



## **Freedom of Information Act 2000(Section 50)**

### **Decision Notice**

**Dated 18 July 2006**

**Public Authority: Guildford Borough Council**

**Address: Millmead House  
Millmead  
Guildford  
Surrey GU2 4BB**

### **Summary Decision and Action Required**

**The Commissioner's decision in this matter is that the public authority has dealt with the Complainant's request in accordance with part I of the Act.**

#### **1. Freedom of Information Act 2000 (the `Act') – Applications for a Decision and the Duty of the Commissioner**

1.1 The Information Commissioner (the `Commissioner') has received an application for a decision whether, in any specified respect, the Complainant's request for information made to the public authority has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 (the "Act")

1.2 Where a complainant has made an application for a decision, unless:

- a complainant has failed to exhaust a local complaints procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or
- the application has been withdrawn or abandoned

the Commissioner is under duty to make a decision.

1.3 The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

## 2. The Complaint

- 2.1 The Complainant has advised that, on 25 January 2005, the following information was requested from the public authority in accordance with section 1 of the Act.
- 2.2 “.....to have sight of the agendas provided to members in connection with the Civic Hall tender which were not for publication at the time. In addition, the plans and detail that were submitted by.....and the other bidders to the process. I request any reports that were provided by.....or lawyers acting for the Council reporting on the disposal of Bedford Road and the Civic Hall.”
- 2.3 Guildford Borough Council (the “Council”) replied to this request on 21 February 2005. The Council released to the Complainant a number of Executive agenda items although these documents were redacted in order to withhold information which the Council said was protected under sections 42 (Legal professional privilege) and 43 (Commercial interests) of the Act. All other information requested was withheld under the same two sections of the Act. The Council also, in relation to some of the information provided by.....(a firm of Chartered Surveyors and International Property Consultants) and by legal advisers, cited section 41 (Information provided in confidence), although the information believed to be covered by this section was not specifically identified.
- 2.4 The Complainant sought a review but, in a letter dated 10 March 2005, the Council upheld their decision. During the course of the next few months, including after the matter had been referred to the Commissioner, the Complainant made a number of further requests to the Council, essentially for the same information. Following further consideration the Council released to the Complainant all of the previously redacted information from the Executive agenda items other than a small amount of financial information which they continued to withhold under section 43.

## 3. Relevant Statutory Obligations under the Act

**Section 1(1)** provides that:

*“Any person making a request for information to a public authority is entitled-*

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*

**Section 41(1)** provides that:

*“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 42(1)** provides that:

*“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”*

**Section 43(2)** provides 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).*

#### **4. Review of the case**

- 4.1 The Complainant asked the Commissioner to review the Council's refusal to release all the information he had sought.
- 4.2 The information sought by the Complainant relates to various attempts by the Council to procure developments on land they own, as well as to secure the replacement of a civic hall, adjacent to one of the sites, which had fallen into disrepair.
- 4.3 In carrying out this review the Commissioner examined the files held on this matter by the Council. He also examined a sample of the tender documentation relating to these tender exercises held by the company that managed the tender process on the Council's behalf.

#### **5. The Commissioner's Decision**

- 5.1 The Commissioner's decision in this matter is that the public authority has dealt with the Complainant's request in accordance with the requirements of Part I of the Act.

#### **Section 42 – Legal Advice**

- 5.2 In respect of section 42 of the Act the Commissioner has noted that, at the time of the original request, the Council withheld all of the legal advice that it had received on the grounds that it was covered by legal professional privilege. This advice came from a variety of sources: internal legal advice, advice provided by the Council's solicitors and advice provided by external counsel on specific issues. There is no prejudice test in respect of this exemption: it is class-based and prejudice is assumed. There is however a public interest test.

#### **Section 42 - The Public Interest**

- 5.3 At the time of the original request the Council took the view that, because the tender process was still incomplete (as a contract had not been signed) and because there was also the possibility of legal action, the public interest in

maintaining the exemption outweighed the public interest in disclosure. During the subsequent months the tender process was abandoned following the withdrawal of the preferred contractor. The Council therefore decided that, as the matter was no longer active, the position in respect of the legal advice could be re-considered. The outcome was that those parts of the Executive agenda items previously redacted on the grounds that they were covered by legal professional privilege were released to the Complainant.

- 5.4 In releasing that information, the Council took the decision that circumstances had changed and that the public interest test now operated in favour of disclosing information rather than withholding it. The Commissioner has noted that the history of these projects has been a matter of considerable local controversy and interest over a number of years. Legal advice was provided to the Council in the expectation that it was covered by legal professional privilege. It is therefore the view of the Commissioner that, by now releasing what in effect constitutes summaries of the legal advice received by the Council, and bearing in mind that the right under the Act is to information not to documents, the Council have acknowledged the legitimacy of the public interest in this matter while recognizing the essential nature of the confidential relationship between lawyer and client that underpins this section of the Act. The Commissioner believes that section 42 has been correctly applied.

#### **Section 43 – Commercial Interests**

- 5.5 The Council also withheld information under section 43(2) of the Act. This information was of essentially two kinds. First, it was information included in the Executive Agenda items which was considered, at the time of the original request, to be commercially sensitive. Second, it consisted of the documentation provided by those companies who had made bids in response to the tender exercises that had been carried out in relation to the various sites. Subsequently, the Council decided to also release the bulk of the commercially sensitive information previously redacted from the Executive Agenda items, with the exception of some financial information contained in the appendices to one report and details of the financial scoring in respect of one of the tender exercises; this was information which was still considered to fall within the exemption. The information released included information relating to the Council's evaluation of the bids for the last of the tender exercises. The Commissioner is satisfied the release of the information not already released would be likely to prejudice the commercial interests of the companies who made bids and, arguably, also those of the Council. Section 43 of the Act is a qualified exemption and therefore attracts the public interest test.

#### **The Public Interest**

- 5.6 The still unredacted information from the Executive Agenda items can be considered along with the information provided by the various companies in response to the tender exercises carried out by the Council, access to which has been refused. The Complainant has argued that the tender exercises were a matter of public procurement and that information relating to them should automatically be placed in the public domain. The Commissioner has however established that, when seeking bids in relation to particular tenders, companies

were advised that they should place in one document information that could be made public and, in another document, information that they wished to remain confidential. The expectation was that this document would contain financial information but tenderers were invited to include within that document any information that they regarded as confidential. The Council did however make it clear that the net financial implications for the Council of any particular tender bid might be released to the public. It is therefore clear to the Commissioner that part of the detailed information provided by those tendering for this project was intended to be confidential and that this would have been the expectation on both sides.

- 5.7 It is the Commissioner's view that, while a tender exercise is being carried out, the public interest is best satisfied by maintaining confidentiality in order to ensure the integrity of the process. However, once such an exercise has been completed and a contract signed, the public interest in maintaining the exemption is unlikely to outweigh the need for the public to be assured that the contract has been awarded to the right company and that value for money has been achieved. At this stage the public interest might well result in the release of information previously appropriately withheld under the exemption.
- 5.8 In the present case, however, the tender exercises never reached the stage at which a contract was signed, and information as to why that happened is already in the public domain. The Commissioner is therefore of the view that there is no significant public interest in the release of information relating to abortive tenders now some years old. His view is reinforced by the likelihood that, when these sites are marketed again in due course, some of those companies who put in bids in response to previous exercises might wish to do so again. It would therefore seem reasonable that confidential information provided by those companies in relation to earlier bids for the same sites should not be released as that information might inform subsequent bids: to require the release of that information might put those companies at a disadvantage as opposed to companies bidding for the first time. The Commissioner therefore believes that, in relation to confidential information provided in response to tender exercises for these sites, the release of which would be prejudicial to the commercial interest of the tenderer, the public interest in maintaining the exemption outweighs the public interest in disclosing it.

#### **Section 41 - Information provided in confidence**

- 5.9 The Council have also cited section 41 of the Act in respect of advice provided to them by external legal advisers and external advisers on property development, land valuation and related matters. This exemption is an absolute exemption, requiring no consideration of the public interest. The Council, when citing this section, have cited it in conjunction with both of the sections considered above without specifying any particular information that they believe this exemption, as opposed to either of the other exemptions, might cover. Having examined the advice provided, however, the Commissioner is of the view that it would have been given in the expectation that it would be treated on a confidential basis: it was, after all, advice provided in the context of tender processes being abandoned or not concluded, where litigation was a continuing threat (one which

was in fact realised), and where the advice that was provided would not have been as frank and candid as it was had it not been offered on such an understanding. The Commissioner is therefore of the view that, in all the circumstances, the Council have correctly applied section 41 of the Act in withholding this information, albeit that it was unnecessary for them to rely on this exemption.

## **6. Action Required**

- 6.1 In view of the Commissioner's decision that sections 41, 42 and 43(2) of the Act have been correctly applied, there is no action that the Commissioner requires the Council to take. He welcomes the Council's recognition of the changed circumstances which have led to the release of some previously withheld information.

## **7. Right of Appeal**

- 7.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

- 7.2 Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

**Dated the 18th day of July 2006**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

**Information Commissioner  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire SK9 5AF**