



Information Governance Team

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Dear Sir/Madam

Freedom of Information Act 2000 (FOIA)

Request ID: FOI410180947

Thank you for your request for information relating to the future of waste services within the Council.

You have requested the following information:

1. By reference to the period commencing 1 November 2021, through to the present day, please tell me if the Council has any contracts agreed with Tom White Waste Limited (Tom White).

Yes. Two contracts have been agreed.

2. If the answer to the previous question is yes, please provide a copy of the contract or contracts and I accept that you may need to redact commercially sensitive material, e.g. of pricing, but this should not impact upon disclosure relevant to the work being done and the respective obligations of the parties.

It is our view that the contracts are exempt from disclosure under the following exemptions in the FOIA:

- Section 43(2) (commercially sensitive information)
- Section 41 (information provided in confidence)

SECTION 43(2) – COMMERCIALLY SENSITIVE INFORMATION

Section 43(2) exempts information from disclosure where disclosure of that information would, or

would be likely to, prejudice the commercial interests of any person (an individual, a company, the public authority itself or any other legal entity).

It is the Council's position that Tom White and its own commercial interests would be prejudiced and / or would be likely to be prejudiced by the disclosure of the requested information.

In determining the above, the Council has adopted a three-stage approach:

1. Third Party Commercial Interests:

What are the applicable interests concerned?

Tom White's ability to participate in a commercial activity are the applicable interests concerned. This will be affected because Tom White has contracts with the Council for which they have provided highly detailed information on their specific service model, pricing, policies, procedures, strategies, best practice protocols and examples of experiences. This information is unique to Tom White and is what gives Tom White a competitive advantage, making them able to compete against other refuse carriers in the market.

Tom White has invested considerable resources on researching, analysing and developing its strategies and business models. Disclosure of redacted versions of the contract may result in their business models being replicated or plagiarised, inevitably impacting upon the success of their business.

The wider ramifications of disclosure are that once this information is disclosed it is in the public domain indefinitely. Any tenderer on any bid could access or obtain the information for their own benefit or possibly for collusion purposes, depriving the public of best value and defeating the object of the fair competitive process.

Additionally, once the information is disclosed this means that it could not only be used by the requestor but also any other contractors in a similar market.

Please note that the Council's comments regarding third party commercial interests are not speculative and Tom White have been consulted in accordance with the section 45 of the Code of Practice – Request Handling.

2. The Council's Interests:

What are the applicable interests concerned?

The Council's ability to participate in a commercial activity are the applicable interests concerned.

The comments made in relation to Tom White are repeated.

In addition to the above, disclosure of the requested information may deter future contractors from competing in public sector opportunities in order to protect their commercial interests. Contractors may therefore further elect to adapt their strategy to focus on the private market. This would be detrimental to service provision for the Council and throughout the broader public sector.

Additionally, once the information is disclosed this means that it will be in the public domain and it could not only be used by the requestor but also any other providers in a similar market.

3. Public Interest Test

The exemption at s 43(2) is qualified, and therefore subject to a public interest test. Even where a qualified exemption is engaged it can only be applied where the public interest in withholding information outweighs that in favour of releasing it. In applying the public interest test the Council have given careful consideration to the arguments for and against disclosure.

Part 1 – Arguments in Favour of Disclosure

- Promote accountability and transparency for the Council's decisions and in its spending of public money
- Assist the public to understand and challenge our decisions
- Inform the public of the activities carried out on their behalf, allowing for more user involvement and collaborative decision making
- Enable the public to better scrutinise the public monies spent
- Help to ensure clarity around fairness, equity, value for money and quality of care in the overall competitive process

Part 2 – Arguments Against Disclosure

- There is a public interest in allowing public authorities to withhold information which if disclosed, would reduce Tom Whites' ability to compete in a commercial environment, for the reasons given above
- Tom White operate in a competitive market. If prejudicing the commercial interests of Tom White in the market would distort competition in that market, this in itself would not be in the public interest
- There is a public interest in protecting the commercial interests of individual companies and ensuring they are able to compete fairly: "If the commercial secrets of one of the players in the market were revealed then its competitive position would be eroded and the whole market would be less competitive with the result that the public benefit of having an efficient competitive market would be to some extent eroded" (taken from the decision of the (then) Information Tribunal in *Visser v ICO EA/2011/0188* at paragraph 20)
- Disclosure of information may cause unwarranted reputational damage or loss of confidence in the Council.
- Revealing information in contracts even where redacted could be detrimental to Tom Whites' commercial interest. If an organisation has knowledge of a contractor's business model, it can exploit this for its own commercial interest. This would also have a detrimental impact on the Council on other contracts and procurements by distorting the market, for the reasons stated

above.

The Balancing Exercise

Having taken into account the arguments for and against disclosure, the Council has decided that the public interest in this case is best served by maintaining the exemption under section 43(2) FOIA and by not disclosing the redacted contract.

The Council considers that the possible benefits of disclosure are outweighed by the real risk of causing prejudice to the commercial interests of Tom White and the Council itself. In this case there is an overriding public interest in ensuring that Tom White are able to compete fairly and in ensuring there is competition for public sector contracts. It is more probable than not that disclosure would prejudice Tom White and the Council's commercial interests.

SECTION 41 – INFORMATION PROVIDED IN CONFIDENCE

Some of the information in the contracts is technical information, provided to the Council by Tom White in addition to the mutually agreed terms and obligations. This information was provided confidentially and the material constitutes information obtained by the authority from another "person". The Council are not obliged to provide information that has been provided in confidence to the Council under section 41(b) of the Freedom of Information Act. The terms of this exemption in the Freedom of Information Act mean that we do not have to consider whether or not it would be in the public interest for you to have the information.

The wording of s41 is as follows:

(1) Information is exempt information if—

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person. Section 41 provides an exemption to the right of access under the FOIA if release would be an actionable breach of confidence.

This exemption qualifies the right of access under the FOIA by reference to the common law action for 'breach of confidence'. According to that action, if a person who holds information is under a duty to keep that information confidential (a 'duty of confidence'), there will be a 'breach of confidence' if that person makes an unauthorised disclosure of the information.

The concept of 'breach of confidence' has its roots in the notion that a person who agrees to keep information confidential should be obliged to respect that confidence. However, the law has now extended beyond this: the courts recognise that a duty of confidence may also arise due to the confidential nature of the information itself or the circumstances in which it was obtained.

The concept of 'breach of confidence' recognises that unauthorised disclosure of confidential information may cause substantial harm. For example, the disclosure of a person's medical records could result in a serious invasion of that person's privacy, or the disclosure of commercially sensitive information could result in substantial financial loss. The law protects these interests by requiring the information to be kept confidential: if information is disclosed in breach of a duty of

confidence, the courts may award damages (or another remedy) to the person or company whose interests were protected by the duty.

Finally, the Council would bring to your attention that it publishes a Contracts Register, which is available to the public, providing basic details of the contracts that we hold, a copy of which can be found at the following link:

<http://www.coventry.gov.uk/contractsregister>

3. As regards any dealings between the Council and Tom White, please confirm if councillors and/or employees of the Council have met with representatives of Tom White to discuss waste service related issues, and if so, please confirm the date or dates of such meetings.

Officers meet regularly with operational staff but no councillors have met with Tom White.

Meetings between Council Employees with Tom White took place as follows:

• November 2021

29/11/22

• December 2021

02/12/21, 08/12/21, 13/12/21 & 21/12/21

• January 2022

04/01/22, 10/01/22, 14/01/22, 18/01/22, 20/01/22 & 25/01/22

• February 2022

15/02/22 & 18/02/22

• March 2022

23/03/22 & 30/03/22

• April 2022

07/04/22, 11/04/22, 12/04/22 & 13/04/22

4. As regards any meetings which have taken place by reference to point 3 above, please provide copies of minutes of meetings, or if the minutes are already in the public domain, please confirm the location of the minutes so that I can review them.

No minutes have been taken at any of the meetings listed in response to Question 3.

5. Please tell me if any councillors and/or employees of the Council have exchanged emails

or other written forms of communication with Tom White in relation to waste services and identify the names of those involved.

1. Councillors

No Councillors have exchanged emails and other written forms of communication with Tom White.

2. Employees

The following senior staff at the Council have exchanged emails and other written forms of communication with Tom White:

- Andrew Walster – Director, Streetscene and Regulatory Services
- Gurbinder Singh Sangha – Corporate & Commercial Lead Lawyer
- Sarah Elliott – Head of Fleet and Waste Management

Other less senior staff have also exchanged emails and other written forms of communication with Tom White, but the Council considers that this information is exempt under section 40(2).

The names of all staff are personal information. The dispute is a matter of public record. While more senior staff have a reasonable expectation that they will be named publicly, less senior staff have a reasonable expectation that they will not be identified under FOIA, which is a disclosure to the world at large. The disclosure of this information would breach one or more of the Data Protection Principles in the General Data Protection Regulation (GDPR). For example, disclosure would breach the first data protection principle. This is because it would be unfair to disclose such personal data where the staff members and others concerned have no expectation that their names would be released in the context of the information held.

Section 40(2) is an absolute exemption not subject to the Public Interest Test.

6. If emails have been exchanged on the basis referred to under point 5 above, I want to see copies of the emails and any attachments, which should only be redacted in line with the strict guidance in the FOI Act.

The Council believes that information in respect of emails or other written forms of communication with Tom White (in relation to waste services in respect of employees) is exempt from disclosure under the following exemptions:

- Section 43(2) (commercially sensitive information)
- Section 41 (information provided in confidence)
- Section 40(2) (personal data)

The comments in the response to Question 2 are repeated for the above-identified exemptions save that the same are applicable to communications between officer / employees at the Council and operatives at Tom White.

In addition to the above the Council believes that information not caught by the above-mentioned exemptions is exempt under Section 36(2) (prejudice to the effective conduct of public affairs).

Sections 36(2)(c) of the FOIA provides that:

36.—(2) Information to which this section applies is exempt information if in the reasonable opinion of a qualified person disclosure of the information under this Act—...

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs”.

These exemption applies when, in the opinion of the Council’s “qualified person” (the City Solicitor and Monitoring Officer, Julie Newman), disclosure would, or would be likely to, inhibit the free and frank provision of advice and exchange of views for the purposes of deliberation, or would otherwise prejudice, and / or be likely to prejudice, the effective conduct of public affairs.

In this instance, you have requested information about emails or other written forms of communication with Tom White in relation to waste services in respect of employees. Please note that:

1. The contact between the Council and Tom White in relation to the services that Tom White are providing to the Council contains commercially sensitive, confidential and personal information;
2. The matter is of a sensitive nature as a whole because it concerns provision of a refuse collection service while an industrial dispute is ongoing.

Disclosure under FOIA is a disclosure to the world at large. If the requested information was to be disclosed, it would inhibit the extent to which officers and employees advising the Council and communicating with Tom White regarding the terms and operation of the contract could provide advice as well as feeling able to communicate openly, thereby prejudicing the Council’s ability to engage with Tom White as effectively and efficiently as possible. As a result, we are satisfied that the exemption applies.

Further information on the process used to reach this decision is set out in Annexes A and B, attached.

7. Has the Council prepared any report or any similar document in relation to dealings with Tom White, and if so, provide a copy of the report or other similar document. You are aware of the nature of my request for disclosure, and even if my specific requests do not touch upon an exact piece of information for a specific document, your disclosure should still reflect the spirit of the legislation.

Please see below the following links:

1. Exercise of Emergency Functions - Waste Services Direct Award to Tom White Waste Limited - 31st January 2022:

<https://edemocracy.coventry.gov.uk/ecSDDisplay.aspx?NAME=SD3274&ID=3274&RPID=13213700>

2. Exercise of Emergency Functions - Waste Collection Services - 1st April 2022:

<https://edemocracy.coventry.gov.uk/ecSDDisplay.aspx?NAME=SD3278&ID=3278&RPID=13213703>

The supply of information in response to a FOI/EIR request does not confer an automatic right to re-use the information. You can use any information supplied for the purposes of private study and non-commercial research without requiring further permission. Similarly, information supplied can also be re-used for the purposes of news reporting. An exception to this is photographs. Please contact us if you wish to use the information for any other purpose.

For information, we publish a variety of information such as: [FOI/EIR Disclosure Log](#), [Publication Scheme](#), [Facts about Coventry](#) and [Open Data](#) that you may find of useful if you are looking for information in the future.

If you are unhappy with the handling of your request, you can ask us to review our response. Requests for reviews should be submitted within 40 days of the date of receipt of our response to your original request – email: infogov@coventry.gov.uk

If you are unhappy with the outcome of our review, you can write to the Information Commissioner, who can be contacted at: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF or email icocasework@ico.org.uk.

Please remember to quote the reference number above in your response.

Yours faithfully

Information Governance

ANNEX A

Section 36: Prejudice to Effective Conduct of Public Affairs

Section 36 exempts information from disclosure where this would, or would be likely to prejudice the effective conduct of public affairs.

Section 36 can only be used if, in the reasonable view of a "qualified person", disclosure of the requested information would have one of the specified effects, as identified in Annex, B below.

The application of section 36 is subject to the 'public interest' test, as follows:

Factors for disclosure

- There is an inherent public interest in disclosing information which helps further the public's understanding of the way in which the Council operates so as to increase public trust in the Council's processes. This can particularly be the case when information relates to a high profile matter such as the alternative provision for refuse collection in respect of the industrial action as is the case here.
- Transparency is likely to increase confidence in decisions made by the Council.

Factors for withholding

- Disclosure of this information would inhibit both the free and frank provision of advice and the free and frank exchange of views for the purposes of the operation of the contracts for the alternative refuse collection provision between the Council and Tom White. This in turn would prejudice the effective conduct of the Council's affairs, insofar as compromising its ability to manage the contracts as effectively and efficiently as possible.
- Disclosure of communication between Council Officers and Tom White would lead to a breakdown of trust and confidence between the parties to the contracts and could affect the parties in the dispute.

Reasons why public interest favours withholding information

It is important that the Council's officers are able to deal with the contracts, so as to ensure the efficient and effective use of its limited public resources.

The disclosure of the information in respect of communications between Council Officers and Tom White would therefore cause a detriment to the Council's ability to effectively deal with the contract as Officers would not be able to exchange views in a free and frank manner.

ANNEX B

Opinion of the Qualified Person

Dear Sir/Madam

Freedom of Information Act 2000 (FOIA)

Request ID: FOI410180947

Thank you for your request for information relating to the contracts between the Council and Tom White Waste Limited.

The information you requested is being withheld as it falls under the exemption in section 36 of the Freedom of Information Act.

I am a "qualified person", as defined in section 36(2) of the Freedom of Information Act 2000 and am duly authorised by a Minister of the Crown for the purposes of that section.

In my reasonable opinion, disclosure of the information in respect of offers made by the Council would, or would be likely to prejudice the effective conduct of public affairs.

Also, in applying this exemption I have had to balance the public interest in withholding the information against the public interest in disclosing the information.

I have set out above at Annex A, the factors I considered when deciding where the public interest lay.

If you have any queries about this letter, please contact:
informationgovernance@coventry.gov.uk

Signed:

Date: 21 April 2022

Julie Newman

City Solicitor and Monitoring Officer

Coventry City Council