds that the section 43(2) exemption is engaged and that the public interest favours maintaining the exemption on this occasion. The council was not, therefore, obliged to disclose this information.

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

49. Section 1(1) of the FOIA states that: Any person making a request for information to a public authority is entitled—
  - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
  - (b) if that is the case, to have that information communicated to him.
50. Section 1(1) requires that any person making a request for information to a public authority must be informed in writing by the 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.

51. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
52. In other words, in order to determine such complaints, the ICO must decide whether on the balance of probabilities a public authority holds any - or additional - information which falls within the scope of the request (or was held at the time of the request).

### **The complainant's position**

53. It is the complainant's position that the council holds information in scope of request 2d, which is "...the rates utilised by the workforce pre-Kier appointment. It is understood this will be Amey rates."
54. The complainant contends:
  - The council would have negotiated and entered a contract with Amey to provide services;
  - Amey would have charged the council agreed rates;
  - The rates would have been compared with the rates proposed by the new contractors;
  - Even though the contract is no longer live, the records must be required for legal, tax or accounting purposes in case claims are challenged;
  - Records are not usually deleted immediately once a contract ends;
  - The TUPE workforce were originally Amey staff therefore the council must know and hold the rates.

### **The council's position**

55. The council explained the contract arrangements:
  - Until June 2019 the council's contract for Highway Maintenance and Management was with Amey Birmingham Highways Ltd (ABHL).
  - From June 2019 ABHL became Birmingham Highways Ltd (BHL) with Amey's planned exit from the contract on 31 March 2020.

- BHL delivers the services under the contract via the Operating Subcontract. Prior to April 2020, this was with Amey LG.
56. The council explained that it was not subject to agreed rates because this is not how a PFI type contract works:
- A PFI contract transfers risk to the Service Provider (ABHL / BHL), who in turn transfer that risk to an Operating Subcontractor (in this case Amey LG). The PFI contract between the council and ABHL is on a fixed price basis and this is the same for the operating subcontract between ABHL and Amey LG.
  - Risk of recovery of claims for damage to the council's highway assets was transferred to Amey LG via ABHL. Amey LG's incentive to recover the cost of dealing with claims was to recover its costs for the repairs that it was liable for under its contract to ABHL (recover costs Amey LG incur under the fixed price arrangement).
  - The council paid ABHL according to a Unitary Charge, which is a single payment for all the services under the contract (the fixed price). The council was entitled to deduct from this payment for non-performance of the contract.
  - Amey was paid by ABHL according to the terms of its Operating Subcontract. This did not have specific costs for claims and is on the basis of a fixed price service charge. Payment was related to service outputs and completion of investment works.
  - The Payment Mechanism contains no provision for payment of claims by or to the council due to the indemnity and risk transfer to the private sector. This is why the council did not require visibility of those payments and never requested that information from ABHL.
57. The council advised that there is no business or legislative reason for it to hold the information. Similarly, ABHL do not hold the records due to the nature of the operating subcontract, fixed price arrangement and indemnities under the operating subcontract with Amey LG. Records are retained in the wider context of the contract, not in the case of claims.
58. As the council did not hold the requested information, for the reasons outlined above, the information has not been deleted.
59. The council explained that following the procurement of a replacement subcontractor by ABHL and the appointment of Kier Highways, the workforce did transfer from Amey LG to Kier Highways. While some of the staff from Amey LG transferred to Kier Highways, the information relating to claims dealt with by Amey LG was held by Amey LG and

would not therefore be accessible to those staff post-transfer, Kier Highways, ABHL or the council.

60. The council advised that any historical claims, whether ongoing, disputed or unresolved remained under the control and management of Amey LG as a residual liability of Amey LG given it was their risk and for Amey LG to recover costs that they incurred with respect to the contractual indemnities in place.
61. The council advised that information relating to the contract is dealt with by a relatively small team within the council and therefore is straightforward to check. Whilst searches were undertaken to look for the information on the teams systems and with team members, the council advised that, as explained, it has no requirement to hold this information and it remains clear that it is not held. It also stated that the same is said of ABHL as the council's contractor and who had the subcontract with Amey LG. It confirmed that to the best of the knowledge of the relevant staff this information has not been held at any time.

### **The Commissioner's Conclusion**

62. The Commissioner has considered the council's position, in conjunction with the request.
63. The council have provided a thorough explanation of why the rates would not have been required at any time, due to the charging mechanism of the PFI contract.
64. There is no contradictory evidence available to the Commissioner that indicates the council's position is wrong.
65. On this basis the Commissioner has concluded that, on the balance of probabilities, the requested information is not held.

## Right of appeal

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66. 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)

67. 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.
68. 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 .....**

**Janet Wyles**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**