

Freedom of Information Act 2000 (Section 51)

Information notice

Date: 11 May 2022

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

Section 51

Under section 51 of the Freedom of Information Act 2000 (the "Act"), which is set out below, the Information Commissioner (the "Commissioner") has the power to serve a notice on a public authority requiring it to furnish him with any information he requires to enforce the requirements of the Act.

51. – (1) If the Commissioner –

(a) has received an application under section 50, ...

he may serve the authority with a notice (in this Act referred to as "an information notice") requiring it, within such time as is specified in the notice, to furnish the Commissioner, in such form as may be so specified, with such information relating to the application, to compliance with Part I or to conformity with the code of practice as is so specified.

Application under section 50

1. The Commissioner has received an application under section 50, reference IC-100855-S8J9, for a decision whether a request for information made by the complainant to Birmingham City Council on 18 February 2021, has been dealt with in accordance with the requirements of Part I of the Act.

Nature of complaint

2. On 18 February 2021, the complainant wrote to the Council and requested information in the following terms:

"I refer you to the responses at [previous request redacted]

It appears Kier Highways are not complying with the contract but charging those unfortunate enough to hit Council property using a different, higher schedule of rates than those agreed. Contrary to your account, Kier are using CECA rates which appears to contradict your 'not profiting from claims' response. There is a lack of the transparency you convey.

The situation is simple; either Kier are complying with the account you have supplied and utilising agreed rates or they are not. The rates Kier are using (KSoR) can be found here <http://www.englandhighways.co.uk/dcp-cla...>

1. If, as you state Kier are using agreed rates, it follows they should be those at the above link. In turn, the rates being in the public domain, there is no commercial sensitivity attached and they should be released.

2. In the alternative, it appears Kier are acting contrary to the contract, using contract non-compliant rates (again) and the Council are withholding information to assist this conduct.

I ask to be provided the following:

A. Is the schedule of rates at <http://www.englandhighways.co.uk/dcp-cla...>, that agreed with Kier to be used when billing Third Parties following damage to Council property?

B. Is the above schedule of rates at <http://www.englandhighways.co.uk/dcp-cla...>, that agreed with Kier to be used when billing the Council following damage to Council property?

C. With regard to the request at [previous request redacted] I ask to be provided all information/exchanges relating to this."

3. The Council responded on 17 March 2021 as follows:
 - For the information requested at part A), it said that all rates associated with the BHISC between Kier and BHL, and between BCC and BHL, were commercially sensitive and exempt from disclosure under section 43 (Commercial interests) of FOIA.
 - As regards part B), it stated that BHISC was not subject to any Kier Highways England schedule of rates.
 - For part C), it referred the complainant to its response to the FOIA request he had cited, and said that its position remained the same.
4. The complainant requested an internal review on 18 March 2021, on the following grounds:
 - As regards point A), he said that the Council had “avoided” answering the question he had asked, and he asked it to provide the information requested.
 - For part C), he said “I expect to be provided with all exchanges between you and your contractor following my approach for rate-related information.”
5. The Council provided the outcome of the internal review on 15 April 2021. It maintained that section 43 had been correctly applied to withhold the information requested at point A). It did not address point C) of the request.
6. The Commissioner wrote to the Council on 14 February 2022, asking the Council to let him have a copy of the withheld information and to explain its position on points A) and C) of the request.
7. The Council responded on 22 March 2022. As a result of its response, the Commissioner was not satisfied that it had interpreted either part of the request correctly. As regards part C), it appeared to believe that the complainant was simply remaking a request he had originally made to it on 2 November 2020 and which had already been refused.
8. The Commissioner wrote to the Council on 23 March 2022. In relation to point C) of the request, he explained that the complainant had clarified when requesting an internal review that the request was for any exchange of correspondence between the Council and its contractor **after** it had received the complainant’s request for information of 2 November 2020. With this interpretation in mind, he again asked the Council to forward any information it held falling within scope of point C) of the request. In the event that no information was held, he asked the

Council to answer a set of questions in relation to section 1 of FOIA, which he supplied. He asked the Council to respond by 7 April 2022.

9. The Council responded on 7 April 2022. It again set out its understanding that point C) related to a separate request for information that had already been dealt with and it asked for clarification. It did not supply the information that was requested in the Commissioner's letter of 23 March 2022.
10. The Commissioner wrote to the Council again on 25 April 2022 explaining that the request at point C) was specifically seeking any correspondence the Council had had with its contractor **about** the request for information dated 2 November 2022. By way of clarification, he said:

"For example, if, prior to responding to that request, the Council asked the contractor whether it had any objections to the requested information being disclosed and the contractor responded, the complainant wants a copy of that correspondence."
11. He asked for a response by 3 May 2022.
12. As of the date of this information notice no further response has been received from the Council.

Information required

13. In view of the matters described above the Commissioner hereby gives notice that in the exercise of his powers under section 51 of the Act he requires that Birmingham City Council shall, within 30 calendar days of the date of this notice, furnish the Commissioner with a copy of the following information.
 - A copy of the withheld information (bearing in mind that the request is for all information/exchanges between the Council and its contractor, after the request of 2 November 2020 had been received, and regarding it).
 - In the event that no information falling with scope of the request is held, the Council must answer all the questions set out in paragraph 15, below, setting out its reasons for believing no information is held.

Section 1 – information not held

14. 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 Information Tribunal decisions, applies the civil standard of the balance of probabilities.
15. In order to assist with this determination please answer the following questions:
 - a. What searches have been carried out to check no information was held within the scope of the request and why would these searches have been likely to retrieve any relevant information?
 - b. Please describe thoroughly any searches of relevant paper/electronic records and include details of any staff consultations.
 - c. If searches included electronic data, which search terms were used and please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.
 - d. If no or inadequate searches were done at the time, please rectify this now and let me know what you have done.
 - e. If the information were held would it be held as manual or electronic records?
 - f. Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?
 - g. If recorded information was held but is no longer held, when did the Council cease to retain this information?
 - h. Does the Council have a record of the document's destruction?
 - i. What does the Council's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can the Council describe the way in which it has handled comparable records of a similar age?
 - j. If the information is electronic data which has been deleted, might copies have been made and held in other locations?
 - k. Is there a business purpose for which the requested information should be held? If so what is this purpose?
 - l. Are there any statutory requirements upon the Council to retain the requested information?
 - m. Does the Council have any other specific reason for believing that it does not hold the requested information?
16. In summary you are required to provide a thorough response to the above questions in order to comply with your statutory obligations. The Commissioner will therefore challenge responses and assertions made which fail to satisfactorily address our questions and require a more

detailed explanation. The Tribunal has also demonstrated that it is very critical of public authorities who fail to respond adequately to our enquiries. We therefore expect a public authority where appropriate to provide full details of its searches to support its conclusions.

Failure to comply

17. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act, and may be dealt with as a contempt of court.

Right of appeal

18. There is a right of appeal against this information notice to the First-tier Tribunal (Information Rights). Information about the appeals process can 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

19. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this information notice is sent. If Notice of Appeal is served late the Tribunal will not accept it unless it is of the opinion that it is just and right to do so by reason of special circumstances.

Signed

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