

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 November 2011

Public Authority: London Borough of Newham

Address: Newham Dockside
1000 Dockside Road
London
E16 2QU

Decision

1. The complainant has requested information relating to London Borough of Newham's (the "council") decision to award a single large casino premises licence to Aspers. The complainant represents Apollo¹, one of the companies which competed against Aspers for the awarding of the licence.
2. The Commissioner's decision is that the council correctly interpreted the scope of information requested and, in this respect complied with its duty under section 1(1) of the FOIA. In relation to some of the information withheld under the commercial interests exemption, the Commissioner has found the exemption was not engaged; in relation to the remainder of the information withheld under this exemption, the Commissioner has found that, whilst the exemption is engaged, the public interest favours disclosing the information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information it has withheld under section 43(2) of the FOIA to the complainant.
4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

¹ See paragraph 8 for further details.

(or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. In 2007, the London Borough of Newham won the right from the Casino Advisory Panel to grant a large casino licence. Sixteen of these licences are to be granted across England, Wales and Scotland, and the London Borough of Newham ran the first tender competition to grant a licence.
6. The tender process for granting a licence is governed by the Gambling Act 2005. It is a two-stage process. Stage one is set out in schedule 9, paragraph 4 of the Gambling Act. This is a regulatory stage where the authority considers which of the applications should receive a provisional decision to grant by reference to the test at section 153 of the Act. The authority looks at whether the applications comply with the licensing objectives under the Gambling Act, the authority's gambling policy, and any code of practice or guidance issued by the Gambling Commission. This stage is a public process, and the application itself and any representations are placed in the public domain.
7. The second stage is a competitive bid process used where more than one bidder is successful at stage one. It is set out at schedule 9, paragraph 5 of the Gambling Act. At this stage applicants submit detailed bids and the authority selects the application which "would be likely if granted to result in the greatest benefit to the authority's area".
8. In September 2010, three applicants made submissions to the second stage of the process. These were Aspers Startford City Ltd ('Aspers'), Great Eastern Quays Casino Ltd ('GEQ'), and Apollo Resorts and Leisure Ltd, who pursued a joint bid with Apollo Genting London Ltd (together, 'Apollo').
9. The council awarded the casino licence to Aspers. The complainant represents Apollo, one of the other companies that submitted a stage two application for this casino licence.

Request and response

10. On 21 March 2011, the complainant wrote to the council and requested a range of information relating to the council's decision to award a single large casino premises licence to Aspers. The full text of the request is published in the annex to this notice.

11. The council responded on 26 April. It stated that it was providing some of the requested information but confirmed that some information was being withheld because it considered that disclosure would be likely to cause substantial prejudice to Aspers. In withholding information for this reason, the council was relying on the commercial interests exemption set out in section 43(2) of the FOIA.
12. Following an internal review the council wrote to the complainant on 26 May 2011 and confirmed that it was upholding its original decision to withhold the information. The council also confirmed that it was holding some information (the legal advice referred to in part b of the request) under the legal professional privilege exemption (section 42 of the FOIA).
13. In its submissions to the Commissioner, the council has confirmed that, in addition to the commercial interests exemption, it also considers that the withheld information is exempt under section 44 of the FOIA (prohibition on disclosure by statutory bar).

Scope of the case

14. The complainant contacted the Commissioner to complain about the way their request for information had been handled.
15. The Commissioner has confirmed with the complainant that the scope of his investigation will be confined to the following issues:
 - whether the council has breached section 1(1) of the FOIA by failing to identify all the information which falls within the scope of the request and,
 - whether the council has correctly applied exemptions in withholding information specified in the request.
16. In its submission to the Commissioner, the council has confirmed that it no longer wishes to rely on the legal professional privilege exemption to withhold information as any relevant legal advice is not held. The Commissioner has, therefore, not considered this matter further although the other matters section of this notice comments on this practice.

Reasons for decision

Section 1 - duty to provide requested information

17. Section 1(1) of the FOIA requires public authorities to confirm or deny whether information specified in a request is held and, where it is, to provide it to a requester.
18. In their complaint to the Commissioner, the complainant has alleged that the council has failed to identify all the information it holds which is covered by the request.
19. In their internal review submission, the complainant argued that, in relation to a number of items of information, the council failed to provide, or to otherwise confirm or deny whether the information was held. The specified information and the associated response given by the council in its internal review are:

(a) Information relating to the Advisory and Technical Panels' and the Licensing Committee's consideration of GEQ's bid.

The council stated that it considered that this information did not fall within the scope of the request.

(b) Records of discussions between the Advisory Panel and the Licensing Committee.

The council confirmed that this information was not held and stated that, in any event, it considered that this information did not fall within the scope of the original request.

(c) Additional records of all proceedings of the Licensing Committee in relation to the decision to award the licence to Aspers.

The council confirmed that this information was not held.

(d) Information relating to the Committee's consideration of the funding of the residential development.

The council confirmed that further information, beyond that contained in the 'decision' was not held.

20. In their submission to the Commissioner the complainant has not provided any reasons or evidence in support of their view that the council has not addressed the full scope of their request.
21. The Commissioner considers that this aspect of the complaint raises two questions – whether the council correctly interpreted the scope of the

request and whether the council's confirmation that further information falling within the scope (as defined by the council) is not held is correct.

22. In relation to the first question, the complainant has argued that the council should have considered the information specified in paragraph 19(a) and 19(b) above as falling within the scope of their original request.
23. In determining whether an authority has correctly interpreted the scope of a request, the Commissioner follows the Tribunal by considering whether the request is capable of being read "objectively"². In some cases, requests can be ambiguous and are capable of being objectively read in more than one way. In such instances, authorities should approach the requester for clarification.
24. The Commissioner considers that, where the meaning of a request appears to an authority to be unambiguous, there is no requirement for it to seek a second meaning or ask for clarification. In such cases there is only one objective reading of the request and this defines the scope of the relevant information.
25. In considering the complainant's interpretation of the scope of the request, the Commissioner has referred to both the original request and the specific information cited under paragraph 19 above.
26. In relation to 19(b), this is related to the information requested at (c) in the original request (see annex), namely "The reports of the advisory panel and the technical panel on the *successful* bid..." (emphasis added). By definition, the Commissioner considers that an objective reading of this would exclude information relating to unsuccessful bidders such as GEQ.
27. In relation to 19(b), although part (c) of the original request makes reference to the Advisory Panel, information regarding its discussions with the Licensing Committee is not specified, neither is it referred to elsewhere in the original request.
28. In its submissions to the Commissioner, the council has explained that it is satisfied that it correctly interpreted the request and provided the full scope of relevant information held (subject to any exemptions applied). The council confirmed that it did not consider it necessary to approach the complainant for clarification as the request was clear, having been

² EA/2006/0049 & 50 (Berend).

drafted by a firm of solicitors which explicitly knew what information was being sought.

29. The Commissioner considers that the complainant's alternative reading of the request does not constitute an objective reading but appears to broaden the scope of the original request. In light of this, the Commissioner has concluded that, in relation to the information referred to in paragraphs 19(a) and 19(b) above, the council's objective reading of the original request correctly excluded this information.
30. In relation to the information specified in paragraph 19(c) and 19(d) above, the Commissioner has not considered whether this fell within the scope of the original request as the council's responses have not questioned this. Instead, the Commissioner has looked at whether the council's confirmation that relevant information is not held is correct.
31. The normal standard of proof to apply in determining whether a public authority does hold any requested information is the civil standard of the balance of probabilities. In this instance, the council explicitly confirmed in its internal review response and in its submissions to the Commissioner that, beyond the information already provided to the complainant, no further information is held.
32. In relation to the information specified in paragraph 19(c), the council had directed the complainant to the minutes of meetings of the Licensing Committee in its initial response. The council has confirmed that no further information was held and the complainant has not advanced any arguments which suggest that further relevant information is held.
33. In relation to the information specified in paragraph 19(d), the council confirmed that, beyond information regarding the decision of the Licensing Committee in this regard, which had already been provided, no further information was held.
34. In weighing the balance of probabilities, the Commissioner has considered the information which has been provided and the likelihood of there being more, and the complainant's assertions. In relation to the information specified in paragraphs 19(c) and 19(d), the Commissioner considers that the council has demonstrated that it has kept records of its decision making and provided relevant information to the complainant. Without evidence to the contrary, the Commissioner concludes that that it is likely that the council has correctly confirmed that no further information is held.
35. In relation to its interpretation of the scope of the request and its confirmation of the extent of relevant information held, the

Commissioner concludes that the council complied with its duty under section 1(1) of the FOIA.

Section 44 – Prohibitions on Disclosure

36. Section 44(1)(a) of the FOIA provides an exemption in cases where the disclosure of information is prohibited “....by or under any enactment.”

37. [Schedule 9, paragraph 6\(1\) of the Gambling Act 2005](#) provides that:

“The Secretary of State may issue a code of practice about—

(a) the procedure to be followed in making the determinations required by paragraphs 4 and 5, and

(b) matters to which a licensing authority should have regard in making those determinations”

Paragraph 5.4.5 of this [code of practice](#) states that:

“A licensing authority may not, during the second stage, discuss the details of a person’s application with the other competing applicants without the person’s permission.”

38. Although the council did not cite this exemption in its refusal notice or internal review, in its submissions to the Commissioner, it has confirmed that it considers that paragraph 5.4.5 of the code of practice provides a statutory bar to disclosure of the requested information. This is because the requested information relates to Aspers’ application for the casino license.

39. Where a public authority has not referred to a particular exemption or exception when refusing a request for information, the Commissioner may exercise his discretion and decide whether, in the circumstances of the case, it is appropriate to take the exemption or exception into account if it is raised by the public authority in the course of his investigation.

40. In deciding whether it is appropriate to allow the late application of the exemption, the Commissioner has referred to another complaint about the council which relates to a request for similar information³. In that

³ ICO reference: FS50374999.

instance the council applied the exemption at the refusal notice stage and the Commissioner's decision notice upheld its use of the exemption. In view of the close parallels between the requests and the nature of his decision in this previous complaint, the Commissioner has concluded that it is appropriate to allow the council to rely on the exemption in this case also.

Can the Code of Practice provide a statutory bar to disclosure?

41. The Commissioner has first considered whether the provisions of the code of practice can provide a statutory bar to disclosure. The complainant argues that no part of the code of practice can provide a statutory bar, because it is not part of "an enactment". The council, however, contends that section 44(1)(a) specifies that information is exempt if prohibited "...by or under any enactment" (the council's emphasis). The council argues that the expression "or under" connoted a prohibition not contained in an enactment but in another instrument made under an enactment, such as the code of practice.
42. The Commissioner notes that schedule 9, paragraph 6(2) of the Gambling Act provides that "a licensing authority shall comply with a code of practice under sub-paragraph (1)". He also observes that paragraph 1.3 of the Code itself states that a public authority "must" comply with its provisions. The Commissioner considers that due to paragraph 6(2), the Code is an instrument made under the Gambling Act, which is itself an enactment. Schedule 9, paragraph 6(2) makes this Code enforceable and demonstrates that it is not merely a good practice recommendation but a procedure which must be followed. The Commissioner notes that the [Gambling Act \(Commencement No. 8\) Order 2008/1326](#) brought schedule 9, paragraph 6 into force on 19 May 2008.
43. The Commissioner's conclusion is consequently that the code of practice has been issued in accordance with schedule 9, paragraph 6(1) and can constitute a statutory bar as a result of schedule 9, paragraph 6(2) which provides that an authority shall comply with the code. As the Commissioner is satisfied that the code can act as a statutory bar, he has gone on to consider whether paragraph 5.4.5 prohibits the disclosure of the information requested by the complainant.

Does the statutory bar apply in this instance?

44. The Commissioner notes that the council is the "licensing authority" for the purposes of the casino. The second stage of the process opened in September 2010 and concluded on 11 March 2011. The complainant represents one of the companies which were bidding for the license and submitted their request on 21 March 2011.

45. In reaching his conclusion about the relevance of the statutory bar, the Commissioner has considered the council's submissions.
46. The council has argued that correspondence submitted as part of and under cover of the stage two licensing process would be caught by the prohibition. The reasons for this are as follows:
 - The aim of the code of practice is clarified in paragraph 5.4.6, which requires authorities to "...put in place a protocol governing the storage of information submitted to them during the second stage, so as to maintain the confidentiality of that information." The intention of the code is to protect the confidentiality of applications and this protection does not cease at the end of the stage two process.
 - At the time the request was received, the stage two decision was subject to judicial review proceedings. As the outcome of these proceedings could be that the decision would be quashed and stage two might be revisited, disclosure would have defeated the aim of protecting confidentiality provided by the code of practice;
47. The Commissioner considers that, in summary, the first argument represents an attempt to extend the scope of the prohibition beyond the conclusion of the second stage (and potentially indefinitely) and the second argument appears to rely on a form of backwards causality, allowing for a scenario where disclosure retroactively affects the integrity of the second stage of the process.
48. With regard to the first argument, paragraph 5.4.6 of the code of practice is qualified by paragraph 5.4, which states "The procedure a licensing authority propose (sic) to follow in making any determination required by paragraph 5 of the Schedule must provide for the following...."
49. The Commissioner considers that paragraph 5.4.6 does not in itself provide a blanket prohibition on disclosure but rather sets out a separate duty for licensing authorities to maintain the confidentiality of information provided by bidders. In the Commissioner's view, it is likely that paragraph 5.4 restricts protocols regarding confidentiality to the duration of the second stage of the process. However, the Commissioner considers that, regardless of the timeframe which this duty extends to, this paragraph does not have a bearing on the statutory bar provided by paragraph 5.4.5.
50. With regard to the council's second argument, the Commissioner considers that the function of the statutory bar is unambiguously confined to the duration of the second stage. Following the completion

of the second stage, even if the courts were to subsequently overturn a licensing authority's decision, this would not retroactively make that second stage incomplete.

51. As the request was submitted after the conclusion of the second stage of the bidding process, the Commissioner considers that the statutory bar, which is explicitly confined to disclosures *during* the second stage, does not apply. The Commissioner, therefore, finds that the council has wrongly relied on section 44(1)(a) to withhold the information.

Section 43(2) – Prejudice to Commercial Interests

52. Section 43(2) provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is therefore subject to the public interest test.
53. In this instance the council has argued that disclosure of the requested information would be likely to prejudice the commercial interests of Aspers and Westfield, the owner of the complex where the casino would be situated.
54. In considering whether the exemption is engaged, the Commissioner has considered, in each instance where information has been withheld, whether prejudice is likely to occur.
55. In considering its response to the request, the council, in accordance with the Code of Practice issued under section 45 of the FOIA, consulted with and sought the views of Aspers. In reaching his decision about the application of this exemption, the Commissioner has considered the arguments put forward by the council, Aspers and the complainant. In order to determine whether prejudice would be likely to occur, the Commissioner has considered whether the possibility of prejudice is real, significant and certainly more than hypothetical or remote.

Aspers Casino Presentation 6 December 2010

56. This presentation set out the details of the Aspers bid to the casino licence advisory panel. It was provided to the complainant with certain elements redacted.
57. One of the redacted sections followed text stating "what is the status of the possibility for an extension of the lease after...". Aspers has argued that the disclosure of the terms of the lease, which were not in the public domain, would affect the commercial position of Westfield. As Westfield was, at the time, in lease negotiations with other tenants, disclosure of the terms of the lease with Aspers would adversely affect its ability to conduct these negotiations. Although the council's

arguments in this respect mirror those provided to it by Aspers it has confirmed that it is relying on the '*disclosure would be likely to result in prejudice*' threshold, rather than the higher '*would result in prejudice*' limb of the exemption.

58. The Commissioner accepts that disclosure of details of the terms of the lease would be likely to prejudice Westfield's ability to negotiate leases with other tenants and concludes that, in relation to this element of the request, the exemption is engaged. He has, therefore, gone on in paragraphs 60 – 67 to consider the public interest in upholding the use of the exemption.
59. Other redacted sections in the Aspers Casino Presentation relate to Aspers' responses to the questions "How will Aspers communicate with the local community to address matters arising and concerns?" and "How do Aspers measure their contribution to the increase or decrease in gambling associated problems?". In relation to the first redacted section, this identifies information which relates to other, publicly available information, and the council has not explained why disclosure would engage the commercial interests exemption⁴. Similarly, the Commissioner does not consider that the information redacted in the response to the second question engages the exemption. The Commissioner acknowledges that, in some instances a 'mosaic' argument might be relevant, namely that the disclosure of a number of small, individually insignificant items of information can contribute towards the formation of a complete picture. In this instance, the Commissioner does not accept that the withheld information could form a picture which would be likely to result in prejudice being caused to Aspers' commercial interests. He has therefore, not gone on to consider the public interest in both these sections.

⁴ See the report of the "Advisory Commission on the Newham Casino", published on the council's website here: <http://www.newham.gov.uk/nr/rdonlyres/1d637c30-83b6-46c8-aebe-448adde12144/0/casinoreport.pdf> and also, <http://www.aspersgroup.co.uk/index.php/newsreader/items/aspers-attracts-new-trainees.html>

Public interest in favour of maintaining the exemption

60. The public interest arguments in favour of maintaining the exemption are focussed on the reasons for the initial engagement of the exemption, namely the prejudice that disclosure is likely to cause.
61. The council has argued that the terms of the lease are not in the public domain and that the ability of Westfield to negotiate with other tenants would be likely to be harmed by the disclosure of information regarding the terms of other tenants' leases. As such negotiations were in progress at the time, it was likely that this effect would directly result. The council has also argued that the public interest has been served by the existing information about the lease which is in the public domain.
62. There is a public interest in authorities honouring the circumstances under which they are provided with information. Information may be provided to authorities under an assumption of confidence and, whilst this might be confidential in laypersons' terms as opposed to in the sense of an actionable breach, disclosure might hinder an authority's future ability to attract prospective tenders or applications for licences.

Public interest in disclosing the information

63. Clearly, there is a public interest in transparency with regard to public authorities' probity in granting licences. The public interest in openness is particularly strong in relation to the awarding of the super casino contracts. The concept of such large scale gambling premises is relatively new in the UK and the issue has attracted controversy and public debate.
64. The details about the lease would broaden the public understanding of the licence decision-making process and would give prospective future competitors for such licenses an insight into the requirements of the process. This could have the effect of encouraging more bidders to take part, giving the council a broader choice in making a decision in the interests of the community.

Balance of the public interest arguments

65. The Commissioner's general position is that information relating to contracts or applications for licences will be more sensitive before a contract is signed or a licence awarded. After the conclusion of such a process the competitive element will fall away and the sensitivity of the information will diminish.
66. In this instance, the Commissioner accepts that information about the lease relates to a process which is ongoing, namely Westfield's ability to negotiate competitive deals with other tenants.

67. However, the Commissioner is not convinced that the public interest in withholding the information outweighs the public interest in enabling the public to understand the factors which led to the council's decision to award the licence. In relation to this information, the Commissioner has concluded that the public interest does not favour upholding the use of the exemption.

LED advisory Panel Briefing Meeting 7 January 2010

68. This document details feedback from dialogue meetings and technical panel reporting requirements. The council redacted information which named Aspers' guarantor because it considered that disclosure would give an insight into the particular licensing arrangements to which the guarantor was willing and able to commit. This would influence the guarantor's own negotiating position in other contexts as well as the position of Aspers in other licence competitions should it choose to submit the same guarantor.

69. The Commissioner has considered the arguments provided by the council and has viewed publicly available information at the time of the request. The Commissioner has found that the name of the guarantor was already in the public domain at the time the request was received⁵. The Commissioner accepts that the existence of information in the public domain does not automatically count against non-disclosure. However, in this instance, the Commissioner considers that the redacted information does not reveal anything (beyond that which is already in the public domain) which would be likely to result in the prejudice described by the council. In view of this, the Commissioner does not consider that the exemption is engaged nor is the public interest test engaged. He has not, therefore, gone on to consider the relevant public interest arguments.

Aspers Casino Dialogue Meeting 20 December 2010 and LED Advisory Panel Briefing Meeting 20/21 January 2011

70. These documents record the status of the licence competition and considerations of supplementary information received from bidders. The council has stated that it redacted information relating to Aspers' bid because it reveals the particularities of Aspers' negotiating position,

⁵ Published online, 11 March 2011: <http://uk.westfield.com/stratfordcityleasing/news/press-releases/aspers-wins-license-for-new-casino-at-westfield-stratford-city/>

specific proposals (including strategic business plans and other information relating to the preparation of its bid), net present value forecasts over specific periods and other unique details. The council has argued that disclosure of this information would prejudice Aspers' ability to participate in other casino licence competitions as it would allow competitors to see how a winning bid should be structured.

71. Having viewed the redacted information contained in the Aspers Casino Dialogue Meeting 20 December 2010 and LED Advisory Panel Briefing Meeting 20/21 January 2011 documents, the Commissioner does not consider that this reflects the description provided by the council. He does not see that disclosure of this information, which largely takes the form of a general commentary on options regarding potential changes to a bid, would be likely to prejudice the commercial interests of Aspers. The Commissioner has concluded that, in relation to the redacted information in these two documents, as it relates to Aspers, the exemption is not engaged. The Commissioner has not gone on to consider the public interest in this regard.

Advisory Panel Evaluation Report 21 February 2010, Schedule 9 Agreement and Technical Panel Report

72. The council withheld parts of the Advisory Panel Evaluation Report, the entirety of Schedule 1 of the Schedule 9 Agreement and all of the Technical Panel Report. The Commissioner has viewed the withheld information and considered, in light of the arguments presented by the council, whether disclosure would be likely to result in prejudice being caused to Aspers.
73. The withheld information is varied. Whilst much of it, in isolation, would not be commercially sensitive, when considered as a whole, it emerges as a strategy which has enabled Aspers to win the licence bid. As such, disclosure of the information would reveal the basis of Aspers' advantage and have an impact on its ability to compete in future licence bids. However, before deciding whether the exemption is engaged, the Commissioner has to determine whether the council has demonstrated that disclosure would be likely to result in prejudice.
74. The Commissioner considers that there is a burden on public authorities to be able to demonstrate that (i) the nature of the prejudice claimed can be linked back to the disclosure of the information in question and (ii) the likelihood of the prejudice occurring meets the test for the level of likelihood claimed. In other words, the level of evidence provided in support of a prejudice claim should be sufficient to meet the level of likelihood claimed.

75. In this instance, the council has relied on generic arguments and has not provided evidence of the character of the prejudice that disclosure would be likely to cause. The argument can be presented by imagining the following hypothetical scenario: Prior to or during the licensing award process, information about Aspers' bid is made public. Competitors are able to revise their bids to mirror or improve upon that presented by Aspers. As an outcome, Aspers loses the competitive advantage provided by its unique bidding strategy and suffers prejudice to its commercial interests.
76. If we extrapolate this general argument to scenarios involving other casino licence bids submitted by Aspers either in progress at the time of the request or in the future, it can be seen how prejudice is likely to occur. In relation to the information withheld from each of these documents, therefore, the Commissioner concludes that the exemption is engaged and has gone on to consider the public interest arguments.

Public interest in favour of maintaining the exemption

77. The council has argued that the public interest favours upholding the exemption because the substantial prejudice to Aspers which disclosure would be likely cause outweighs the benefits of transparency. In support of this determination, the council has argued that the public interest has already been served by the substantial amount of information about the process which is already in the public domain. According to the council, the information which has already been made available sets out the benefits to be enjoyed by the people of Newham and the reasons why Aspers was awarded the licence.
78. As noted at paragraph 57, there is also a general public interest in authorities honouring the circumstances under which they are provided with information. Whilst the council has not made reference to any duty of confidence regarding the information, disclosure of information provided by third parties might, in some situations, discourage their participation (or cooperation) in future activities. This in turn could diminish the options available to an authority in securing good deals for the community.

Public interest in disclosing the information

79. In their internal review submission, the complainant argued that there is a very substantial public interest, both within and outside Newham, in respect of the benefits to be provided by, and the council's reasons for awarding the licence to Aspers.
80. The complainant has also argued that, in the context of the contemporaneous judicial review proceedings and associated potential

for disclosure of equivalent information relating to the unsuccessful bidders, Aspers bid cannot maintain the same level of commercial sensitivity.

81. There is a general public interest in the scrutiny of how public authorities award contracts or grant licences. Transparency around such decisions will generate confidence in the integrity of the procedures involved. Similarly, increased access to information about the licence awarding process may encourage more potential bidders to compete. A better understanding of the process, the award process and knowledge of how successful bids have been put together could also lead to improved bids being submitted in the future.
82. Another factor relevant to elements of the withheld information is that the sensitivity of commercial information will generally decrease over time, particularly in relation to financial or market details. Also, information submitted during a tendering or licence award process is more likely to be commercially sensitive whilst the process is in train. Once the process is complete, disclosure of relevant information cannot provide a retrospective advantage to competitors for a specific licence.

Balance of the public interest arguments

83. In determining whether the public interest favours disclosing the information, the Commissioner has weighed the competing arguments.
84. In relation to the complainant's argument which suggests commensurability between disclosures made via the judicial review procedure and via the FOIA, the Commissioner does not consider that this is valid. Disclosures made via FOIA are unrestricted and are not analogous to disclosures made under the judicial review process.
85. However, the broader public interest arguments around transparency regarding the decision making process, the associated public confidence that an authority has reached an appropriate decision and the benefits of making information about the process available are particularly strong. The council has argued that these public interest factors have already been served by the information which is already in the public domain. However, in view of the already noted controversial nature of the casino licence and the concerns and opposition voiced by local

residents, the Commissioner considers that there is a very strong public interest in transparency⁶.

86. In reaching a decision, amongst the criteria applied by the Advisory Panel Evaluation Board include 'commitment to maximise job creation and regeneration opportunities', 'financial consideration terms that ensure benefit to the Newham Community' and 'prevention, monitoring and safeguards'.
87. Schedule 9, paragraph 5 of the Gambling Act 2005 clarifies that, in determining which bidder should be awarded the licence, the licensing authority should assess which would provide the greatest benefit to the authority's area⁷. Disclosure of information which shows how an authority has reached a decision in these regards would, in terms of furthering public understanding of the process and instilling confidence that decision makers have acted in the best interests of a community, serve the public interest. Disclosure would also satisfy the general principle of accountability in public life, enabling the local community and the wider public to assess whether the winning bidder has delivered on its proposed objectives. In view of the general controversy and public debate surrounding the creation of the concept of the large casinos licence and the specific concerns raised in the Newham community, the public interest in broad transparency appears to the Commissioner to be particularly strong.
88. In relation to the likelihood of disclosure of the information prejudicing Aspers' ability to compete in other casino licence bids, the Commissioner considers that the information in question is very context-specific and relates to the particular conditions of the Newham casino proposal. The likelihood of the same bid details being capable of being transposed to a casino bid in another area appears remote and is offset by the public interest in seeing that, in relation to regeneration, contribution to local projects, crime prevention and other benefits, the licence awarding process has ensured that all of the evaluation criteria have been thoroughly considered. Disclosure would also assist future potential bidders for such licences to understand the composition of a successful bid, contributing to competition and enhancing the quality and range of bid options available to the licensing authority.

⁶ See the report of the "Advisory Commission on the Newham Casino", published on the council's website here: <http://www.newham.gov.uk/nr/rdonlyres/1d637c30-83b6-46c8-aebe-448adde12144/0/casinoreport.pdf>

⁷ <http://www.legislation.gov.uk/ukpga/2005/19/schedule/9>

89. In relation to any expectations that parties contributing to the licence bid might have had about the confidentiality of their submissions, the Commissioner has referred to section 2.0 of the Advisory Panel Evaluation Report. Under the heading "Confidentiality", this clarifies that applications received by the council contain "commercially sensitive information". The Report goes on to explain that information relating to applications will be subject to the council's 'Protocol for the Management of Information and Handling of Confidential Data'.
90. The council has not cited the 'information provided in confidence' exemption (section 41), nor has it submitted arguments which show that disclosure of the information would result in an actionable breach of confidence. The Commissioner accepts that there is a close relationship between commercial sensitivity and confidentiality; however, he considers that it is not appropriate to import the criteria for the engagement of section 41 into a determination about the application of the commercial interests exemption⁸. In any event, the Commissioner's general view is that, once a tendering or licence awarding process is concluded, the public interest in withholding related information obtained during these processes diminishes.
91. In light of the above, the Commissioner has concluded that, in relation to the information withheld from the Advisory Panel Evaluation Report, Schedule 1 of the Schedule 9 Agreement and the Technical Panel Report, the balance of the public interest arguments are weighted in favour of disclosing the information.

Other matters

92. Although it does not form part of this decision notice the Commissioner wishes to record his concerns in relation to the council's initial reliance on the legal professional privilege exemption. It would appear that when applying this exemption the council had not checked whether this information was held and sought to refuse this element of the request on a general basis. A failure to obtain or consider the actual information requested could result in an incorrect or inaccurate response and as such the Commissioner considers that this is extremely poor practice.
-

⁸ The reference to confidentiality protocols mirrors the language used in the Gambling Act 2005 code of practice (see paragraphs 46-51, above).

Right of appeal

93. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

94. 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.
95. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

Gerrard Tracey
Principal Policy Advisor
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex – Full Text of Request for Information

- (a) A full explanation of the way in which the deliverability criteria were designed, interpreted and applied, including in particular the Authority's understanding of the way in which these criteria relate to the statutory test of greatest benefit and their impact on the scoring of applications involving development works;
- (b) All information (including internal communications and any legal advice) regarding the setting, interpretation and application of the deliverability criteria;
- (c) The reports of the advisory panel and the technical panel on the successful bid, and the Committee's full determination in respect of that bid, including in particular the approach and scoring on the greatest benefit criteria (namely Criteria B, C and D);
- (d) A full explanation of, and all documents relating to, the Committee's consideration of the dependence or otherwise of the funding on the associated residential development, and AGL's further submissions and evidence on this point as well as the proof of funding provided for the casino and the LED (including whether or not they would make any difference to the outcome); and
- (e) Confirmation as to whether any other bidder other than the successful bidder received full marks in respect of the deliverability criterion (Lead Criterion A).