

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 26 January 2016

**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 a copy of a funding grant offer made to First Press (Plastic Moulders) Ltd. The Commissioner's decision is that Birmingham City Council has incorrectly applied both the exemption where disclosure would prejudice commercial interests at section 43(2) of the FOIA and the exemption for information provided in confidence at section 41 of the FOIA.
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
  - Disclose the information redacted from the requested funding offer letter.
3. The public authority must take this step 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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4. On 28 July 2015, the complainant wrote to Birmingham City Council ('the council') and requested information in the following terms:

"Would you please send me a copy of the Grant Offer made to First Press(Plastic Moulders)Ltd @15 Pritchett Street Birmingham B64EH"

5. The council responded on 12 August 2015 and refused to provide the requested information citing the exemptions at sections 41 and 43(2) of the FOIA.
6. The complainant requested an internal review on 19 August 2015 stating that the expenditure of public money should be in the public domain.
7. On 9 September 2015, the council provided its internal review response. It revised its position and stated that although parts of the funding offer letter are confidential and commercially sensitive this would not apply to the whole document. It said that the exemptions used in the original request only apply to First Press Ltd the total funding offered, proposed project details and project costs.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 18 September 2015 to complain about the way his request for information had been handled.
9. The Commissioner has considered the application of section 43(2) and section 41 of the FOIA to the withheld information.

### **Reasons for decision**

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#### **Section 43(2) – Prejudice to Commercial Interests**

10. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.
11. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43<sup>1</sup>. This comments that:

“...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1178/awareness\\_guidance\\_5\\_v3\\_07\\_03\\_08.pdf](https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf)

goods or services.”

12. In this instance the council has applied section 43(2) to information redacted from a funding offer letter. The information relates to funding for a specific commercial project relating to the sale of goods and therefore the Commissioner considers that the requested information does fall within the remit of section 43(2) FOIA.
13. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that “likely to prejudice” means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. “Would prejudice” places a much stronger evidential burden on the public authority and must be at least more probable than not.
14. In its submission to the Commissioner, the council said that it is relying on the lower threshold of likelihood, that being that disclosure ‘would be likely to’ have a prejudicial effect.
15. The council said that both it and the funding applicant (First Press) would suffer a prejudicial effect.
16. The Commissioner has considered how any prejudice to commercial interests would be likely to be caused by the disclosure of the redacted information. This includes consideration of whether the prejudice claimed is “real, actual or of substance” and whether there is a causal link between disclosure and the prejudice occurring.
17. The council submitted the following;

“There is a clear link between disclosure of the information requested, and prejudice to both parties’ commercial interests. Public authorities possess commercial information in numerous circumstances. Policy implementation encourages economic development via the awarding of grants and this may result in information regarding both commercial and financial interests to be held. This information, if disclosed is therefore likely to prejudice both the third parties commercial interest and their financial interests. As regards the City Council’s own commercial interests, whilst the grant of funding primarily benefits the applicant company, there are also favourable implications for the Council in its future dealings with those companies once they are established and successful, which in turn benefit local taxpayers.”
18. In relation to the third parties interests, the council also said that the nature of the companies who apply for assistance in the form of grants is such that they are relatively new, and are usually competing by offering something different from their rivals.

19. In relation to the council's own interests, the council said that the funding of new companies at their inception is likely to ensure competitive tenders and contract terms in future projects with such companies, ensuring good value for local taxpayers.
20. When claiming that disclosure would prejudice the commercial interests of a third party, the Commissioner expects a public authority to obtain arguments from the third parties themselves. In his enquiries to the council, the Commissioner asked the council to clarify on what basis it has established that disclosure of a third party's interests may occur and to provide copies of any correspondence the council has had with third parties in relation to this request.
21. The council provided the Commissioner with a copy of a letter from it to the complainant stating that First Press has declined permission to share the requested information. It also provided copies of emails between it and First Press which set out recent events between the complainant and First Press. The Commissioner notes that neither the letter nor the emails provide details of why the information should be withheld that relate to the commercial interests of First Press. The Commissioner's aforementioned guidance on section 43 states the following:

"It is important to note that in claiming the exemption on the basis of prejudice to the commercial interests of a third party, the public authority must have evidence that this does in fact represent or reflect the view of the third party. The public authority cannot speculate in this respect; the prejudice must be based on evidence provided by the third party, whether during the time for compliance with a specific request or as a result of prior consultation. This approach has been confirmed by the Information Tribunal<sup>2</sup>."

22. The Commissioner's guidance on 'The Prejudice Test'<sup>3</sup> states that;

"If an authority claims that prejudice would be likely to occur they need to establish that

- there is a plausible causal link between the disclosure of the information in question and the argued prejudice; and

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<sup>2</sup> Derry City Council v Information Commissioner (EA/2006/0014; 11 December 2006)

<sup>3</sup> [https://ico.org.uk/media/for-organisations/documents/1214/the\\_prejudice\\_test.pdf](https://ico.org.uk/media/for-organisations/documents/1214/the_prejudice_test.pdf)

- there is a real possibility that the circumstances giving rise to prejudice would occur, ie the causal link must not be purely hypothetical; and
  - the opportunity for prejudice to arise is not so limited that the chance of prejudice is in fact remote.”
23. The Commissioner does not consider that the explanation given by the council (at paragraphs 17 - 19) sufficiently demonstrates a causal link between the disclosure of the redacted information and the prejudice to commercial interests. The explanations are couched in very general terms and no link is made between the information that has actually been withheld and the prejudice to commercial interests. This was despite the council being informed by the Commissioner that it must justify its position and being provided with the Commissioner’s guidance on how he deals with complaints<sup>4</sup> which clearly states that it is the public authorities’ responsibility to satisfy the Commissioner that information should not be disclosed and that it has complied with the law.
24. It is not for the Commissioner to speculate as to how the prejudice would be likely to occur. The lack of sufficient arguments from the council, coupled with the lack of confirmation that First Press would consider disclosure would be prejudicial to its commercial interests, has led the Commissioner to the conclusion that section 43(2) of the FOIA is not correctly engaged in this case.

### **Section 41(1) Information Provided in Confidence**

25. This exemption provides that information is exempt if it was obtained by the public authority from any other person and the disclosure would constitute an actionable breach of confidence.

#### **Was the information obtained from another person?**

26. The first step is for the Commissioner to consider whether the information was obtained by the council from any other person in order to satisfy the requirement of section 41(1)(a).

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<sup>4</sup> [http://www.ico.org.uk/for\\_organisations/freedom\\_of\\_information/guide.aspx](http://www.ico.org.uk/for_organisations/freedom_of_information/guide.aspx)

27. In his enquiries to the council, the Commissioner asked the council to identify which third party provided it with the withheld information and pointed out that it appears that a letter from the council to a third party would not constitute 'information provided by a third party'.
28. The council said that the third parties who provided the information were the applicant for funding and the funding bodies listed in the letter. It said that the redacted items are confidential information provided by third parties.
29. In deciding whether information has been 'obtained from any other person', the Commissioner will focus on the content of the information rather than the mechanism by which it was imparted and recorded.
30. Given that the redacted information relates to the value of the grant applied for, the purpose and costs of the project and the number of jobs to be created and safeguarded, the Commissioner is satisfied that the withheld information in this case was obtained from another person.
31. Having established that the withheld information was obtained from other persons, the Commissioner must next consider whether or not its disclosure to the public (otherwise than under the FOIA), would constitute a breach of confidence 'actionable' by that or any other person.

### **Actionable claim for breach of confidence**

32. Whilst it is not the only test for establishing confidence, the Commissioner finds that the appropriate test for this case is that which is set out in the case of *Coco v Clark* [1969] RPC 41. According to the decision in this case a claim for breach of confidence can be established where:

"... three elements are normally required if ... a case of breach of confidence is to succeed. First, the information itself ... must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it..."
33. All three elements must be present for a claim to be made. However, for that claim to be 'actionable' within the meaning of section 41(1)(b) of the FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed. This requires consideration of whether or not there would be a public interest defence to such a claim.

### **Necessary quality of confidence**

34. For information to have the necessary quality of confidence it must be more than trivial and not otherwise accessible.
35. The Commissioner is satisfied that the information in this case, that being the specifics of a funding grant from the council to First Press, is not trivial.
36. However, as stated above, this alone is not sufficient to indicate that the material has the necessary 'quality of confidence'. Therefore the Commissioner has considered whether the information is otherwise accessible.
37. The council said that the redacted information is not otherwise accessible, being clearly marked 'commercial in confidence' at the head of the letter.
38. The Commissioner accepts that the withheld information in this case has the necessary quality of confidence.

### **Obligation of confidence**

39. Even if information is to be regarded as confidential, a breach of confidence will not be actionable if it was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.
40. The council said that the information was communicated in circumstances importing an obligation of confidence as the letter is marked 'commercial in confidence'.
41. The Commissioner accepts that there is an obligation of confidence in this case.

### **Detriment to confider**

42. Having considered whether the information in this case was imparted in circumstances giving rise to a duty of confidentiality and had the necessary quality of confidence, the Commissioner must also consider whether unauthorised disclosure could cause detriment to the confider.
43. The council said that unauthorised disclosure would cause a specific detriment to both the confider and the confidant. It said that making accessible to the world at large the confidential terms, conditions and funding for a council special project would be to the detriment of both parties.

44. The council did not provide any details of what the detriment to the confider would be or how the detriment would be experienced if the confidence was breached.
45. It is not for the Commissioner to speculate as to what the detriment would be. The council was informed by the Commissioner that it must justify its position and was provided with the Commissioner's guidance on how he deals with complaints<sup>5</sup> which clearly states that it is the responsibility of the public authority to satisfy the Commissioner that information should not be disclosed and that it has complied with the law.
46. The Commissioner considers that the council has been provided with sufficient opportunity to provide its rationale for withholding the redacted information. The rationale should have been in place since the request was refused and therefore opportunities for providing this existed when responding to the request and when requested by the Commissioner.
47. He has therefore concluded that the council has not sufficiently demonstrated that there would be detriment to the confider. Therefore, the Commissioner considers that the test of confidence fails on this limb and therefore section 41 does not apply.

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<sup>5</sup> [http://www.ico.org.uk/for\\_organisations/freedom\\_of\\_information/guide.aspx](http://www.ico.org.uk/for_organisations/freedom_of_information/guide.aspx)



## Right of appeal

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48. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

49. 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.
50. 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** .....

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**