

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

### **Decision notice**

**Date:** 13 June 2019

**Public Authority:** Belfast City Council

**Address:** City Hall  
Belfast  
BT1 5GS

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

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1. The complainant has asked Belfast City Council for copies of emails and correspondence sent between Councillor Lee Reynolds and Mr Richard Cook, which are held on the Council's email server. In particular, the complainant asked the Council for copies of emails which concern 'Vote Leave', 'Constitutional Research Council' and 'CRC'. The Council confirmed that it holds some emails falling within the first part of the complainant's request and also that it does not hold any emails which meet the terms the complainant specified. The Council informed the Commissioner that it now seeks to withhold the emails it holds in reliance on sections 3(2), 40(2), 41, 43, and 44 of the FOIA.
2. The Commissioner has decided that Belfast City Council is not able to rely on section 3(2) of the FOIA in respect of the emails it holds. She finds that the Council holds those emails for its own purpose, at least in part. The Commissioner has also decided that the Council has properly applied the exemption provided by section 43(2) of the FOIA to the emails it holds.
3. No further action is required by the Council in this matter.

## Request and response

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4. On 16 April 2018, the complainant wrote to Belfast City Council and asked to be provided with the following information:

"Emails held on the Belfast city council email server between Councillor Lee Reynolds and Richard Cook.

Emails written or received by Councillor Lee Reynolds held on the Belfast city council email server, which include the following search terms: 'vote leave', 'Constitutional research council' and CRC.

Written correspondence between Councillor Lee Reynolds and Richard Cook."

5. The Council responded to the complainant's request on 16 May 2018, confirming that the Council holds information in relation to part 1 of his request but does not hold information requested in respect of parts 2 and 3.
6. With regard to part 1 of the request, the Council advised the complainant that it considers the information is exempt from disclosure under Section 43(2) of the Freedom of Information Act. The Council considered that disclosure of the requested information would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it. The Council advised the complainant that it would require further time to consider the public interest arguments related to his request.
7. On the 13 June 2018, the Council wrote to the complainant and informed him that the emails it holds cannot be disclosed on the grounds that they are subject to an application of the exemption provided by section 41(1) of the FOIA. The Council said, "In this case the emails you requested relate to information that was obtained from another person, namely Mr Cook, and are subject to a non-disclosure agreement".
8. On the 15 June 2018 the complainant asked the Council to conduct an internal review. The complainant's email set out his rebuttal of the Council's application of section 41(1) making reference to the Commissioner's guidance on that section.

9. The complainant advised the Council that, "During the EU referendum period Mr Reynolds was working for Vote Leave. Richard Cook has been identified as a major DUP donor. Communication during this period could represent a serious breach of electoral law. It is therefore incumbent on the council to review all of the information sought in this context because if the council concludes that there would in the circumstances be a defence to a breach of confidence action, then the section 41(1) exemption would not be available and the information should be disclosed".
10. Having reviewed its handling of the complainant's request, the Council responded to the complainant on the 6 August 2018, advising him that it had decided to uphold its decision to withhold the requested information under Section 41(1).

### **Scope of the case**

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11. The complainant contacted the Commissioner on 22 August 2018 to complain about the way his request for information had been handled.
12. Having reviewed the documents provided by the complainant, the Commissioner spoke with the complainant on 23 February 2019 to advise him that, in the first instance, the focus of her investigation will be to determine whether Belfast City Council holds the emails he has requested for any of its own purposes and to decide whether the Council is entitled to rely on section 3(2) of the FOIA.
13. Additionally, if the Commissioner decided that the Council does hold the requested information for its own purposes, the Commissioner advised the complainant that she would then determine if the Council is entitled to withhold information from him in reliance of any other substantive exemptions that the council may choose to rely on.

### **Information already in the public domain**

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14. The Council has advised the Commissioner that, in response to another freedom of information request of 17 August 2018, the Council disclosed that it hosted a meeting at which Mr Richard Cook was present on 4 August 2016. The purpose of that meeting was to discuss the potential for commercial site acquisitions in Belfast.

15. In response to a further request submitted on 12 October 2018, the Council disclosed that, in addition to Mr Cook, the following individuals were present at the meeting held on 4 August 2016, Suzanne Wylie, the Council's Chief Executive, Nuala Gallagher, Interim Director of City Centre Development, and Cllr Lee Reynolds. The Council also disclosed that the potential commercial sites discussed were Sirocco and Queen's Quay. The Council made clear that they (Belfast City Council) does not have an interest in either of these sites.
16. Additionally, in response to a recent press enquiry concerning meetings involving the Council's Chief Executive and Richard Cook held in August 2016 and February 2017, the Council disclosed the following information:
17. "The Council regularly meets with potential investors, and their representatives, who express an interest in pursuing projects in the city. It is normal procedure that the Chief Executive and/or members of her senior management team will host introductory meetings in order to provide information or to signpost investors to others who can assist them in taking their projects forward. Meetings took place with Mr Cook present on two occasions, 16 August 2016 and 15 February 2017. Prior to those meetings Mr Cook was not known to any of the senior management team.
18. Present at the first meeting were Mr Cook, Councillor Lee Reynolds, the then Belfast City Council Director of City Centre Development, and Belfast City Council Chief Executive. Present at the second meeting were Mr Cook, a representative of an investment company from the US, Belfast City Council Director of Legal & Civic Services, the former Belfast City Council Directors of Planning and City Centre Development, and Belfast City Council Chief Executive.
19. The purpose of the meeting was to explore the potential proposition of a significant investment company to fund major commercial building projects in Belfast targeting regeneration. Nothing materialised from these meetings and there was no further follow-up."
20. The Council has since corrected the date of the meeting identified as taking place on 16 August 2016. It has advised the Commissioner that the meeting in question was actually held on 4 August 2016.
21. The Council has confirmed to the Commissioner that it is content to disclose the following information:

The withheld emails relate solely to the identification of possible development sites in Belfast on behalf of a potential investor;

Arrangements for the meeting held on 15 February 2017;

Details provided by a Council official on an identifiable individual associated with another investment company, and the portfolio of the company.

## Reasons for decision

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22. The Council has provided the Commissioner with copies of the emails it is withholding from the complainant. Those emails were sent during the period between 18 November 2016 and 17 March 2018. The Council has confirmed that the Council now relies on section 3(2) of the FOIA to withhold those emails.
23. In giving this confirmation, the Council has explained why it told the complainant that the Council holds the requested emails.
24. The Council says that Councillor Reynolds and Mr Cook corresponded using the Councillor's Council email account – the type of account made available to all elected members. On the basis that the requested emails were on the Council's email server - and therefore physically in the Council's possession, the Council told the complainant that it held that information.
25. Having considered the matter further, the Council now asserts that the requested emails are not held by the Council for FOIA purposes as defined Section 3(2)(a) of the FOIA.
26. The Council has provided the Commissioner with unredacted copies of the email correspondence it holds which is relevant to question 1 of the complainant's request made on 16 April 2018.
27. It has confirmed to the Commissioner that the Council holds no further information in respect of the complainant's question 1 and also that it does not hold, in any sense of the word, any recorded information which is relevant to questions 2 and 3 of the complainant's request.

### *Section 3(2) – information held by a public authority*

28. Section 1 of the FOIA states that any person making a request for information is entitled to be told whether the public authority holds the information requested and, if held, to be provided with it.
29. Section 3(2) sets out the criteria for establishing if information is held for the purposes of the FOIA:
30. "For the purposes of this Act, information is held by a public authority if

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority.”

31. The Commissioner’s guidance on “Information held by a public authority for the purposes of the FOIA “states that when a public authority holds information solely on behalf of another person it is not held for the purposes of the FOIA and that each case needs to be considered according to the specific circumstances.
32. The Commissioner’s guidance considers that a key determining factor is whether the Council has any interest in, or control over, the disputed information.
33. The Council has advised the Commissioner that Councillor Reynolds was not undertaking Council business when he sent or received the requested emails. It says that Councillor Reynolds was acting solely in a party or political capacity when he sent and received the requested emails and it adds that the requested emails are not held by the Council to any extent for its own purposes.
34. The Council has described the circumstances in which the correspondence between Councillor Reynolds and Mr Cook arose.
35. The Council says that Councillor Reynolds was contacted on behalf of a potential investor seeking to identify possible development sites in Belfast. The Council assisted the Councillor by providing him with information about such sites and made arrangements for a meeting with Mr Cook – a representative of the potential investor and Council officers. Notwithstanding its assistance to Councillor Reynolds, the Council asserts that he was not undertaking Council business in his email correspondence.
36. In view of the preceding paragraph, it is clear to the Commissioner that, whilst Councillor Reynolds and Mr Cook were not engaged in substantive council business at the time the emails were sent and received, they were engaged in potential business which was at the very least of some interest to the Council. Having examined the withheld information, it is clear to the Commissioner that the Council provided some of the content of the email chain, facilitated the Councillor’s enquiries, and made arrangements for meetings involving the Council’s Chief Executive and senior officers.
37. The Commissioner cannot rule out the possibility that the withheld emails have some party political or political purpose or motivation, although this is not self-evident from their contents. She can however discern that the Council has a clear interest in and control over the

contents of some of the emails and therefore the Commissioner does not accept the Council's reliance on section 3(1) of the FOIA.

38. The Commissioner's decision is given greater weight by the fact that the Council entered into a non-disclosure agreement with a representative of a potential investor, which indicates, at least to some extent, the Council's own interests in the subject matter of the withheld emails.
39. In view of her decision in respect of the Council's reliance on section 3(1), the Commissioner is required to consider the Council's reliance on alternative exemptions to disclosure, i.e. sections 40(2), 41, 43, and 44 of the FOIA. In the first instance the Commissioner will consider the Council's application of section 43(2) of the FOIA.

### **Section 43 – Commercial interests**

40. The Council has advised the Commissioner that it seeks to rely on section 43(2) to withhold the emails requested by the complainant.
41. Section 43(2) provides an exemption from disclosure if the information would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
42. The Commissioner considers that three criteria must be met for the exemption to be engaged:
  - 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;
  - 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
  - it is necessary to establish whether the level of likelihood of the prejudice being relied upon by the public authority is met. In other words, disclosure 'would or would be likely' to result in prejudice.

43. The term 'commercial interests' is not defined in the FOIA. In the Commissioner's guidance on section 43 (Freedom of Information Act Awareness Guidance No 5)<sup>1</sup> the Commissioner considers that:

*"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services".*

44. The Commissioner must consider the prejudice that disclosure of the withheld information would cause in respect of the Council's commercial interests, and to any other party or parties that would be affected.

45. Section 43(2) has 2 limbs: They concern the probability of the prejudice occurring, should the withheld information be disclosed. 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.

46. In this case, the Council has explained that it considers disclosure would prejudice the commercial interests of the Council and those of a potential investor.

47. The Council has provided the Commissioner with an explanation of how the emails came into existence. It says that Mr Cook contacted Cllr Reynolds on behalf of the potential investor who sought information on potential development sites in Belfast for the purpose of investment.

48. As made clear by the existence of the non-disclosure agreement mentioned above, the investor did not want their intentions to become public knowledge, as this would prejudice their commercial interests in negotiations with the owners of potential sites and would give the company's competitors an insight into their business plans and damage the potential investor's commercial interests in a highly competitive environment.

49. To protect its commercial interests, the potential investor entered into the non-disclosure agreement which contained an obligation of

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[https://ico.org.uk/media/fororganisations/documents/1178/awareness\\_guidance\\_5\\_v3\\_07\\_03\\_08.pdf](https://ico.org.uk/media/fororganisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf)



confidence on commercial grounds. Even though this agreement expired twelve months after 31 January 2017, the Council argues that it is indicative that the information concerned was serious, confidential and critical to the potential investor's commercial interests.

50. The Council argues that the obligation of confidence remains in force and disclosure of the emails would prejudice the investor's commercial interests. It would potentially jeopardise the investor's future negotiations with the landowners of development sites and would give the company's commercial competitors an unfair insight into the investor's business plans in a highly competitive commercial environment. Likewise disclosure of the emails would likely result in the loss of the Council's credibility with, and trust of, potential investors in development sites which remain available.
51. The Council asserts that its own commercial interests would be prejudiced. It points out that it regularly meets with potential investors and their representatives, who express an interest in pursuing projects in the city. These meetings can involve the exchange of information which has a commercial value and is commercially sensitive to the potential investor. It is therefore of great importance to the Council to maintain its credibility and reputation with potential investors to protect their legitimate commercial interests.
52. In this case, disclosure of the requested information would damage the Council's credibility with the potential investor and also its credibility with other potential investors. The Council therefore concludes that disclosure of the requested information would prejudice its commercial interests.
53. To support its position further, the Council has drawn the Commissioner's attention to provisions of the Local Government Act (Northern Ireland) 2014. Schedule 6 of that Act covers 'Access to Information' and provides descriptions of exempt information. Under Part 1, paragraph 3 of Schedule 6, 'Information relating to the financial or business affairs of any particular person (including the council holding that information)', is described as exempt information. The Council therefore holds the position that the withheld information clearly relates to the business affairs of particular persons.
54. The Council argues that there is a clear link between the disclosure of the requested information and the prejudice that would be caused to the commercial interests of the Council and the potential investor. The Council has not considered it necessary to consult with the potential investor in respect of its application of section 43(2). However the Council asserts that it has not taken account of speculative arguments. Rather, the Council's arguments are based on its prior knowledge of the

third party's concerns and the fact that the investor operates in a highly competitive commercial environment. It is on that basis that the Council has determined that disclosure of the withheld emails 'would' have a prejudicial effect on its own commercial interests as well as those of the investor.

55. In the Council's opinion this prejudice constitutes a real and significant risk, and is much more than a hypothetical possibility. The Council's position is based on recognising the fact that the information is relevant to a highly competitive commercial environment and that the information requested is of commercial value and is commercially sensitive.
56. The Council argues that disclosure of the requested information would be of significant commercial benefit to the owners of the potential development sites and to the potential investor's competitors. The effect of disclosure would be to weaken the potential investor's negotiating position with the owners of potential sites and damage the potential investor's competitive edge in relation to business competitors.
57. The damage to the Council's credibility and reputation, and thereby prejudice its own commercial interests relates to the risk that future investors would be reluctant to engage with the Council if they thought that commercially sensitive information would be disclosed into the public domain. This in turn would have an adverse effect on the Council's ability to deliver one of its key functions, namely, the economic development and regeneration of the city. This leads the Council to argue that it is critically important that, at all times, potential investors should have confidence and trust in the Council and ensure that its credibility is maintained.
58. The Council has advised the Commissioner that this is particularly important at this time due to the relatively recent announcement of a City Deal and Treasury funding for infrastructure projects, and there being significant levels of interest from the commercial sector in relation to potential development.
59. The Commissioner has examined the information which the Council has withheld in reliance on section 43(2). On the grounds that she considers that the essence of commerce is trade or some form of commercial activity such as the sale or purchase of goods or services for profit, the Commissioner accepts that the withheld information engages this exemption.
60. It is clear to the Commissioner that the withheld information concerns a potential investor's interest in investing in the Belfast City. The Commissioner is therefore content that the information falls within the

scope of the exemption provided by section 43(2) on the grounds that it relates to commercial activity.

61. Section 43 is a qualified exemption and consequently the Authority's reliance on section 43 is subject to the Commissioner's consideration of the public interest.

#### *The public interest*

62. The Commissioner will always give significant weight to the public interest where disclosure of information provides accountability and transparency for decisions taken by public authorities, and where the decisions concern public expenditure and significant numbers of people.
63. In this case, disclosure of the withheld information concerns potential investment in developments within Belfast City. The Commissioner accepts that disclosure of the information requested by the complainant would allow the public to scrutinise the information which the Council has provided to the potential investor.
64. The Commissioner acknowledges that disclosure is likely to provide a degree of accountability in that disclosure would assist the public to understand and challenge the Council's role and decisions in relation to future development in the city and the spending of public money in this regard.
65. In the Commissioner's opinion, disclosure of the withheld information would allow for a more informed public debate in respect of the future development of the city.
66. Weighed against these factors is the strong public interest in maintaining the confidentiality of commercially sensitive information which remains current. Added to this is the fact that information relevant to the complainant's request has already been placed into the public domain and the Commissioner is unable to find any obvious exceptional circumstances which would warrant the disclosure of the withheld information.

#### *The Commissioner's decision*

67. The Commissioner must recognise the public interest in withholding information which could significantly undermine a potential investor's ability to engage in negotiations and the fact that disclosure would more than likely damage the Council's credibility and reputation in attracting investment into the city.

68. This, together with the fact that the information still has currency leads the Commissioner to find that the weight of the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
69. The Commissioner's decision is that the Authority has correctly applied the exemption provided by section 43(2) to the information contained in the withheld emails.
70. Notwithstanding this decision, the Commissioner notes the Council's reliance on section 44 of the FOIA. In the Commissioner's opinion the exemption provided by section 44 is likely to be engaged.
71. Section 44 provides an absolute exemption to the disclosure of information which is prohibited by or under any enactment.
72. In this case the Council has identified the provision of Schedule 6 of the Local Government Act (Northern Ireland) 2014. The Commissioner notes that reliance on Schedule 6 of that Act is itself subject to a public interest test. In the Commissioner's opinion the same public interest considerations outlined above would be relevant to the application of Schedule 6 and therefore engage section 44 of the FOIA. This, together with the Commissioner's decision in respect of the Council's reliance on section 43(2), means that the Commissioner has not gone on to consider the Council's additional application of sections 40(2) and 41.

- 73. Right of appeal
- 74. 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)

- 75. 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.
- 76. 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  
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