

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

### **Decision notice**

**Date:** 25 April 2024

**Public Authority:** The West of England Combined Authority  
**Address:** 70 Redcliff Street  
Bristol  
BS1 6AL

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

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1. The complainant requested from The West of England Combined Authority ('the council') information relating to the appointment of its Interim Chief Executive. The council refused the request on the basis that the exemption in 43(2) of FOIA applied (prejudice to commercial interests).
2. The Commissioner's decision is that the council was not correct to withhold the information under section 43(2).
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
  - To disclose the withheld information to the complainant subject to the redactions specified under section 40(2) of FOIA, and the appropriate redaction of bank account details.
4. The public authority must take these steps within 30 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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5. On 25 August 2023, the complainant wrote to the council and requested information in the following terms:

*"Contracts for Richard Ennis's employment as:*

- *the director of investment and corporate services;*
- *acting interim chief executive and director of investment and corporate services; and*
- *acting interim chief executive.*

*I understand the contract(s) are with a third party, as per the annual statement of accounts.*

*Please provide copies of the invoices submitted by the third party/Mr Ennis.*

*I would also be grateful if you would provide the recorded information relating to Mr Ennis's expense claims from his becoming acting interim chief executive and director of investment and corporate services (1 December 2022 according to the annual statement of accounts."*

6. The council responded on 22 September 2023. It said that some of the information is already publicly available via its published statement of accounts. However, it refused to provide further information on the basis that section 43(2) of FOIA applied (commercial interests).
7. Following an internal review the council wrote to the complainant on 27 November 2023. It upheld its decision that the requested information is exempt under section 43(2).

## Scope of the case

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8. The complainant contacted the Commissioner on 21 November 2023 to complain about the way their request for information had been handled. The complainant argues that the council should disclose the information it has withheld.
9. The withheld information consists of a contract and contract extension documents, together with expense and payment records relating to the interim chief executive of the council. As such, it contains copies of information such as bank details where payments are being issued to and from bank accounts.

10. The complainant confirmed to the Commissioner that he does not wish a copy of the specific bank details involved, nor personal contact details of any individuals.
11. The Commissioner therefore considers that the scope of his investigation is to determine whether the council was correct to withhold the remainder of the information under section 43(2) of FOIA.

## Reasons for decision

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### Section 43(2) – Commercial interests

12. 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)."

#### The council's arguments

13. The council argued that a disclosure under FOIA would be likely to prejudice the commercial interests of it, the Interim Chief Executive, and a third-party agency, who are each operating in a commercial services market with limited supply. It said that disclosing the information would be likely to prejudice its ability to negotiate and contract confidentially and cost-effectively in the commercial services market.

#### The complainant's arguments

14. The complainant argues that the council has applied the exemption in a blanket form. The complainant argues that other authorities have disclosed similar information to them in similar circumstances, and that the public interest in the disclosure of the information greatly outweighs that in the exemption being maintained under the circumstances of this case.

#### The Commissioner's analysis

15. In order for a prejudice-based exemption, such as section 43, to be engaged the Commissioner considers that three criteria must be met:
  - a) Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information were disclosed has to relate to the applicable interests within the relevant exemption;

- b) Secondly, 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
- c) Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

(a) Does the information relate to a person's commercial interests?

- 16. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his guidance on the application of section 43(1), 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."

- 17. The Commissioner is satisfied that the issues highlighted by the council, relate to the parties' commercial interests.

(b) Does a causal relationship exist between the potential disclosure and the prejudice which the exemption is designed to protect

- 18. The Commissioner has reviewed the withheld information, in conjunction with the council's arguments.
- 19. The council has seemingly applied section 43(2) to the information simply on the basis that it relates to the contract and terms between itself and the third party regarding the interim chief executive. No distinction has been made between the content and sensitivity of the information, and no clear explanation has been provided in respect of the claimed prejudice and how, in the circumstances of this particular matter, that prejudice would be likely to occur in respect of the various types of information that the council has applied the exemption to.
- 20. It is also relevant for the Commissioner to note that the council has not provided any evidence to indicate that it has consulted with the third parties, or that its arguments are based on knowledge of the third parties' concerns. The Commissioner does note, however, that the contract stipulates that the information is being provided in confidence.

21. The Commissioner considers that, due to the subject matter (the engagement of a chief executive via the services of the third party) some of the information might cause prejudice to the commercial interests of the third parties. However, having had regard to the cursory arguments made by the council, in conjunction with the council applying the exemption so widely to the withheld information, the Commissioner is not satisfied that the council has demonstrated the claimed prejudice.
22. The lack of detail and clarity in the council's submissions suggests to the Commissioner that it has not carefully considered this matter to the necessary degree, and as a result it has sought to apply the exception on a general basis. The Commissioner emphasises that responsibility for demonstrating the correct application of an exemption lies with the council. In the context of the application of section 43(2), it is not appropriate for the Commissioner to formulate arguments on behalf of the council.
23. For the above reasons, the Commissioner does not consider that the council has provided compelling evidence that prejudice would be likely to occur. As this test is not met, there is no requirement for the Commissioner to proceed any further. On this basis he finds that the exemption is not engaged.

#### **Section 40(2) – personal data of third parties**

24. The Commissioner notes that some of the documents include the names of non-senior staff working for the parties concerned.
25. The Commissioner has long upheld the position that such information is exempt from disclosure under section 40(2) of FOIA, other than in specific circumstances which merit such a disclosure. The Commissioner has seen no evidence that such circumstances exist in this case, and accordingly, his decision is that the council is able to redact the identities of non-senior staff from the information prior to disclosing it.

#### **Other matters**

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26. The Commissioner considers that the council has sought to apply an exemption in a 'blanket' approach, without considering the differing content and the sensitivity of that information, nor the public interest in that information being disclosed.

27. The Commissioner reminds the council that in cases where a public authority seeks to withhold information, this should be done with careful consideration of the actual content of the information, at a granular level if necessary.
28. Should a public authority consider that such consideration would place a grossly oppressive burden upon it, due to the request seeking a substantial volume of information from which the potentially exempt information cannot be easily isolated, then section 14(1) provides an exclusion from the duty to comply with the request.

## **Right of appeal**

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29. 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)

30. 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.
31. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Ian Walley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**