

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

### **Decision Notice**

**Date: 29 June 2011**

**Public Authority:** London Borough of Southwark Council  
**Address:** Corporate Records Office  
London Borough of Southwark  
Floor 9  
Downstream Building  
London  
SE5 8UB

### **Summary**

---

The complainant requested a copy of a contract signed between the council and Fusion, an organisation contracted to manage the authority leisure facilities, in 2000. The council withheld the information under sections 43(1), 43(2) and section 41. The council disclosed some information but stated that it had withheld other sections of it. The complainant initially accepted the information he received, however a subsequent disclosure made in response to a different request highlighted that significant further information was withheld which had not initially been explained to the complainant. He therefore made a further complaint to the council but was told that he had had the option to complain to the Commissioner at the time but did not do so. The complainant therefore made a belated complaint to the Commissioner.

The Commissioner's Decision is that the council breached section 1(1)(b) by inappropriately relying on sections 41 and 43 and in not providing the information to the complainant. He also considers that the council had not met the requirements of sections 10 and 17.

### **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.

## Background

---

2. The complainant requested copies of a contract between the council and a company called Fusion Lifestyle. Fusion manages leisure facilities within the borough under contract to the council. The council pays Fusion quarterly for the management of these facilities based on a contract between the parties agreed in 2000. The request is for a copy of that contract.

## The Request

---

3. The Commissioner notes that the complaint to him has arisen out of a long running dispute between the complainant, the council and Fusion. During correspondence over an extended period of time the requestor made complaints about the service he was receiving from Fusion but also made and remade requests to see information relating to the agreement. This Decision Notice deals with a request made by the complainant for a copy of the contract between the parties. Given this extended correspondence the chronology outlined below does not include details of all correspondence and discussions between the complainant and the council.
4. On 9 November 2008 the complainant requested from the council:  
  
*"Since Fusion have got rid of their 'Promise to Customers' leaflet, I am now formally requesting access to their contract with you, so I can see what they have to provide."*
5. The council initially dealt with this request as part of the service complaint which the complainant was also making within his letter. The complaint was about Fusion's management of the leisure centres. Further discussions and correspondence followed.
6. On 8 March 2009 the complainant remade his request, stating this time that he required the information under the Freedom of Information Act.
7. After receiving no response the Complainant wrote back to the council on 6 July 2009. He stated:  
  
*"Would you therefore please release the full contract between the Council and Fusion by Friday 24th July. Failing this, I will refer the matter to the FOI Commissioner."*

8. However, crossing this in the post, the council responded to the request. On 7 July 2009 the complainant received a letter (dated 22 June 2009) which provided some information to the complainant but stated that other information was exempt under sections 41 and 43. The letter accepted that its response was late and apologised to the complainant for the delay. The complainant states that the disclosure amounted to approximately 12 pages of information.
9. At the time the complainant accepted that response and did not question it further. However he made a subsequent request for different information to the council on 22 October 2009. In response to that request the council disclosed redacted sections of information which formed part of the contract. The complainant says that the council had not initially told him that it was withholding that information, and that it had not clarified the extent of the information which was being withheld. He states that he subsequently found that over 100 pages had been redacted from the contract after the disclosure.
10. On 18 November 2009 the complainant wrote to the council complaining about the information being withheld and the extent of the withheld information not being explained to him. The council responded on 10 December 2009 refusing to consider it further and stated that the complainant had already been given the opportunity to appeal to the Commissioner but had not done so.

## **The Investigation**

---

### **Scope of the case**

11. On 17 January 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the information should have been disclosed to him. He also asked the Commissioner to consider whether the council's response was appropriate given that it had not initially explained what information, or the extent of the information which was being withheld.
12. There was subsequent correspondence between the Commissioner and the complainant addressing the delay in the complaint being submitted to him and the Commissioner's understanding of the complaint. This resulted in delays before the Commissioner agreed to consider the case further.
13. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

## Chronology

14. The Commissioner wrote to the authority on 14 March 2011 stating that a complaint had been made and that the Commissioner considered that that request was eligible for consideration. He asked the council to provide him with a copy of the withheld information and to explain why it had initially reacted to the complainant's request as outlined above.
15. The council initially responded on the same day stating that it held no record of a request being made by the complainant on 8 November 2009 but that it did have a record of a request dated 8 March 2010.
16. The Commissioner wrote back on 15 March 2011 providing information which allowed the council to identify that request.
17. The council responded on 28 March 2011 providing a copy of the withheld information together with arguments in support of its position. It confirmed that there had been issues with its initial response to the complainant and said that it recognised that its response in that respect had not been adequate.

## Analysis

---

### Exemptions

#### Section 43(1)

18. In its letter to the Commissioner dated 28 March 2011 the council claimed for the first time that the information was exempt under section 43(1) of the Act. This relates to information which is a trade secret.
19. It stated that:

*"For completeness the council now also wishes to rely on the exemption available under section 43(1) of the Act as well as section 43(2). Section 43(1) has not previously been raised however the council wishes to rely on the same at this stage."*
20. However the council provided no evidence to show why the information would constitute a trade secret, and the Commissioner has not been provided with arguments from Fusion arguing that point.
21. In considering his decision on the application of section 43(2) he has found no immediate or obvious reason why section 43(1) would be applicable. The Commissioner is not prepared to speculate on the

grounds for determining that the information is a trade secret, and so therefore dismisses this argument.

22. The Commissioner notes in passing however that he would be unlikely to find that information of this sort would constitute a trade secret in any event. He notes the decision of the Scottish Information Commissioner in the case of *Streetwork UK and Glasgow City Council (Decision 104/2008)* and considers that his decision would follow along similar lines.

#### Section 43(2)

23. The council informed the complainant in its Refusal Notice that the information was exempt under section 43. In its review notice it clarified that it was relying upon section 43(2).
24. Section 43(2) provides that information is exempt from disclosure under the Act where a disclosure would, or would be likely to prejudice the commercial interests of any party.
25. The council stated that if the information was disclosed the commercial interests of Fusion would be likely to be prejudiced.

#### Considering the nature of the prejudice

26. Fusion provided arguments to the council that a disclosure of this information would allow its competitors a commercial advantage both as regards its existing contracts and also its future tenders. It states that it has a number of contracts to provide leisure services with other local authorities in the area.
27. It states that a disclosure of the information would
  - Impact on existing funding commitments from third party funders/commercial loans.
  - It would impact on current tenders to new local authority clients.
  - It would impact on relations with existing local authority clients.
  - It would impact on the securing of new funding.
  - It would impact on credit arrangements with suppliers.
  - It would impact on the position with staff and recruitment of new staff.
  - It could be exploited by competitors of Fusion.

What is the likelihood of the prejudice occurring

28. The council argues that the provision of leisure services is a particularly competitive market. In the circumstances of the case it argues that prejudice would be likely to occur if the information were to be disclosed.
29. The Commissioner has considered the above. He has separated his consideration between the different documents which the council has stated falls within the scope of the request. These sections are the grant agreement, the business proposal and the business plan.

The arguments of the council and Fusion re the Grant Agreement

30. Fusion provided arguments about sections of the grant agreement which it wished to be withheld. Its arguments are those outlined above.
31. The grant agreement addresses how the grant system will run. It defines the rights and obligations of both parties and provides agreements as to how amendments to the grant or the agreement will be managed in the future.
32. Fusion argues that a full disclosure of the information would disclose details of the funding it receives from the council in respect of the contract to interested parties. It says that this would be likely to impact upon its dealings with third parties such as creditors etc in a negative way because interested parties would have a much clearer idea of the commitments which Fusion has accepted and how the grant may be managed or affected in various circumstances. The Commissioner understands this argument to mean that interested parties would be able to establish or better understand the cash flow which Fusion receives from the council under particular circumstances. Where specific circumstances arise which affect the funding which Fusion receives then third parties could identify that and seek to take advantage of it.
33. The Commissioner accepts that a disclosure of the information would provide interested parties with a clearer picture of the agreement between Fusion and the council. It would clarify to users the circumstances and timescales under which the grant can be amended or specific payments will be made. It would clarify how Fusion ensures that it receives adequate resources for it to carry out the functions it has contracted to do and how circumstances might change which will have an effect on that. This would allow interested parties to draw conclusions as to the liquidity of Fusion during particular points in the year, or under certain circumstances.

34. However the Commissioner notes that the council has stated that Fusion has contracts with other authorities and so an impact from one council's funding would not provide an overall picture of the funding which Fusion is receiving at any particular time. He does however accept that creditors and competitors would be given a better idea of the circumstances under which Fusion's liquidity would be weakened and might be able to take advantage of that situation.
35. The Commissioner is therefore satisfied that a disclosure of this information would be likely to prejudice the commercial interests of Fusion if it was disclosed. He has therefore considered this further within the public interest test below.

### Business Proposal and the Business Plan

36. The Business Proposal has been exempted from disclosure in its entirety under section 43. The Business Plan has specific sections withheld, but the majority of it has been disclosed. Exempted sections of the Business Plan include the executive summary of the proposal, and small sections from the document itself.

### The Business Proposal

37. The Business Proposal sets out in detail the proposal which Fusion put to the council when tendering for the contract. It sets out in detail its intentions with the sites, how they will be run and how the contract will work. It is both a selling point, and a guide to Fusion's management of the contract.
38. The Commissioner notes that the proposal is 10 years old, but that the approach taken by Fusion may still be relevant to today's market. It details factors which Fusion can bring to any tender which would provide an attractive tender to local authorities.
39. The Commissioner is satisfied that its disclosure would be likely to prejudice the commercial interests of Fusion if it were disclosed because competitors could identify the approach taken by Fusion and potentially amend their own tenders to counter or better their own tenders to make them more attractive or competitive to local authorities.

### The Business Plan

40. The Commissioner firstly notes that the withheld information relates to 2000 and that some of that information will have been easily obtainable since that point by simple observance. For instance sections of the withheld information relate to the branding of the centres. The

Commissioner notes that this will have become readily apparent over the years since the agreement was first made.

41. Only relatively small sections of the Business Plan have been withheld, however these sections relate to performance indicators and customer 'promises' – both of which will have a marked effect on customers use and enjoyment of the facilities. Consequently, the Commissioner is satisfied that the disclosure of the withheld sections would be likely to prejudice the commercial interests of Fusion.

### Conclusions

42. The Commissioner is satisfied that any prejudice which might occur relates for the most part to demonstrating how Fusion constructed a winning tender, and disclosure would allow others in competition with it to assess and change their tenders to bolster areas where Fusion's approach may be better than theirs in other tendering competitions.
43. However whilst taking this into account, the Commissioner notes that the information is itself 10 years old, and that the market, as well as the expectations on local authorities when delivering services of this sort would be likely to have changed over that period, and be different within different areas and different authorities.
44. He is also satisfied that the competitive edge which Fusion can bring to such tenders rests primarily on its status as an Industrial and Provident Society and the grants and dispensations which it attracts as a result of that status. Both this and the fact that it is a not for profit organisation provide benefits to Fusion and these in turn can be utilised to provide benefits to local authorities. It is primarily this which gives Fusion its competitive edge over private, profit orientated competitors during tendering competitions rather than any 'secret' approach. The Commissioner however notes that many of these benefits would be evident to any competitor who is aware of Fusion's status because they arise as a result of its status.
45. The Commissioner does not therefore consider that a disclosure of Fusion's Business Proposal and the Business Plan would divulge information which its competitors would not already be able to broadly establish from their knowledge of the sector and an understanding of Fusion's status.
46. The Commissioner notes that the severity of any prejudice which might occur is not a factor which is relevant to a decision as to whether section 43 is engaged or not. The Commissioner notes however that for a harm to constitute a prejudice it has be at least real actual and of substance. It cannot be merely hypothetical. Although he recognises that the prejudice which has been foreseen by the council can be offset



against many other benefits, he nevertheless recognises that there would be likely to be a degree of prejudice to Fusion's commercial interests if this information is disclosed. He is therefore satisfied that the exemption in section 43 of the Act is engaged. He has therefore carried out a public interest test as required under section 2 of the Act.

#### The public interest under section 43

##### The public interest in maintaining the exemption

47. The central public interest in maintaining the exemption resides around the ability of contractors to provide full and frank information to councils in order that their tenders can be fully understood and appreciated. If sensitive information is not able to be provided to the council its decision making will not be as effective because it will not have all of the facts available when making its decision. There is therefore a risk that contractors will fail to win tenders when in fact their bid is the best value for the council.
48. When council's are seeking to judge best value from tendering contractors they must be able to obtain sensitive commercial information from them in order to know whether the contractor's tender does provide the best value over the period of the contract.
49. If contractors are not able to provide such information to councils because they fear that that information will be disclosed and thereby damage their overall business then the decisions cannot take into account all of the facts of the case. In such a scenario tenders may not therefore be as effective as they could be. There is therefore a strong public interest in allowing sensitive commercial information to be withheld if the need to withhold it is greater than the public interest in that information being disclosed.
50. As regards the Grant Agreement the Commissioner is satisfied that there is clearly a public interest in allowing payment pricing methods to be withheld where a result of disclosing that information would be substantial damage to the commercial interests of the contractor. However he has not been convinced that a disclosure of the Grant Agreement would be substantially damaging to the commercial interests of Fusion in this instance.

##### The public interest in the information being disclosed

51. The Commissioner notes that the public interest in the information being disclosed are the same as his considerations on that subject outlined in the section on confidentiality in paragraph 74 to 76 below.

##### The balance of the public interests

52. Following the public interest test outlined below the Commissioner's decision is that the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information in this case.

### Section 41

53. Both the council and Fusion argue that the withheld information is confidential and that it was provided to the council by Fusion in confidence. They have therefore applied section 41 to the information.

54. Section 41(1) provides that information is exempt from disclosure if

- (a) it was obtained by the public authority from any other person; and
- (b) the disclosure of the information to the public by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

55. In order for section 41(1) to be engaged it must be shown that:

- The information was provided to the authority by another person, and
- that a disclosure of the information would give rise to an actionable breach of confidence - which in turn the Commissioner considers in this case requires that:
  - the information has the necessary 'quality of confidence' – it need not be highly sensitive, but it must not be trivial;
  - the circumstances in which the information was provided gave rise to an obligation of confidence, in that a 'confider' provided information to a 'confidant' in the expectation, whether explicit or implied, that the information would only be disclosed in accordance with the wishes of the confider;
  - disclosure of the information would be unauthorised and to the detriment of the person(s) to whom the duty of confidence is owed, or cause a relevant loss of privacy;
  - the action would not fail on grounds which provide a legal defence to a breach of a duty of confidence, for instance that disclosure would be protected by a public interest defence.

56. The Commissioner recognises that the above does not constitute the only test of confidence, however he considers it appropriate to use this test in this case.

Was the information provided to the council by another person?

57. The Commissioner asked the council to explain whether the information was provided to the council in confidence by Fusion. He asked it to consider whether any sections were not confided in it by Fusion but agreed in negotiations with it. This follows the Decision of the Information Tribunal in *Derry v Information Commissioner* (EA/2006/0014) which found that information agreed or negotiated between parties could not be considered to meet the requirement for information to have been provided to it *by another person*. The Commissioner has considered this.

The Grant Agreement

58. The council did not argue that the Grant Agreement was confided in it by Fusion, and it is clear from the nature of the information and the arguments provided to the Commissioner by the parties that that is not the case. Fusion argued that there was both an express and an implied duty of confidence on the information but also stated that it was a negotiated agreement between the parties. The Commissioner's decision as regards the Grant Agreement is therefore that section 41 is not applicable as it was not provided to the council by a third party but agreed with it during negotiations.

The Business Proposal and the Business Plan

59. The council argued that the Business Proposal and the Business Plan were not agreed with Fusion as part of their negotiations over the contract, but were 'confided' in the council by Fusion.
60. The nature of the information demonstrates that the information was provided to the council as part of Fusion's tender for the contract. The information sets out in detail who Fusion are and how they intend to run the contract. The Commissioner is therefore satisfied that this information was therefore provided to the council by a third party.

Obligation of confidence

61. In order for the information to have the necessary obligation of confidence there must have clearly been an understanding between the parties that the information which was being provided to it was being provided under a duty of confidence. This can be implied as well as being expressed via a contractual term or stipulation.

62. The council has provided the Commissioner with a copy of Fusion's views as to the status of the withheld information wherein it states:

*"The contracts themselves contain express confidentiality clauses which are binding on both parties. Disclosure of information would therefore be in breach of those contracts."*

63. The Commissioner is satisfied that during the period of tendering there is likely to be an expectation that the information which is provided will be held in confidence.

Does the information have the necessary quality of confidence?

64. In order to decide whether the information has the necessary quality of confidence the Commissioner must consider whether the information is otherwise accessible and/or whether it is more than trivial.
65. The Commissioner must also bear in mind that the information was provided in 2000, and that the obligation of confidence may wane over time.

The age of the information

66. When considering the nature of the prejudice he has borne in mind that the contract was signed in 2000. The sensitivity of the information will therefore be lessened due to the age of the information concerned. He has accepted above that the way Fusion has constructed its tender could to an extent be used in other tenders, and a disclosure might therefore provide Fusion's competitors with a better idea of the way in which Fusion approaches such tenders.
67. The Commissioner has also taken into account the fact that at the time of the request the contract between the parties was being renegotiated. The basis of the renegotiation will be likely to be the terms and conditions which were agreed within the existing contract between the parties. However market conditions and other circumstances will affect the degree to which those terms and conditions will change within the new agreement. For instance, caps on local authority funding and spending, any change in the priority provided to leisure services etc may all affect the future agreement. The Commissioner therefore considers that changes in market conditions and the requirements on local authorities would be likely to affect the competitiveness of that tender were it simply to be repeated in other competitions.

### Is the withheld information otherwise accessible?

68. The Commissioner is satisfied that some of the withheld information would have become known over time. For instance the council withheld information relating to Fusion's intentions regarding staff working at the leisure centre if they were successful in winning the contract. Fusion won the contract in 2000 and so its changes in this respect would have been implemented and therefore common knowledge amongst staff and those using the centres, or they would have been discarded and no longer relevant. Similarly the council withheld parts of the contract relating to branding and its intentions as to how the new partnership should be marketed. Again as this contract was agreed over 10 years ago it is clear that these intentions would have been acted upon and either now be common knowledge or would have been discarded and no longer relevant.
69. However other information would not be common knowledge, such as the financial section of the contract and the approach that the Business Proposal took in order to be competitive. The Commissioner has however highlighted above why some of that information may already be reasonably apparent to Fusion's competitors.
70. The Commissioner is satisfied that the information is not trivial. It relates to a commercial agreement between the parties which is currently under renegotiation. He also found that a disclosure of some of the information would be likely to prejudice Fusion's commercial interests above. He questions however the severity of that detriment given the age of the information and the fact that much of it may already be ascertained.

### Detriment to the confider

71. In his analysis of the information above the Commissioner has been found that a disclosure of the information would be prejudicial to Fusion if it was disclosed. He is therefore satisfied that a disclosure of the information would be detrimental to Fusion.

### Would an unauthorised disclosure be actionable?

72. There are a number of defences to a breach of a duty of confidentiality. The Commissioner must consider whether a disclosure in this case would be 'actionable'. This means that if the council disclosed the information, Fusion could take the council to court for breaching the duty of confidence which it owed to Fusion and that it would have a reasonable prospect of success were it to do that.

73. In *Derry v ICO* (EA/2006/0014) the Information Tribunal clarified that the test to be applied in deciding whether the public interest provides a defence to a breach of a duty of confidence is that the duty should be maintained unless the public interest in disclosing the information outweighs the public interest in protecting confidences.

#### Public interest arguments in favour of disclosing the information

74. The Commissioner has considered the public interest in the information being disclosed. Primarily disclosure would increase transparency and allow greater scrutiny of the deal which the council entered into with Fusion. It seems from the complainant's request that it is not clear to users what Fusion's obligations are when managing the service. He notes for instance that both the performance indicators and information on the quality and service levels which Fusion signed up to with the council have been redacted from the Business Plan.
75. The council has outsourced its management of these leisure functions to Fusion. Fusion are a not for profit organisation which has managed the leisure facilities on behalf of the council for 10 years prior to the complainant making his request for information. The withheld information will give users and taxpayers within the community a much better idea of the overall agreement which was made. They will be better able to understand whether Fusion has produced value for money in its management of the services, and whether it has met the terms it agreed with the council in terms of the quality of service it has provided to the community. This is of particular importance given that the contract was in the middle of renegotiation at the time that the request was received. A disclosure would also allow the public to understand whether the council has appropriately monitored Fusion's management of the service. They will be able to establish whether Fusion has failed to live up to its obligations and from there seek to establish what steps the council has taken to address this.
76. As disclosure would also allow the public a better understanding of the obligations signed up to by the council in outsourcing management responsibilities. It will also provide a better understanding as to whether the contract was appropriate. This is of primary importance given the current renegotiation of the contract.

#### Public interest arguments in favour of maintaining the exemption

77. The Commissioner notes that the courts have generally taken the view that the grounds for breaching confidentiality must be strong ones, since confidentiality is recognised as an important value in itself. There is a public interest in maintaining trust and preserving the free flow of

relevant information to public authorities to enable them to perform their functions.

78. Historically, a duty of confidence has only been disapplied by the courts in very limited circumstances. Examples of cases where the courts have required disclosure in the public interest include those where the information concerns misconduct, illegality or gross immorality. In this case none of these provisions apply. That limitation has widened when considering commercial confidentiality in response to requests under the Act however.
79. There is a public interest in allowing those tendering for contracts with the council to be able to provide full and frank information to the council in order for it to be able to fully understand the nature of the service which the tendering contractor is stating it will provide. Clearly if sensitive information is not able to be provided then the council's decision making will be reduced as a consequence of this. This would also be damaging to the tendering contractor which may no longer be able to stipulate in as great a detail the service it is offering for the price it has tendered.

#### The balance of the public interest

80. In this case Fusion provided information to the council in response to the tender. The information it provided was produced in 2000 however some details of that offer may still be sensitive and may still have relevance, particularly as at the time of the request the contract was being renegotiated.
81. The Commissioner has identified above that some sections of the contract which the council has sought to exempt could in fact be broadly ascertained relatively easily by interested parties.
82. As regards the remaining sections he believes that in order to fully understand the nature of the contract which the council entered into with Fusion, at a time when it is clearly considering entering into a further contract with it or extending the contract for a longer period, it is necessary to be able to scrutinise the obligations which Fusion agreed to when it first tendered for the contract in 2000. Without that information it is impossible for the community to know how Fusion performed against its expected standards. There is therefore a very strong case for the disclosure of both the Business Plan and the Business Proposal in full. Although the Business Proposal does refer to financial information, that information is a forecast and relates to the business as it was 10 years ago. The Commissioner is therefore satisfied that its use to competitors would be limited.

83. The Commissioner is therefore satisfied that, given the age of the information, together with the fact that it would be impossible to properly judge whether Fusion met its agreements from the 2000 contract without access to this information, the public interest in disclosing the information held in the Business Plan and the Business Proposal outweighs that in maintaining the duty of confidence in this instance.

### **Procedural Requirements**

84. The Commissioner notes that the council initially dealt with the request for information as a service complaint about the service Fusion was providing to its customers. Fusion stated to the Commissioner that it was not until the complainant specifically mentioned his rights under the Act that the request was recognised as being a request under the Act. The council states that it has recognised that this is an error on its behalf and it has therefore taken steps to ensure that in the future officers who are likely to receive requests are trained to recognise them as such and deal with them accordingly.
85. Nevertheless the Commissioner must consider the response which the council did provide, and his decision is that it breached section 10(1) in not issuing a valid refusal notice to the complainant's request within 20 working days.
86. The council also breached section 1(1)(b) in failing to provide the complainant with information which he was entitled to under the Act in response to his request.
87. It breached section 17(1) in failing to provide a refusal notice within 20 working days.
88. It breached section 17(1)(b) in not specifying to the complainant the exemption it was relying upon.
89. It breached section 17(1)(c) in not providing an explanation as to why it could rely on the exemptions it subsequently chose to rely upon.



## The Decision

---

90. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.
- The council breached section 1(1)(b) in so far as it inappropriately relied on sections 41(1) and 43(1) and (2) and by not disclosing a copy of the information to the complainant which he was entitled to under the Act in response to his request.
  - The council breached section 10(1) in not disclosing information to him to which he was entitled within 20 working days.
  - The council breached section 17(1) for failing to provide a refusal notice within 20 working days; and 17(1)(b) and (c) in not providing an adequate refusal notice specifying which exemptions it was relying upon and why by completion of the internal review.

## Steps Required

---

91. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- To disclose unredacted copies of the Grant Agreement, the Business Proposal and the Business Plan to the complainant
92. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

---

93. 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

---

94. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
95. The Commissioner notes that the council initially did not deal with the complainant's request of November 2008 as a request, but dealt with it as part of an ongoing service complaint.
96. The council has subsequently agreed that its response in this respect was inadequate, and has stated that since that time it has taken steps to ensure that those likely to receive freedom of information request will recognise the authority's obligations under the Act and follow its procedures for dealing with request in the future.
97. The Commissioner recognises that the authority has addressed his concerns; however its initial response did not deal adequately with its obligations under the Act.

## Right of Appeal

---

98. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

99. 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.

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

**Dated the 29<sup>th</sup> day of June 2011**

**Signed .....**

**Gerrard Tracey  
Principal Policy Adviser**

**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 –

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

#### **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,
  - (iii) section 41, and
  - (iv) section 44"

#### **Section 17(1) provides that -**

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the

duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies."

**Section 17(2) states –**

"Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
  - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
  - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

**Section 17(3) provides that -**

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, 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 authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

**Section 17(4) provides that -**

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

**Section 17(5) provides that –**

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

**Section 17(6) provides that –**

“Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

**Section 17(7) provides that –**

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

**Information provided in confidence.**

**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 41(2) provides that –**

"The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence."

**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)."