

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

### **Decision notice**

**Date:** 19 December 2019

**Public Authority:** Barrow Borough Council

**Address:** Town Hall  
Duke St  
Barrow-in-Furness  
LA14 2LD

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

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1. The complainant has requested information about a Schedule of Works for property repairs. Barrow Borough Council withheld the information under the exemption for prejudice to commercial interests – section 43(2) of the FOIA.
2. The Commissioner's decision is that Barrow Borough Council has correctly withheld the requested information under section 43(2) of the FOIA.
3. The Commissioner does not require the public authority to take any steps.

## Request and response

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4. On 31 July 2019, the complainant wrote to Barrow Borough Council (the "council") and requested information in the following terms:

*"Contractor No 1 £445,882.59 obtained from DPL Services (Northern) Ltd.  
Contractor No 2 £350,791.67 obtained from Keepmoat Ltd.  
Contractor No 3 £462,696.71 obtained from Herbert T Forest Ltd.  
Contractor No 4 £470,178.84 obtained from Mayson Bros Ltd.  
Contractor No 5 £484,863.41 obtained from Esh Property Services  
Contractor No 6 £494,712.27 obtained from Westhoughton Roofing & Pointing Services Ltd.  
Contractor No 7 £628,256.09 obtained from Top Notch Contractors Ltd.  
Contractor No 8 £679,025.28 obtained from Bullock Construction Ltd.  
Contractor No 9 £694,483.01 obtained from Stobbarts Ltd."*

5. The council responded on 2 August 2019. It stated that it was withholding the information under the exemption for information intended for future publication – section 22 of the FOIA.
6. Following an internal review the council wrote to the complainant on 30 August 2019 in which it revised its position, dropping its reliance on the exemption in section 22 and confirming that the information was now being withheld under the exemption for commercial interests – section 43(2) of the FOIA.

## Scope of the case

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7. On 5 September 2019, following the internal review, the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld information under section 43(2) of the FOIA.

## Reasons for decision

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### Section 43 – prejudice to commercial interests

9. The council provided the Commissioner with the following background details as context to the request

*"...during the winter of 2015 a number of properties on the Island of Walney were badly affected by storms. This led to an on-going penetrating damp problem. In 2017 the Council's housing maintenance team decided to carry out some remedial work which the estimated to be approximately £300k. The work would be recharged to the tenants and under the Landlord and Tenant Act 1985 - Section 20 because the cost would be more than £250 per tenant they carried out a consultation exercise. Having undertaken some work on a "pilot block" of properties it became clear, that additional work would be required. In February 2018 the Council started a second consultation exercise estimating that each leaseholder would have to pay £9,370. [redacted] requested a fully priced "schedules of works" from the successful contractor."*

10. The withheld information consists of a highly detailed breakdown of the rates for the work carried out by the contractors appointed by the council.
11. Section 43(2) of the FOIA says that information is exempt information if its disclosure under the FOIA would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). The exemption is subject to the public interest test.
12. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met. Firstly, the actual harm that 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.
13. The council has confirmed that disclosing the information would prejudice the commercial interests the contractors who had submitted tenders for this piece of work.
14. The council has explained that the withheld Schedule of Works relate to the cost that a contractor would apply to a specific task, for example, a contractor may quote Plastering = £50 per square metre which they would apply to every job they tender for. The council clarified that on the Procure Plus framework schedule of works prices are valid for 4 years so it is very likely that if they apply to repeat tender exercise then the schedule of works prices would be the same. This information could also be applied to other pieces of work which are not related to this

project thereby putting these contractors at a disadvantage if they tender for other work.

15. In accordance with the code of practice issued under section 45 of the FOIA, the council sought the views of the relevant contractors about the potential effects of disclosing the information<sup>1</sup>.
16. The council stated that the contractors in question explicitly highlighted the commercial sensitivity of their prices within the Schedule of Works and confirmed that they would be commercially disadvantaged if the information were to be made public.
17. The council has argued that disclosing the fully priced Schedules of Works would reveal the bidding strategies used by contractors to draw up their tenders for similar works and this would to prejudice the commercial interests of the contractors who had submitted prices during the second consultation exercise.
18. The council has further argued that there are other local construction companies which could potentially bid for the work as part of the third consultation exercise. The council considers that disclosing the Schedule of Works details would give these companies a commercial advantage over the other contractors bidding during the third consultation exercise. In other words, disclosure would result in competitors changing their strategy in a way that would be to the detriment of contractors who had submitted their Schedule of Works to the council.
19. Regarding the third criterion, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – e.g., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

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<sup>1</sup> See page 16 of the section 45 code of practice, here:  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/744071/CoP\\_FOI\\_Code\\_of\\_Practice\\_-\\_Minor\\_Amendments\\_20180926\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf)

20. The Commissioner accepts that disclosing the Schedule of Works would inhibit existing contractors' ability to secure competitively priced contracts in the future. New entrant contractors would be able to adopt the released 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 is prepared to pay.
21. The Commissioner is prepared to accept that if the requested information was to be disclosed, there will be prejudice caused to contractors' commercial interests. In reaching this conclusion the Commissioner has referred to the decisions reached in previous decision notices which relate to comparable requests<sup>2</sup>. She considers that the conclusions reached in these previous cases can be transposed to this case.
22. Because the Commissioner has found that the criteria for prejudice have been met, she finds that section 43(2) is engaged with respect to the request. She has gone on to consider the public interest test with regard to this exemption. Although she has found the section 43(2) exemption is engaged, it may still be released if the public interest in disclosing the information outweighs the public interest in maintaining the exemption.

*Public interest in disclosing the information*

23. The council has acknowledged the importance of the public interest in openness, transparency and accountability and accepted that disclosing information held by the council assist the public in understanding the basis of its decision making processes.
24. The council has also acknowledged that there is a public interest in disclosing information which would help the public to determine whether the council has acted appropriately in its management of public money and contract tendering processes.
25. The complainant has argued that the withheld information relates to copies of the 9 estimates which they consider that the council should have made available when they were carrying out remedial work to their

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<sup>2</sup> See, for example, the following notices on the ICO website:

<https://ico.org.uk/media/action-weve-taken/decisionnotices/2018/2173211/fs50688840.pdf>  
<https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2616385/fs50848643.pdf>

property. The complainant has drawn the Commissioner's attention to a decision of the First-Tier Property Chamber (Residential Property) Tribunal (the "property tribunal") of 25 July 2019<sup>3</sup>. This related to the complainant's complaint (along with other tenants) about the council's handling of the remedial works on their properties. The complainant highlighted that one element of the decision was that the council should provide tenants with unredacted details costings of the works.

*Public interest in maintaining the exemption*

26. The council has recognised that the output from the property tribunal had indicated that it should disclose the information but that it had also instructed the council to undertake a third Section 20 exercise.
27. The council has taken the view that complying with both of these instructions would be a contradiction of public interest because although it has a duty to be transparent about how public money is spent it is also obliged to ensure that its tendering exercises are commercially competitive.
28. The council has explained that (prior to the property tribunal decision) it initially offered to allow inspection of the full documentation but would allow copies to be taken. It explained that, following advice from Procure Plus this offer was withdrawn. The council confirmed that the complainant was provided with a copy of the tender documentation but the council redacted the schedule of works information.
29. The council concluded that providing the fully priced Schedules of Works would inhibit the contractors' ability to operate in a competitive environment and, in doing so it would not be upholding our duty of ensuring fair commercial competition. It reiterated that the Schedule of Works pricing covers services across similar works projects and disclosure would prejudice contractors' ability to negotiate with third parties.

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[https://assets.publishing.service.gov.uk/media/5d5d43db40f0b6706a2c56d9/97\\_Ocean\\_Road\\_Walney\\_Barrow\\_in\\_Furness\\_LA14\\_3HN.pdf](https://assets.publishing.service.gov.uk/media/5d5d43db40f0b6706a2c56d9/97_Ocean_Road_Walney_Barrow_in_Furness_LA14_3HN.pdf)

*Balance of the public interest*

30. The Commissioner is mindful of the interests that the exemption is designed to protect and has ensured that these are given due weighting in the public interest analysis.
31. The Commissioner accepts that the complainant has genuine concerns about the council's handling of the substantive issue, namely its contractual arrangements for repairs to their property. She also notes the considerations of the property tribunal and its directions in relation to its responsibilities to tenants. However, she is mindful that her remit is confined to requests made under FOIA which might result in unrestricted disclosures being made on a global basis. It is not the Commissioner's role to comment on the meaning or intention of the property tribunal's decision and, whilst it might be the case that, as per the property tribunal's directions, individual tenants may be given access to estimate details, this would represent a restricted disclosure rather than a disclosure to the world as provided for by the FOIA.
32. While acknowledging the general public interest in transparency, the Commissioner does not find that the decision of property tribunal has any bearing on the council's handling of the request under the FOIA and thus does not provide any additional public interest weight.
33. The Commissioner also notes that the council has put the contractors' total estimates for the work to be undertaken in the public domain and accepts that this goes some way to serving the public interest in transparency and accountability.
34. The Commissioner accepts that disclosing the Schedule of Works would result in prejudice to the commercial interests of the contractors by providing competitors with insights into their pricing strategies which, in turn would harm their ability to competitively negotiate future contracts. The Commissioner considers that the fact that the information is relatively recent and would be relevant to other equivalent contracts intensifies the likelihood and scale of harm that disclosure would cause.
35. The Commissioner, therefore, finds that the section 43(2) exemption is engaged and that the public interest favours maintaining the exemption on this occasion.

## Right of appeal

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36. 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)

37. 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.
38. 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**