FOIA2011 Response

It has been determined that the information that you are seeking falls within the following exemption under section 43 of the Freedom of Information Act.

Section 43 of the FOIA (Commercial Prejudice)

Section 43(2) of the FOIA states:

(2) Information is exemption 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).

In considering your request I have taken into account the following documents:

1. Information Commissioners “Freedom of Information Act - Awareness Guidance 5: Commercial Interests”
3. Information Commissioners “Freedom of Information Act – Environmental Regulations – Commercial detriment of third parties”

All of which can be obtained at the Information Commissioner’s website at www.ico.gov.uk.

I have also had recourse to two cases:

(i) Staffordshire County Council v IC & Sibelco [2010] UKFTT 573 (GRC)(EA/2010/0015) which can be accessed at:

Firstly it must be established that there is a commercial interest. The guidance states:

A commercial interest relates to a person’s ability to participate competitively in a commercial activity. There will also be interests which related indirectly to the activity of buying and selling, such as labour issues and details as to the bidder’s structures and operations.

The commercial interest of the Council relates to its ability to participate in a competitive process for the sale of assets and procurement of goods and services.

The Council is required to identify information which may affect those commercial interests:

“Information provided during a purchasing process, including information contained in unsuccessful bids right through to the details of the contract with the successful party. In my opinion the requested information falls within the above in that it is information provided purchasing process.
The information is commercially sensitive as it contains, pricing, quality and specification information, and it is likely that prejudice would be caused to the purchaser and the Council if it were disclosed.

**Application of Public Interest Test**

The exemption can however, only be used where the Council are satisfied that the public interest in withholding the information outweighs the public interest in disclosing it. It is accepted that the starting point is in favour of disclosure.

Those arguments in favour of disclosure are:

- Transparency in relation to commercial transactions – there is a clear public interest in ensuring that commercial transactions are undertaken on a competitive commercial basis. Disclosure of the requested information would help assure the public that the process has been completed properly
- Promoting understanding of Council decisions – disclosure may promote understanding of the process and decision reached by the Council.
- Generating confidence in integrity – disclosure may promote public confidence in the integrity of the procedures followed

Those arguments against disclosure are:

- Negotiations are ongoing with the successful purchaser. They have expressly stated that information contained within their proposal is commercially sensitive. If the purchaser were to withdraw this would have harmful consequences for the local authority, financial and otherwise. It would also mean that the purchaser would no longer be in place and the Council may suffer financial loss as a result.
- It may also be the case that the process would need to be re-started, which would carry cost and resource issues and delay implementation
- Release of the information in question has significant potential to impact upon the willingness of parties to deal with the Council in future. Even where parties do treat with the Council they may not be prepared to disclose certain information for concern that it may be disclosed. This would not be conducive to open and transparent negotiations and dealings between the Council and third parties. The public have an interest in the Council being able to conduct its affairs in an appropriate manner intrinsic to which is the requirement to achieve best value and efficiency. If parties were unwilling to treat with the Council this would distort tender processes and would be prejudicial to achieving best value and efficiency.
- There is an obvious public interest in maintaining trust and preserving the free flow of information which is required for the performance of public functions.

**Decision**

In balancing the arguments for and against disclosure, I am satisfied that the public interest lies in maintaining the exemption. I am therefore satisfied that the information is exempt from disclosure under section 43(2) of the FOIA. I note also that the courts
have said that where the requested disclosure concerns confidential commercially sensitive information, the human rights of the persons to whom it relates are engaged. This includes the human rights of companies and public bodies. It is my opinion that the case law I have referred to adds further weight to the application of the exemptions already applied, in that the human rights of those parties concerned are also engaged.