

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 January 2013

Public Authority: Telford & Wrekin Council
Address: Addenbrooke House
Ironmasters Way
Telford
TF3 4NT

Decision (including any steps ordered)

1. The complainant has requested a copy of the successful supplier's submission for the Data Centre Storage Tender. Telford & Wrekin Council (the "council") provided the complainant with a redacted version of the information and withheld the remaining information under the exemptions for personal data, information provided in confidence and commercial interests.
2. The Commissioner's decision is that:
 - The council has correctly applied the exemptions for personal data and information provided in confidence;
 - The exemption for trade secrets is not engaged. The exemption for prejudice to commercial interests is engaged but the public interest favours disclosure of the information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld under the exemptions for trade secrets and prejudice to commercial interests.
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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. The request relates to a tendering exercise conducted by the council to award a Data Storage contract.
6. In dealing with the request, the council has noted that the requester is a channel partner of the winning bidder and also their direct competitor when submitting bids for the same work.

Request and response

7. On 20 February 2012, the complainant wrote to the council and requested information in the following terms:

(In relation to the tender for Data Centre Storage)

"We would like to request under the freedom of information a copy of the successful suppliers tender submission please."

8. The council responded on 12 April 2012. It stated that it was providing the complainant with some of the requested information but withholding the remainder under the exemptions for personal data, information provided in confidence and prejudice to commercial interests.
9. Following an internal review the council wrote to the complainant on 1 June 2012. It stated that it was maintaining its original position regarding the handling of the request.

Scope of the case

10. On 31 July 2012 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
11. The Commissioner confirmed with the complainant that his investigation would look at whether the council had correctly applied exemptions to withhold information.

Reasons for decision

Section 40 – personal information

12. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its

disclosure under the FOIA would breach any of the data protection principles or section 10 of the Data Protection Act 1998 (DPA).

13. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

"...data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."

14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the data protection principles under the DPA.
15. The first consideration is whether the information is personal data. The withheld information contains the name and contact details of individuals who do not work for the council and are not an employee of a public authority. The Commissioner considers that individuals' names and contact details are clearly personal data as such information relates directly to an identifiable individual.
16. In his role as regulator of the DPA, the Commissioner has noted that some information contained in the tender submission, withheld by the council under section 41, also constitutes the personal data of third party individuals. In analysing the council's application of section 40, the Commissioner has also considered this information (contained on page 4 of the submission), even though the council did not itself apply the exemption to this specific information.
17. As the Commissioner is satisfied that the information is personal data, he now needs to consider whether disclosure would breach the first data protection principle, as the council has claimed, i.e. would disclosure be unfair and/or unlawful.
18. In deciding whether disclosure of this information would be unfair, the Commissioner has taken into account the nature of the information, the reasonable expectations of the data subjects, the consequences of

disclosure on the data subjects and balanced the rights and freedoms of the data subjects with the legitimate interests in disclosure.

Nature of the information and reasonable expectations

19. In his guidance "Requests for personal about public authority employees"¹ the Commissioner notes that a factor to be taken into account when considering whether to release information identifying an employee is whether the information relates to the employee's public or private life. The threshold for releasing professional information will generally be lower than that for releasing truly personal, sensitive information.
20. In this case, whilst the withheld information in this instance relates to an individual's work life, the individuals in question are not public authority employees but employees of a third party, private contractor. The council has argued that, in view of this, the individuals would have an expectation that they would not be subject to the same degree of scrutiny as a public authority employee whose salary is directly provided through the public purse. In view of this, the council considers that the individuals would have had a reasonable expectation that their personal data would not be disclosed into the public domain.

Consent

21. The issue of consent is dealt with in the Commissioner's specialist guidance "Consent"². The guidance states that the Commissioner will take data subjects' comments into account insofar as they represent an expression of the views of the data subject at the time of the request. The Commissioner considers that such views will help to inform the analysis of fairness because of the unique perspective of the data subject on the impact of disclosure on them.
22. The Commissioner notes that an individual's objection to the disclosure of information does not necessarily mean that it cannot be released. It is important to consider whether it is reasonable for the data subject to object to the disclosure. However, as the council has not provided any

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http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Practical_application/section_40_requests_for_personal_data_about_employees.ashx

² <http://www.ico.gov.uk/foikb/PolicyLines/FOIPolicyConsent1.htm>

submissions in this regard, the Commissioner has not considered the question of consent further.

Consequences of disclosure

23. In order to assess the impact of the consequence of disclosure on whether release of the requested information would be fair, it is necessary to consider whether disclosure of the information would cause unwarranted damage or distress to the individual.
24. The council did not provide any specific submissions in this respect, however, the Commissioner is mindful that, as non-public authority employees, the individuals in question would have had a strong expectation that their personal data would not be disclosed in response to a request for information.
25. Taking the above into account, the Commissioner's view is that disclosure of the withheld information would be likely to cause unwarranted distress to the individuals concerned.

Legitimate interest in disclosure

26. The Commissioner accepts that in considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for its own sake. The Commissioner accepts that public authorities should be open to scrutiny and accountability and there is a general interest in tenders which are funded by the public purse.
27. However, the Commissioner considers that, in this case, there is no specific legitimate interest in disclosing the personal details of a third party contractor. He has not been provided with any arguments in this regard and he is of the view that disclosure of this information would not aid the public understanding of the substantive issues. Whilst there is a broad public interest in transparency and accountability in relation to public authorities' actions, especially where it relates to expenditure, the Commissioner does not consider that this would be significantly served by the disclosure of this information.

Conclusion

28. In view of the above the Commissioner has concluded that disclosure of the information would be unfair and the legitimate interest in disclosure in this case does not outweigh the rights and freedoms of the data subject. He, therefore, finds that the council has correctly applied section 40(2) to the withheld information.

Section 41 – Information provided in confidence

29. The council identified a small quantity of information which it considered engaged section 41. Having viewed the information, the Commissioner notes that it consists of details of references and other supporting information relating to the successful bidder's tender submission, including potential future courses of action under consideration.
30. Section 41 of the FOIA sets out an exemption from the right to know where the information requested was provided to the public authority in confidence. There are two components to the exemption:
- The information must have been obtained by the public authority from another person. A person may be an individual, a company, a local authority or any other "legal entity". It is not restricted to information provided verbally or in writing. For example, information recorded by a doctor carrying out a physical examination of a patient is information obtained from that patient. The exemption does not cover information which the public authority has generated itself, although it may cover documents (or parts of documents) generated by the public authority if these contain confidential information provided by a third party. It is the information itself, and not the document or other form in which it is recorded, which needs to be considered.
 - Disclosure of the information would give rise to an actionable breach of confidence. In other words, if the public authority disclosed the information the provider or a third party could take the authority to court.
31. The Commissioner has considered the elements of the withheld report which the council claims engages the exemption, applying the above criteria and analysis.

(a) Was the withheld information obtained by the council from another person?

32. Having viewed the withheld information the Commissioner is satisfied that it was provided to the council in February 2012 by another person, namely by Dell Corporation Ltd ("Dell"). The withheld information forms part of Dell's tender submission for the council's Data Centre Storage contract. The Commissioner has concluded that the information meets this criterion of the exemption.

(b) Would disclosure of the withheld information constitute an actionable breach of confidence?

33. In order to determine whether disclosure would constitute an actionable breach of confidence the Commissioner considered the following questions:

(i) Does the withheld information possess the necessary quality of confidence?

(ii) Was the withheld information imparted in circumstances importing an obligation of confidence?

(iii) Would unauthorised disclosure cause a detriment to the party providing the information or to another party?

(iv) If parts (i)-(iii) are satisfied, would the public authority nevertheless have a defence to a claim for breach of confidence based on the public interest in the disclosure of the withheld information?

(i) Does the withheld information possess the necessary quality of confidence and, (ii) was the withheld information imparted in circumstances importing an obligation of confidence?

34. The Commissioner's guidance explains that information which is protected from disclosure by an obligation of confidence must have the necessary "quality of confidence". There are two key elements to this:

- The information need not be highly sensitive, nor can it be trivial. The preservation of confidences is recognised by the courts to be an important matter and one in which there is a strong public interest. This notion is undermined if it is argued that even trivial matters are covered. However, otherwise trivial information may not be considered trivial if it relates to personal matters and the confider considers it important.
- The information must not be readily available by other means. Information which has been reported in the press or a chemical formula which can be worked out by any chemical analyst, for instance, are unlikely to be viewed by the courts as being confidential. On the other hand, it is not necessary that the information is completely secret. A patient does not lose the right to

medical confidentiality, for instance, simply because he or she has given details of their condition to an employer or a friend.³

35. Part IV of the code of practice issued under section 45 of the FOIA (the "code") advises that, where a public authority receives a request for information which relates to the interests of parties other than the authority itself, that it would be good practice to consult with such parties prior to responding to the request⁴.
36. The council confirmed that it consulted with Dell during its handling of the request and provided the Commissioner with evidence of this consultation. Dell has argued that the withheld information contains highly sensitive commercial pricing which is not public knowledge. It considers that the disclosure of the information could significantly damage Dell and would prejudice its competitive position in relation to tender submissions. Dell is of the opinion that, in view of this, the information is worthy of protection and has the necessary quality of confidence.
37. The Commissioner notes that a section of the requested information which was disclosed to the complainant, titled "Freedom of Information" states that it considers that information contained within its tender submission which relates to financial modelling, pricing or other sensitive information would be subject to the exemption for information provided in confidence, should it be requested under the FOIA.
38. Part V of the code recommends that authorities should be mindful of their obligations under the FOIA before accepting any restrictions on the disclosure of information provided by third parties⁵.
39. In support of its position that the information engages the exemption the council has argued that the withheld information is not trivial and that its disclosure would potentially be anticompetitive, would prejudice Dell's competitive position in the conduct of their business and the conduct or outcome of contractual or other negotiations and could result in a material financial loss.

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http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/CONFIDENTIALINFORMATION_V4.ashx

⁴ <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

⁵ Ibid.

40. Having viewed the withheld information the Commissioner agrees that this consists of details which are unique to Dell's tender submission. The information is not trivial, would not be accessible via other means and would be likely to be of value to competitors. In relation to this information, the Commissioner considers that criteria (i) and (ii) are satisfied.

41. The Commissioner has gone on to consider whether the withheld information satisfies the final criteria for the engagement of the exemption.

(iii) Would unauthorised disclosure cause a detriment to the party providing the information or to another party?

42. Having read the council's submissions and those provided by Dell, the Commissioner considers that Dell would have expected the information in question to remain confidential on the basis that they would not wish their competitors to be privy to it. Disclosure of the information could lead to their competitors gaining an advantage and to the contractor losing business as a result. The view of the Commissioner is, therefore, that there is a possibility of detriment to the confider resulting through disclosure.

(iv) If parts (i)-(iii) are satisfied, would the public authority nevertheless have a defence to a claim for breach of confidence based on the public interest in the disclosure of the withheld information?

43. The final step when considering if this exemption is engaged is to consider whether there would be a public interest defence to the breach of confidence that would result through the disclosure of the information in question. Such a defence would mean that this breach of confidence would no longer be actionable and so the exemption provided by section 41(1) would not be engaged.

44. Consideration of the public interest in relation to section 41(1) is not the same as consideration of the public interest test in relation to qualified exemptions. That test is whether the public interest in maintenance of the exemption outweighs the public interest in disclosure. The test here is whether the public interest in disclosure of the information exceeds the public interest in the maintenance of confidence.

45. The view of the Commissioner is that an obligation of confidence should not be overridden on public interest grounds lightly and that a balancing test based on the individual circumstances of the case will always be required. There must be specific and clearly stated factors in favour of disclosure for this to outweigh the public interest in the maintenance of confidence.

46. The protection provided by the duty of confidence here is to the process of tendering for services on which public funds are to be spent. The Commissioner believes there to be a public interest in the ability of the public authority to carry out this process effectively as this process is intended to ensure that public funds are used appropriately. If disclosure would prejudice the ability of the public authority to carry out this process - by discouraging commercial organisations from participating in this process, for example - this would be counter to the public interest. If the public authority was unable to secure the services of the best quality and value providers, this would not be in the public interest.
47. The Commissioner recognises a valid public interest on the basis of understanding more about the process undertaken by the council to ensure that it secures value for money when undertaking a tendering process. However, this factor must be weighed against the harm to the confider that the Commissioner has accepted could occur as a result of disclosure.
48. Whilst the Commissioner has recognised this argument in favour of disclosure, he is also of the view that protecting the ability of the council to spend public money appropriately is a weighty argument against disclosure. This, combined with the possible detriment to the confider, means that the Commissioner does not believe that the public interest in maintaining the confidence is outweighed. The Commissioner concludes that a valid defence could not be made in this case that the breach of confidence was in the public interest. The breach of confidence would, therefore, be actionable.
49. The Commissioner concludes that the exemption provided by section 41(1) is engaged in relation to the information in question. This conclusion is based on his findings that the information was provided to the public authority from a third party; the information is subject to the quality and obligation of confidence, and any breach of this confidence would result in detriment to the confider. This means that disclosure of this information would constitute an actionable breach of confidence. The Commissioner has also found that a breach of this confidence would not cease to be actionable due to a defence that the breach would be in the public interest.

Section 43 – commercial interests

50. Under section 43, the council withheld a small amount of information relating to details of unit costs, price schedules and discount terms.
51. In withholding some information from the tender submission the council has relied on both subsections of this exemption, namely section 43(1),

where information constitutes a trade secret and section 43(2). The Commissioner has first considered whether the council has correctly applied section 43(1) of the FOIA to the withheld information.

Section 43(1) – trade secrets

52. Section 43(1) of the FOIA provides an exemption from disclosure where requested information constitutes a trade secret.
53. The trade secret exemption within section 43 is a class exemption which means that if information is a trade secret it is exempt, whether or not harm results from its disclosure. As a qualified exemption, it is still, however, subject to the public interest test.
54. The Commissioner's guidance notes that the term "trade secret" is not defined in the FOIA. It acknowledges that the term can have a fairly wide meaning. It covers not only secret formulae or recipes, but can also extend to such matters as names of customers and the goods they buy, or a company's pricing structure, if these are not generally known and are the source of a trading advantage⁶.
55. The Commissioner considers that, generally the less skill, effort, or innovation that is required to generate the information in the first place, the less likely the information is to constitute a trade secret. By the same token, the easier it would be for a competitor to recreate or discover that information through his own efforts, the less likely it is to be a trade secret.
56. As noted above, part IV of the code of practice issued under section 45 of the FOIA (the "code") advises that, where a public authority receives a request for information which relates to the interests of parties other than the authority itself, that it would be good practice to consult with such parties prior to responding to the request⁷.
57. The council directed the Commissioner to submissions it received from Dell as part of the consultation process in respect of the request. In its submission Dell referred to a section of the tender proposal which, under the heading "Freedom of Information" stated that it considered that

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http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

⁷ <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

information contained within the proposal relating to pricing, future products and product development should be withheld as a trade secret.

58. Dell has further clarified that its pricing and technical solution, such as that contained within the withheld information, is unique to each tender and it takes strict steps to ensure that this information is not accessible to competitors.
59. Having considered the withheld information and the council's and Dell's submissions, the Commissioner is not satisfied that the council has demonstrated that the withheld information constitutes a trade secret. Whilst he acknowledges that Dell's pricing and technical solutions constitute knowledge that, were it accessible to rivals, might undermine its commercial advantage, he does not consider that it has been shown that the information transcends the category of commercially sensitive information or that it satisfies the criteria for a "trade secret".
60. The Commissioner notes that, when prompted for further submissions, the council initially simply referred the Commissioner to Dell's own submissions, provided to the council during the consultations period, referred to above. When pressed for further explanation of why it considered that the information engaged section 43(1), the council stated "We feel that the information constitutes a trade secret as it is information which, if disclosed to a competitor, would be liable to cause real or significant harm to the commercial interests of Dell."
61. The Commissioner considers that an evidential burden rests with public authorities to show that, where information is being withheld, the exemption which is being relied upon has been correctly engaged. In this case, the Commissioner considers that the council has failed to show why the withheld information constitutes a trade secret. He has, therefore, concluded that the exemption is not engaged and he has not gone on to consider the public interest.

Section 43(2) – prejudice to commercial interests

62. Section 43(2) of the FOIA 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.
63. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43. This comments that:

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."⁸

64. Having viewed the withheld information, which relates to a submission for a potential contract for the provision of IT equipment and services to the council, the Commissioner considers that the information falls within the scope of the exemption and has gone on to consider the nature of the prejudice and how it is linked to disclosure.

Whose commercial interests and the likelihood of prejudice

65. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.
66. The council has stated that disclosure of the information would be likely to prejudice the commercial interests of Dell.

The nature of the prejudice

67. The council provided the Commissioner with evidence of its consultation with Dell (see above) and confirmed that Dell considered that the information, which relates to pricing, future products and product developments, should be considered commercially sensitive and confidential.
68. The council explained that pricing and technical solutions contained within the withheld information are unique to each tender and specific details of any discounts or pricings applied would provide competitors with an advantage over Dell. Disclosure of the information would enable competitors to construct a tender which would undercut Dell's submission, on the basis of work carried out (in preparing their own tender submission) by Dell.

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http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

69. The council confirmed that the tender bid was submitted in a highly competitive environment. In general terms, the Commissioner accepts that the disclosure of the costings of a single item or service would be sufficiently critical enough to have an impact on a company's ability to win or lose a contract at tendering stage. Knowing which items are priced at what unit value at the stage of procurement for bulk provision is a very powerful lever during the tendering stages an advantage to be gained over competitors.
70. The Commissioner has considered the arguments provided by the council and referred to previous, comparable decision notices where he found that authorities had correctly withheld information because disclosure would reveal companies' pricing strategies and result in competitors undercutting their tender bids. He has determined that disclosure of the information would provide competitors with an advantage which would be likely to prejudice Dell's commercial interests. He has, therefore concluded that the exemption is engaged.
71. The Commissioner has gone on to consider the public interest test.

Public interest in disclosure

72. The Commissioner has, in relation to the council's application of section 43(1), considered public interest arguments submitted by the complainant. He considers that those same arguments are relevant to the council's application of section 43(2) and he has, therefore, transposed these arguments below.
73. The complainant has argued that there is a public interest in transparency in relation to procurement and the spending of public money. The Commissioner acknowledges that the general principles of transparency and accountability are sound arguments in favour of disclosure which will always carry some weight.
74. The complainant has also highlighted the fact that, at the time of the request, the procurement exercise had been completed and it was likely that information relating to pricing structures would either be out of date or no longer as sensitive.
75. The Commissioner notes that the tender contract was awarded to Dell in February 2012 and the request was submitted in March 2012. The Commissioner's guidance acknowledges that circumstances will change over time and information submitted during a tendering process is more likely to be commercially sensitive whilst the tendering process is ongoing compared to once the contract has been awarded. Information refused at one point in time does not mean that the information can be permanently withheld. Market conditions will change and some

information, such as those relating to costs, may very quickly become out of date⁹.

76. Another general argument in favour of disclosure which the Commissioner considers is relevant here is that by increasing access to information about the tendering process may in fact encourage more potential suppliers to enter the market. A better understanding of the process, the award criteria, knowledge of how successful bids have been put together, could also lead to improved bids being submitted in the future. This will lead to more competition and so decrease costs to the public authority. Indeed where a contract comes up for renewal, limiting this kind of information may well favour the current contractor and reduce competition.

Public interest in maintaining the exemption

77. The council confirmed that it considered that the disclosure of the withheld information would be likely to damage Dell's commercial position and that this outweighed any potential public interest in disclosure. The council confirmed that the information was not in the public domain and that disclosure would cause Dell significant damage.
78. The council and Dell have argued that disclosure of the information regarding technical solutions may affect competition for Dell and also for the council in procuring similar solutions in the future. The council considers that this might mean that it would have to pay more for procured services at a time when it is trying to protect public services from budget cuts. Disclosure, therefore, would not serve the public interest.
79. Dell has submitted that disclosure of its pricing and technical solution, with the effect of it being made available to competitors, would serve no public interest but would rather serve the personal interests of a competitor, undermining Dell's competitive position.

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http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

Balance of the public interest

80. In balancing the public interest arguments in this case the Commissioner has been particularly mindful that disclosure of the withheld information would be likely to cause actual prejudice to the commercial interests of Dell.
81. The Commissioner believes that the arguments in favour of accountability and transparency are particularly strong in situations involving the spending of large amounts of public money, however, this has to be weighed against the public interest in avoiding any unwarranted prejudice to the commercial interests of private companies.
82. In this case the Commissioner believes that the withheld information would give a valuable insight into the pricing strategy and technical solutions of Dell. Given the highly competitive nature of this market the Commissioner believes that the disclosure of the withheld information would be likely to give a significant advantage to Dell's competitors.
83. However, the Commissioner is mindful that, as highlighted by the complainant, at the time of the request, the contract had already been awarded so competitors gaining access to the information would not have been in a position to exploit it to undermine Dell's tender submission.
84. Both the complainant at the internal review stage and, subsequently, the Commissioner, invited the council to clarify why it considered that the information remained sensitive, despite the completion of the tendering process. Neither the council nor Dell has provided an explanation for this position. Furthermore, the Commissioner notes that, given that the council has argued that Dell's submission was a bespoke one, unique to the specific tendering criteria published by the council, it is unclear how competitors could transpose this information to other tenders, to Dell's present or future commercial detriment.
85. In relation to the council's concerns that disclosure of the information might result in damage to tender competition, the Commissioner considers that public authorities should be wary of accepting arguments that the potential for commercial information to be released would reduce the number of companies willing to do business with the public sector, leading to reduced competition and increased costs. The Commissioner considers that, in practice, many companies may be prepared to accept greater public access to information about their business as a cost of doing business with the public sector. And the

overall value of public sector contracts is a great incentive to tender for them.

86. The Commissioner is further mindful that the current widespread use of outsourcing in the public sector and the increasing use of private partners to deliver public services strengthens general arguments in favour of transparency and accountability. As information relating to outsourcing will increasingly be held by private companies carrying out work of a public function, there is a risk of a shortfall in accountability in relation to performance and expenditure. To address any such shortfall, public authorities should ensure that potential contractors are made aware of the responsibilities which the FOIA and other information access regimes bring.
87. Whilst the Commissioner has given due weight to the likelihood of disclosure resulting in prejudice to Dell's commercial interest, he considers that the council has failed to provide adequate arguments which demonstrate that the public interest favours maintaining the exemption. Particularly, he notes that both the council and Dell have failed to explain the level of prejudice which would be likely to be caused to Dell's commercial interests and what form this would be likely to take, given that the contract had, at the time of the request, already been awarded.
88. Having considered the relevant arguments and the FOIA's general weighting towards an assumption in favour of disclosure, the Commissioner has concluded that the public interest favours disclosing the withheld information.

Section 17 – refusal notice

89. Section 17(1) states that a public authority which is relying on a claim that information is exempt, must, within the time for complying, issue a refusal notice which:
 - (a) states the fact that information is exempt,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.
90. The Commissioner considers that the council's refusal notice, issued on 12 April 2012, failed to state why exemptions applied and it was not otherwise apparent why the exemptions were applicable.
91. The council did not rectify this at the internal review stage and the Commissioner has, therefore, concluded that, in this case, the council

failed to issue a refusal notice which complied with section 17(1) of the FOIA.

Right of appeal

92. 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

93. 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.
94. 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

Andrew White
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