

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 June 2024

Public Authority: Sandwell Metropolitan Borough Council
Address: PO Box 2374
Oldbury
B69 3DE

Decision (including any steps ordered)

1. The complainant has requested information about a contract with a third party to refurbish a Council building. Sandwell Metropolitan Borough Council (the Council) disclosed some information but withheld information which would reveal the pricing structure applied, citing section 43 (Commercial interests). It said that it did not hold information about future payments.
2. The Commissioner's decision is that the Council applied section 43 correctly, and, on the balance of probabilities, the Council does not hold the remaining information.
3. The Commissioner does not require further steps as a result of this decision.

Request and response

4. On 7 August 2023, the complainant wrote to the Council regarding the contract for the renovation of Alfred Gunn House. He believed that the contractor, Seddon, had submitted a tender bid of £11 million, the contract had eventually been agreed at £14 million and costs were now running at £28 million, with the work not yet completed. He asked:

“Accordingly, within the bounds of tender obligations:

- 1) State the number of bids for this contract;

- 2) Was the Seddon bid the lowest bid? If not, why was it accepted?
 - 3) Without identifying the bidders, what was the upper bid?
 - 4) The Construction media say the final agreed contract was valued at around £14m. Is that correct and, if not, what was the agreed figure?
 - 5) State all payments made to Seddon to date in respect of this specific project above the agreed contract price;
 - 6) If the project is not yet complete please state what further sums SMBC has agreed to pay Seddon until practical completion.
 - 7) Apart from confidential tender documents please disclose all documentation relating to each and every additional payment above the contract value. Please note that I am NOT requesting technical specifications etc but only documents relating to excess payments. Without prejudice to the generality of this request please ensure that all documentation showing Cllr [name redacted]'s personal involvement in this matter is fully disclosed."
5. Having notified the complainant that it needed further time to consider the balance of the public interest, the Council responded on 4 October 2023, as follows:
- It responded to points (1) – (3) of the request.
 - For point (4), it said "This is correct".
 - For point (5), it disclosed the total amount paid to Seddon.
 - For point (6), it said the matter was still under negotiation.
 - For point (7), it cited section 43 of FOIA to refuse to disclose the information it held (although it clarified that the named councillor had no personal involvement in the decision).
6. Following further correspondence, the complainant requested an internal review on 21 November 2023. The Council responded on 19 December 2023, as follows:
- For point (5), it disclosed a breakdown of the amounts paid.
 - For point (6), it said that negotiations remained underway and so the "information cannot be provided at this stage".
 - For point (7), it maintained its application of section 43.

Scope of the case

7. The complainant contacted the Commissioner on 12 January 2024 to complain about the way his request for information had been handled. He expressed dissatisfaction with the Council's response to points (5), (6) and (7) of the request.
8. During the Commissioner's investigation the Council amended its response to point (5), providing the information specified to the complainant.
9. The Commissioner has, therefore, considered whether the Council responded to point (6) in accordance with part 1 of FOIA. He has also considered whether it was entitled to rely in section 43 to refuse point (7).
10. The Commissioner has viewed the withheld information.

Reasons for decision

Section 1 – Information held

11. Point (6) of the request asked:

"If the project is not yet complete please state what further sums SMBC has agreed to pay Seddon until practical completion."
12. The Council says it does not hold information from which it could answer this point.
13. Where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner applies the civil standard of 'the balance of probabilities'.
14. This means the Commissioner must decide whether, on the balance of probabilities, a public authority holds any information which falls within the scope of the request. In deciding where the balance of probabilities lies, the Commissioner will consider the evidence and arguments of both parties, as well as any other pertinent information.
15. The complainant has not offered any evidence that the Council holds this information. It appears that it is simply his belief that it does.
16. The Council told the Commissioner that it does not hold the information. It said that at the time of the request (and currently) the project is not yet complete and no agreement has been reached regarding further

sums to be paid. It said negotiations with respect to this remain underway. It said such an agreement would form part of the final account process.

17. The issue for the Commissioner to consider here is whether the requested information **is** held by the Council. It is not whether it **should be** held by the Council. On this point, the Commissioner is mindful of the comments made by the Information Tribunal in the case of Johnson / MoJ (EA2006/0085), that FOIA:

“... does not extend to what information the public authority should be collecting nor how they should be using the technical tools at their disposal, but rather it is concerned with the disclosure of the information they do hold”.

18. Based on the wording of the request (which specifically asks the further amounts the Council has agreed to pay Seddon) and the Council's reasons for concluding it does not hold the information (ie that no further payments have yet been agreed), the Commissioner is satisfied that, on the balance of probabilities, the Council does not hold the information requested in point (6).

Section 43 – Commercial interests

19. The Council cited section 43 to withhold the information requested at point (7) of the request (all documentation relating to each and every additional payment above the contract value, apart from confidential tender documents).
20. Section 43(2) of FOIA states that information is exempt if its disclosure under FOIA would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
21. In order for section 43(2) to be engaged, three criteria must be met:
- the harm which the public authority envisages must relate to someone's commercial interests;
 - the public authority must be able to demonstrate a causal relationship between disclosure and prejudice to those commercial interests. The resultant prejudice must be real, actual or of substance; and
 - the level of likelihood of prejudice being relied upon by the public authority must be met (ie it must be shown that disclosure would, or would be likely to, result in prejudice occurring).
22. The Council's position is that the information falling in scope is commercially sensitive information, as it relates to the procurement of

Council services, to be delivered on the Council's behalf by a service provider. The complainant disputes that section 43 can apply, stating that he has requested financial information which the Council is required to publish.

23. The Council said that disclosure would be likely to prejudice the commercial interests of both the Council and Seddon, the service provider. It said:

"The withheld information in relation to documentation for excess payments contain details of the build-up to the valuations of additional payments such as contractual rates and information relating to the contractor's overheads and profits. Disclosing this information would allow competitors to work out Seddon's pricing mechanism/structures/strategy for work of this type and this would give its competitors an advantage over it in its pricing tenders for other contracts with local authorities. This would likely lead to Seddon being unsuccessful in obtaining tenders or losing business to competitors. There is more than a hypothetical risk of prejudice occurring, rather there is a real and significant risk of this prejudice occurring.

Furthermore, disclosure of the withheld information is likely to lead to the Council being placed at a disadvantage, as it could impact on negotiations relating to other contracts and procurements. It could lead to other competitors using the information to submit strategic bids for future procurements, thereby limiting the council's ability to obtain best value for money."

24. With regard to the three criteria set out in paragraph 21, the Commissioner is satisfied that the prejudice envisaged by the Council relates to its commercial interests and those of Seddon. His guidance¹ explains that a commercial interest relates to a legal person's ability to participate competitively in a commercial activity and the Council's arguments are concerned with those matters.
25. Next, the Commissioner has considered whether a causal link exists between the disclosure of the requested information and likely prejudice to commercial interests. He notes the detail of the information in scope and that, at the time of the request, the information was current. The withheld information contains detailed information about Seddon's pricing structures for the contract in question, which competitors could

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

use to undercut Seddon, when bidding against it for future, similar contracts.

26. He also recognises that disclosing information about the pricing structure for this contract would weaken the Council's negotiating position when tendering future, similar contracts with suppliers. Knowledge of the price it had recently agreed for particular services would be likely to make it more difficult for the Council to negotiate lower rates in future. Clearly, this could result in the Council not securing best value for money.
27. Lastly, the Commissioner is satisfied that the Council has shown in its arguments that the envisaged prejudice 'would be likely to' occur.
28. As the three criteria set out in paragraph 21 are met in respect of both parties' commercial interests, the Commissioner is satisfied that the exemption provided by section 43(2) is engaged.

Public interest test

29. Section 43(2) is subject to the public interest test, as set out in section 2 of FOIA. This means that although the exemption is engaged, the requested information must be disclosed unless the public interest in maintaining the exemption is stronger than the public interest in disclosure

Public interest arguments in favour of disclosure

30. The complainant has expressed concern about the amount of public money involved and the difference between the tender amount and the likely final costs, saying:

"when the contract is likely to be double the original tender offer there is clear public interest in ascertaining what has gone on here."

31. The Council recognised the general public interest in openness and transparency regarding local government decisions. Disclosure may also provide accountability in terms of decision-making and the spending of public money and could promote public understanding and confidence in its ability to manage public funds.

Public interest arguments in favour of maintaining the exemption

32. The Council argued that it must try to obtain best value for taxpayers' money when contracting with service providers, and anything that would undermine its ability to do this is not in the public interest. It said there is a public interest in the Council not being placed at a disadvantage when in commercial negotiations with the private sector, and that value

for money can be best obtained where there is a healthy competitive environment.

33. Noting that the contract was ongoing, it said it was not in the public interest for information to be released which could negatively influence ongoing and future negotiations associated with it as this would be likely to have an adverse effect on value for money for the Council and the taxpayers of Sandwell.
34. It said it was not in the public interest for the Council to disclose information that would be likely to damage the commercial interests of Seddon, as any resultant financial disadvantage may translate into job losses. It also argued that it was unfair for commercially sensitive information about Seddon to be disclosed, when the same information when relating to businesses that don't contract with the public sector, is regarded as confidential.
35. It concluded:

"The Council has supplied to the requester information in relation to the total amounts paid to Seddon above the agreed contract sum, which the public would have an interest in. The Council has informed the requester that the contract is not a fixed price contract, and there is scope for Adjustment Work in respect of Variations and other types of work. The withholding of the exempt documentation will not negatively affect accountability, as the Council has full and proper mechanisms in place for this, and there are sufficient statutory methods for the public to be involved in ensuring accountability."

Public interest balancing test

36. When balancing the opposing public interests in a case, the Commissioner will decide whether it serves the public interest better to disclose the information in question, or to withhold it, because of the interests protected by the relevant exemption.
37. The Commissioner accepts that, generally speaking, there is a presumption running through FOIA that openness is, in itself, to be regarded as something which is in the public interest. He also recognises the need for transparency and accountability on the part of public authorities, regarding the spending of public money and obtaining value for money. On this point, he notes the complainant is concerned that the costs payable by the Council seem to have increased quite considerably beyond those it agreed when Seddon's bid was accepted. However, the Council says that the complainant has been told that it was not a fixed price contract.
38. The Commissioner further notes that at the time of the request, the contract was still 'live'. Disclosure would reveal the pricing structure

applied in respect of an ongoing project, and it is very much "current-market relevant" information.

39. The Council has emphasised its ongoing need to be able to participate competitively in a commercial market. There is undoubtedly a public interest in allowing the Council to withhold information which, if disclosed, would negatively affect its ability to tender effectively and obtain best value for money.
40. The Tribunal has also noted that prejudicing the commercial interests of third parties would distort competition, which in itself would not be in the public interest:

"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".²
41. The Commissioner also considers it credible that suppliers may be less willing to contract with the Council if they have concerns that detailed, commercially sensitive information may be released under FOIA, to their detriment.
42. The Commissioner notes that the Council has disclosed some information about the payments. More detailed financial scrutiny of the contract is provided for in the oversight role of elected councillors, and through audit provisions.
43. On balance, while he recognises that the concerns the complainant has raised do themselves touch on issues of value for money, the Commissioner finds that there is a stronger public interest in preserving the Council's ongoing ability to negotiate competitively with a wide range of third-party suppliers. Protecting its position in this way will, overall, result in better value for money for the taxpayer.
44. Taking all the above into account, in this case, the Commissioner finds that the public interest favours maintaining the exemption.
45. It follows that the Commissioner's decision is that the Council was entitled to rely on section 43(2) of FOIA to withhold the information.

²<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i691/20120822%20Decisions%20combined%20EA20110188.pdf>

Right of appeal

46. 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

47. 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.
48. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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