

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

### **Decision notice**

**Date:** 27 June 2022

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

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

---

1. The complainant has requested information from Birmingham City Council regarding incidents and claims.
2. Birmingham City Council withheld some information on the basis of section 43(2) (commercial interests), provided some information, and stated that further 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

---

5. On 3 February 2021 the complainant requested information from Birmingham City Council ("the council") in the following terms:

"With regard to the following incidents/claims

A. 05/07/2020

Birmingham - column, sign pole, sign plate, oil, debris  
Fox Hollies Road, Junction of Harvingon Way, Birmingham  
Kier ref. GC\044709  
Kier Invoice # INV24905

B. 11/08/2020

lighting column replacement  
New Street Longbridge  
Kier ref. GC\045274  
Kier Invoice INV25157

I ask to be provided:

1. The amount Kier stated they claimed
2. The amount Kier stated they recovered
3. The breakdown of the charges; labour, plant and materials as conveyed to you
4. Confirmation (or otherwise) the rates are 'cost'
5. The uplift applied if any (as profit)
6. The management fee, if any (comprising profit)
7. The amount remitted to you
8. The detailed application submitted by Kier (monthly)
9. Any payment made to Kier

Please ensure the response sets out the method by which Kier makes a profit from the claims (fee or uplift)

Please also provide the detailed applications for payment submitted by Kier on a monthly basis since 01/09/2020; the detail for the costs incurred as well as the detailed cost transaction report for all levels of activity and associated costs, in Excel format".

6. The council responded on 5 March 2021, it withheld the information on the basis of section 43(2) (prejudicial to commercial interest).
7. The complainant requested an internal review on 8 March 2021.

8. The council sent the outcome of its internal review on 12 May 2021 in which the original position was upheld.
9. On 31 May 2022, during the course of the Commissioner's investigation, the council revised its response in relation to each question as follows:
  1. The information is not held. The only information required from Kier is the amount recovered, which is provided in response to 2 below.
  2. The council provided the requested information.
  3. Withheld on the basis of section 43(2).
  4. The council referred the complainant to a letter sent to them on 2 June 2021 which explains the basis of charging, costs and profit in relation to the contract.
  5. The council referred to the answer given for question 4.
  6. The council referred to the answer given for question 4.
  7. The council explained that the information is not held because no money was remitted to the council. The cost was deducted from the costs that the council pays for the services as per question 2.
  8. Withheld on the basis of section 43(2).
  9. The information is not held because the council does not make payment direct to Kier Highways Ltd for services under its contract with Birmingham Highways Ltd. It referred the complainant to the letter of 2 June 2021 which explains the basis of charging, costs and profit in relation to the contract.

### **Scope of the case**

---

10. The complainant contacted the Commissioner on 27 May 2022 to complain about the way their request for information had been handled. Following the updated response the complainant stated that they dispute the application of section 43(2) to request questions 3 and 8. Furthermore they believe that the council holds other information in scope of request questions 1, 4, 5, 6, 7 and 9.
11. The scope of this case is to decide whether the council was correct to withhold the information in scope of questions 3 and 8 on the basis of section 43(2) and whether it holds any further information in scope of the request.

## Background

---

12. 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).
13. Kier Highways was appointed as the preferred bidder to manage the interim highway services contract for BHL from 1 April 2020.
14. A Private Finance Initiative (PFI) is a long-term contract between a private party and a public sector 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

---

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

15. 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.
16. 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.
17. 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.

18. 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**

19. The complainant's position, in relation to each request question, is as follows:
1. The information is held on behalf of the authority.
  4. The response is unclear. Furthermore the complainant disputes that Kier will only charge cost as there will necessarily be a profit element in the process.
  5. The response is unclear and non-specific.
  6. This is unclear. The complainant stipulates that the council should address the request by explaining the figures and process in relation to each of the claims.
  7. The response does not explain how the costs are deducted from the cost the council pays.
  9. The complainant considers that the response given is subject to semantics. The payment from the council appears to be made to BHL and then to Kier. Therefore the information has not been provided.

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

20. In relation to each question the council has explained that it does not hold the requested information because there is no requirement, mainly due to the way the contracts are set up:
1. The council only holds a record of the amount Kier has recovered, it has no requirement to obtain the amount that Kier has claimed.
  - 4, 5, 6, 9. A full response was provided to the complainant on 2 June 2021 which explains the basis of charging, costs and profit in relation to the contract.
  7. The council does not hold this information because no money was remitted to the council. The cost would have been deducted from the costs that the council pays via BHL for the services which was provided in answer to question 2.

### **The Commissioner's analysis**

21. The council has provided detailed explanations to the complainant regarding how services are provided and charged for.
22. The Commissioner has reviewed the letter that the council sent to the complainant on 2 June 2021, in this respect, which explains the basis of charging, costs and profit in relation to the contract.
23. Extracts from the letter of 2 June 2021 state:

"This is a 'cost reimbursable' contract. The terms of the contract mean that BHL pays Kier Highways Ltd for defined costs that are acceptable under the contract upon confirmation and demonstration of those costs. BHL (and therefore the council) pays Kier the full charge of employing all the staff and resources required to provide all of the services under the contract.

Under the payment arrangements, BHL pays an agreed Management Fee to Kier in addition to the actual cost of service provision. The Management Fee is subject to Kier's performance against defined Key Performance Indicators. The Management Fee includes Kier's profit and management / overhead costs.

Where a third party is responsible for damage to the council's highway infrastructure:

- a. Kier repairs the damage using the resources that it employs and for which it charges BHL under the Interim Services Contract, within the submission of its full service provision costs.
  - b. BHL reviews and approves those costs in accordance with its contract. The approved cost is paid by BHL to Kier and (after the council's own review) the council pays the approved cost to BHL.
  - c. Kier acts to recover costs that it has incurred from third parties where the third party is at fault. To calculate the cost to the third party, Kier uses a Schedule of Rates (KSoR) that is specific to this contract.
  - d. All recovered costs in relation to third party claims are deducted from the costs that are billed to BHL and thus to the council."
24. The Commissioner has considered the council's position in conjunction with the request and the information that was provided to the complainant during the course of the investigation.
  25. The council has given explanations to the complainant regarding the charging mechanism of the PFI contract. This also gives an explanation

as to why some of the requested information is not required and therefore is not held by the council.

26. The Commissioner is satisfied by the explanations provided by the council.
27. On this basis the Commissioner has concluded, on the balance of probabilities, that no further information is held by the council which was in scope of the request

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

28. 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).
29. The term 'commercial interests' is not defined in the FOIA; however, the Commissioner has considered his 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."
30. The complainant has requested
  3. The breakdown of the charges; labour, plant and materials as conveyed to you
  8. The detailed application submitted by Kier (monthly)

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

31. The council has provided the Commissioner with the withheld information, this being the "BHL Payment Notice" and the "Works Application Feb 2021".
32. The information contains a detailed breakdown of payments, charges, costs and commercial assessments for all aspects of the contract. The Commissioner accepts that the information is therefore commercial in nature.

---

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

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

33. 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.
34. 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.
35. 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).
36. 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**

37. The council states that disclosure of the withheld information "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.

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

38. 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.
39. 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.
40. 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.
41. 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**

42. 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**

43. The council recognises that there may be some public interest in providing transparency regarding precise cost details in relation to claims under the contract.

44. The complainant is concerned about transparency. More specifically, they contend that the information is required to ensure drivers, fleets, hauliers or their insurers are charged appropriately, stating “utilising the ‘mates rates’ BCC has negotiated, the pricing they feel it is reasonable to pay as I believe this is what ‘those BCC serve’ should be paying’.”

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

45. The council argues that the effect of publishing the withheld information would be likely to harm the commercial interests of both the contractors and the council. This would prejudice BHL’s ability to obtain a competitively procured price for the services it supplies to the council under that procurement.
46. 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.

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

47. 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 withheld information were to be disclosed and this would be counter to the public interest.
48. The conclusion of the Commissioner is that the public interest in the maintenance of the exemption outweighs the public interest in disclosure in this case. The council is not, therefore, obliged to disclose this information.

## Right of appeal

---

49. 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)

50. 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.
51. 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**