

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 9 July 2007

Public Authority: Trafford Metropolitan Borough Council
Address: Town Hall
Talbot Road
Stretford
Manchester
M32 0TH

Summary

The complainant requested information from Trafford Metropolitan Borough Council (the Council) regarding the bids it had received when offering a property for sale by informal tender. The Council refused to supply the information on the grounds that to do so would prejudice its commercial interests and that therefore it was exempt under section 43 of the Act. The Council further stated that the public interest in maintaining the exemption outweighed the public interest in disclosure. The Commissioner has reviewed the Council's decision and considers that it has failed to demonstrate how its commercial interests would be prejudiced by disclosing the information requested. The Commissioner therefore requires the Council to provide the withheld information to the complainant within 35 days of the date of this notice.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant wrote to the Council by email on 7 November 2006 and requested information concerning a property the Council had offered for sale by informal tender. He specifically requested:

"how many tenders were received and what were the top and bottom figures bid?"

3. The Council responded on 9 November 2006. It confirmed that there were four tenders for the property, however refused to disclose the details of the highest and lowest bids.
4. Later on 9 November 2006, the complainant emailed the Council and requested the value of each individual bid made for the same property.
5. The Council responded on 17 November 2006 and confirmed to the complainant that the information requested was exempt from disclosure under section 43 of the Act (commercial interests). Further, it explained that it believed that the public interest in maintaining the exemption outweighed the public interest in disclosure. The Council also explained to the complainant that, as none of the offers made had been considered sufficient, the property had been placed back on the market, to be sold by informal tender.
6. On 23 November 2006 the complainant requested an internal review of the Council's decision to withhold the requested information. This was acknowledged by the Council on 7 December 2006.
7. The internal review outcome was communicated to the complainant on 2 January 2007. The Council confirmed that, following this review, it considered the exemption and public interest test had been applied correctly. Therefore it did not provide any further information to the complainant about the bids received by the Council. The Council advised the complainant of his right to complain to the Commissioner if he was dissatisfied with the outcome of the internal review.
8. The complainant emailed the Council again on 3 January 2007. He repeated his requests in light of the fact that the most recent tendering process had been completed.
9. On 24 January 2007 the complainant emailed the Council and requested:

"details of the further bids made for [the property] and the current situation regarding [it]."
10. The Council responded on 30 January 2007. It provided the following information:
 - i. The property was tendered in October 2006 and four bids were received. Bids ranged between £25,000 and £115,000. None of the four bids were accepted.
 - ii. A second tendering exercise took place in December 2006. Eight bids were received.
 - iii. The bids received during the second tendering exercise ranged between £130,000 and £210,000. The highest bid had been accepted by the Council and disposal of the property was complete.

The Council refused to provide details of the individual bids, on the grounds that section 43 of the Act applied to that information.

The Council provided the complainant with details of its internal review procedure, which it stated should be completed before any complaint to the Commissioner was made.

The Investigation

Scope of the case

11. On 5 March 2007 the complainant contacted the Commissioner to complain about the way his requests for information of 7 and 9 November 2006 and 3 and 24 January 2007 had been handled. The complainant specifically asked the Commissioner to consider the Council's refusal to supply the information he had requested in full.
12. The Commissioner has therefore considered whether the Council correctly applied section 43 of the Act to the information which was withheld from the complainant following each request.

Chronology

13. The Commissioner wrote to the Council on 16 April 2007. The Commissioner advised that, although the complainant had not completed the Council's internal review procedure following receipt of the refusal notice dated 30 January 2007, as the issues raised and arguments made were very similar to those considered by the Council in the earlier internal review, communicated to the complainant on 2 January 2007, the Commissioner would exercise his discretion and investigate the complaint without requiring an additional internal review to be carried out.
14. Having reviewed the information in the case file and considered the nature of the information requested, the Commissioner did not believe the Council had demonstrated that any prejudice would arise if the information were to be disclosed. Therefore, in his letter of 16 April 2007, the Commissioner encouraged the Council to disclose to the complainant the information it had withheld. The Commissioner asked the Council to provide further information in support of its application of the section 43 exemption and to explain the public interest arguments it had taken into account when deciding the information should be withheld, if it was unwilling to disclose the remaining requested information.
15. On 1 May 2007 the Council responded to the Commissioner's letter and provided information which has enabled him to take a decision in respect of this complaint.

Analysis

Procedural matters

16. The Commissioner has considered whether the Council has complied with section 1 of the Act.
17. 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.”
18. The complainant requested information on 7 and 9 November 2006 and on 3 and 24 January 2007. The Council refused to supply the information requested in full. For reasons which will be outlined below, the Commissioner has found that the Council was not entitled to withhold the information. It has therefore breached section 1 Act by failing to provide it to the complainant.

Exemption

19. 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).”
20. Section 43(2) is a qualified exemption. Therefore if the Commissioner finds that the exemption is engaged he must consider the public interest test as detailed at section 2(2)(b) namely, whether in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
21. The Council has argued that its own commercial interests would, or would likely, be prejudiced if the information requested were to be disclosed. This is because that, whilst the tendering process in relation to the property which formed the subject of the complainant's request has been completed, the Council plans to sell a number of similar properties. The Council has argued that:

“...if a potential purchaser knew the precise details of all losing bids in previous sales, particularly the amount of the second highest bid, there is a possibility that they may reduce their bids for similar properties accordingly. Thus the Council's interests in securing the best possible price for the disposal of its public assets would be adversely affected.”

Further, it was argued that as there were a number of such sales planned in the near future, it was very likely that such a prejudice could occur.

22. The Commissioner has considered the nature of the information requested and the Council's comments regarding disclosure. As the winning bid and some lower bids have been disclosed, he finds it difficult to see how disclosing details of other lower bids could damage the Council's commercial interests. For example, the property in question was first placed on the market for sale by informal tender in October 2006. However the Council did not believe the bids it had received at the time were of sufficient value and therefore none of them were accepted. The property was placed on the market again, in December 2006, when the Council asked for bids in excess of £130,000 to be made. This demonstrates that the Council may reject bids where accepting them may be detrimental to its commercial interests.
23. The nature of the property market is such that property prices change considerably over short periods of time. The Council itself acknowledged this in its letter to the Commissioner of 1 May 2007, stating that it believed the information could be released in six months' time. Other unique factors such as the location and condition of a property are likely to have a significant impact on its value.
24. For these reasons, the Commissioner does not consider the Council's commercial interests would be prejudiced by disclosing the information requested, nor would they have been prejudiced if the information had been released at the time of the requests. As the exemption is not engaged, the Commissioner does not need to consider the public interest in relation to this series of requests.

The Decision

25. The Commissioner's decision is that the Council did not deal with the requests for information in accordance with section 1 of the Act, as it incorrectly applied section 43 to the requested information.

Steps Required

26. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

to supply the complainant with the values of the two bids previously withheld in relation to the tendering exercise which took place in October 2006 and the values of the six bids previously withheld in relation to the tendering exercise which took place in December 2006.

27. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

28. 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.

Other matters

29. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

The Council responded to the complainant's request for information of 7 November 2006 by refusing to provide the information requested. This refusal did not comply with the requirements of section 17 of the Act. The complainant referred to the Act when making subsequent requests and therefore these were processed by a member of staff with responsibility for responding to freedom of information requests within the Council. The Commissioner would like to remind the Council that all requests for information should be considered under the Act, and that any written refusal to supply information should comply with section 17.

On 2 January 2007 the Council communicated the outcome of its internal review into the handling of the complainant's requests of 7 and 9 November 2006. It advised the complainant to make a complaint to the Commissioner if he remained dissatisfied with the Council's response. Rather than ask the Commissioner to investigate, the complainant repeated his request of 9 November 2006 on 3 January 2007. The Commissioner would have expected the Council to again refer the complainant directly to the Commissioner, having already examined the request and set out its response to it.

Right of Appeal

30. Either party has the right to appeal against this Decision Notice to the Information 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

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

Dated the 9th day of July 2007

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

General Right of Access

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 1(2) provides that –

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
- (b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
- (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

Effect of Exemptions

Section 2(1) provides that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

- (a) the provision confers absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply.”

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

Section 2(3) provides that –

“For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
- (g) section 41, and

(h) section 44”

Commercial interests

Section 43(1) provides that –

“Information is exempt information if it constitutes a trade secret.”

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).”

Section 43(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”