

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: November 2007

Public Authority: Waverley Borough Council
Address: Council Offices
The Burys
Godalming
Surrey
GU7 1HR

Summary

The complainant contacted the Council to request a copy of clause 3 of the conditional contract signed by the Council and the developer in April 2003 concerning the development of East Street in Farnham. The Council responded to the request refusing to disclose this information, as it considered that it was exempt from disclosure under section 43 of the Act. The Commissioner has reviewed the requested information and he has concluded that, with the exception of subsection 3.3.4.1 of the contract, the Council were incorrect to rely of section 43 of the Act and therefore that this information should be released to the complainant. Concerning subsection 3.3.4.1, the Commissioner accepted that section 43 of the Act is engaged and that, for this specific information, the public interest in maintaining this exemption outweighs the public interest in releasing this subsection of the contract.

The Commissioner's Role

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

The Request

2. The complainant has been in dispute with the Council since August 2003 along with other local residents regarding the information that has been made available to the public concerning the development of East Street in Farnham. The complainant stated that, in his view, the Council has continued to act "unlawfully" by declaring that much of the "crucial" information relating to the development is exempt from disclosure. Following the introduction of the Act, the complainant

contacted the Council on 2 January 2005 to make the following request in accordance with section 1 (the full text of this section of the Act and any other sections referred to later in this Notice can be found in the Legal Annex section to the end of this Notice) of the Act:

“to release the entire conditional contract under the terms of the Freedom of Information Act”.

The conditional contract between the Council and the developer of East Street in Farnham was signed in April 2003.

3. The Council responded on 9 May 2005 and forwarded a redacted version of the contract to the complainant. It stated that it considered certain sections of the contract should be withheld under section 43 of the Act.
4. The complainant wrote to the Council on 13 May 2005 to appeal against its decision. As he had not received a further response from the Council, the complainant contacted the Commissioner on 6 June 2005 to request that the handling of his information request be formally assessed.
5. The Commissioner wrote to the complainant on 13 June 2005 to confirm that his complaint would be given detailed consideration in due course. The Commissioner advised the complainant to forward any further correspondence he received from the Council to him in the meantime while his complaint awaited allocation.
6. The complainant wrote to the Commissioner on 5 July 2005 enclosing a copy of the Council's further response dated 21 June 2005, which outlined the outcome of the internal review process. The Council informed the complainant that it remained of the view that specific sections of the conditional contract should be withheld under section 43 of the Act.

The Investigation

Scope of the case

7. The Commissioner's investigation into the complainant's concerns sought to establish whether the Council had complied with the requirements of section 1 of the Act and, in particular, whether it had appropriately applied the exemption cited.
8. The complainant also raised concerns with the Commissioner regarding the potential access to the requested information under the Local Government Act. These issues have not been addressed in this Notice, as they fall outside the Commissioner's duty under section 50 of the Act as described in paragraph 1 above.

9. As the withheld information is extensive and relates to various sections of a contract, the complainant has agreed that the Commissioner's investigation under this particular reference will focus on one particular section – clause 3 of the contract, which is headed “General Purpose of Agreement and Conditions Precedent”. This particular clause is separated into 8 sections, numbered 3.1 to 3.8, as follows:

- 3.1 General purpose of agreement
- 3.2 Conditional agreement
- 3.3 The Site Assembly Condition
- 3.4 The Planning Condition
- 3.5 The Road Closure Condition
- 3.6 The Viability Condition
- 3.7 Non-Fulfilment of Conditions Precedent
- 3.8 Effect of determination

Each of these sections has a number of individually referenced paragraphs.

Chronology of the case

10. The Commissioner wrote to the Council on 26 July 2006 to request a copy of the withheld information and for any further submissions to be made.
11. As no response was received, the Commissioner wrote to the Council again on 12 October 2006 and 1 November 2006 to request that a copy of the withheld information be provided as soon as possible. The Commissioner also asked the Council to explain further why it considered the exemption applied to the requested information.
12. The Council responded on 2 November 2006. It provided a copy of the withheld information and explained in more detail why it considered section 43 of the Act applied in this case. The Council stated that the contract remained conditional and therefore there was a possibility that either party to the contract could terminate the agreement subject to certain conditions set out in section 3.7. It explained further that should either party terminate the contract, it would then become necessary for the Council to re-tender for the development. It was of the view that if the withheld information were released and it became necessary to re-tender, the Council's position would be severely weakened, as any future potential developer would have gained prior knowledge of the provisional conditions and the financial details that had been agreed with the existing developer. The Council considers that if the requested information were disclosed this would then restrict its negotiating powers and ability to secure the best financial agreement with another developer if it became necessary.
13. In respect of clauses 3.7.1 and 3.7.2 of the contract, the Council confirmed that it had reconsidered its position. It stated that as the information contained within these two subsections was now in the public domain, it was willing to release these sections to the complainant.

14. The Commissioner wrote to the Council on 8 December 2006 to request a further more detailed explanation concerning the application of this exemption. He reminded the Council that section 43 of the Act is a qualified exemption and that, in addition to demonstrating the prejudice that would or is likely to be caused by disclosure, the Council would also need to apply the public interest test weighing up the public interest arguments for and against disclosure.
15. The Council responded briefly on 28 December 2006. It confirmed that it had contacted the developer concerning the complainant's information request and had obtained a statement which outlined the developer's views to the potential release of this information.
16. The Council responded in more detail on 9 January 2007. It explained again that clause 3 of the contract contained a number of issues that were still open to negotiation and therefore subject to final agreement with the developer. It reiterated that until the contract becomes unconditional it is possible that the contract may be terminated and the development of East Street be re-tendered. If it became necessary to re-tender, it was of the view that the disclosure of certain conditions in clause 3 of the contract would weaken its negotiating powers with other potential developers, which would in turn lead to the Council being unable to secure similar or possibly improved terms with another developer.
17. With regards to the public interest test, the Council stated that until a final agreement of the terms of the contract is reached, it is not in the public interest to disclose the sections or clauses of the contract that are still subject to negotiation.

Analysis

Procedural issues

18. The Commissioner notes that the Council took over four months to respond to the complainant's request. When it responded it disclosed some sections of the contract but refused to disclose others and issued a Refusal Notice advising the complainant that some information was being withheld under section 43 of the Act. Concerning the information that was disclosed, the Commissioner has concluded that the Council was in breach of section 10 of the Act. This is because the Council failed to comply with section 1 of the Act and communicate the information to the complainant within 20 working days following the date of receipt of the request. In respect of the sections of the contract that were withheld, the Commissioner has found that the Council was in breach of section 17 of the Act. This is because the Council failed to identify within 20 working days of the request the exemption upon which it relied and failed to issue a Refusal Notice to the complainant within the time limit prescribed by this section.

Section 43 – Commercial interests

Prejudice test

19. In order for the Commissioner to agree that section 43 of the Act is engaged, the Council would first need to demonstrate that prejudice would or would be likely to occur to the Council and/or the developer if the information were disclosed and that the prejudice claimed is real and of substance. This view is taken from the Information Tribunal hearing of the case of *John Connor Press Associates Ltd v Information Commissioner (EA/2005/0005)* and its decision, which outlined the tribunal's interpretation of "likely to prejudice". The tribunal confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk". In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote. Secondly, and once the prejudice test is satisfied, the Council would then need to apply the public interest test weighing up the arguments for disclosure against non disclosure.
20. The Commissioner has examined the requested information. He has also carefully considered the submissions made by the Council and the complainant.
21. The Council stated that the conditional contract contains a confidentiality clause, which applies to all sections of the contract and that the developer had raised some objections to the requested information being released. The Council referred to the statement it had received from the developer concerning this issue. In this statement the developer specifically referred to this confidentiality clause highlighting the fact that it was agreed by both parties and informed the Council that it was of the view that disclosure would or would be likely to prejudice its commercial interests. The developer confirmed further that it felt it would be particularly disadvantaged if clauses 3.3 and 3.6 were disclosed.
22. The Commissioner accepts that the contract was drawn up and signed in April 2003 prior to the Act coming into force and that it contains a confidentiality clause. He also acknowledges that the developer has not consented to the disclosure of this information and raised some objections to the requested information being released. However, he does not accept that these factors, in themselves, demonstrate that prejudice is likely to be caused to the commercial interests of either party should this information be disclosed. Although the developer stated that it was of the view that it would be particularly disadvantaged if sections 3.3 and 3.6 were disclosed, it has not provided any evidence to support this view or explained in what way and to what extent. The Council has also failed to elaborate further on behalf of the developer exactly how the developer would or would likely to be prejudiced if these specific sections were disclosed despite being provided with several opportunities to do so.
23. It is the Commissioner's view that a public authority is open to public scrutiny, particularly where the exercise of its duties or the decisions it makes on behalf on its constituents involves the use of public funds. The Commissioner therefore does not accept that a confidentiality clause or a third party's objection to disclosure automatically means that the information it covers is exempt from the

- Act. It is the Commissioner's view that third parties entering into contracts with a public authority should be aware that such agreements are open to public scrutiny.
24. The Council also argued that because the contract was still conditional, it would not be appropriate to release clause 3 of the contract at this stage, as certain conditions within this section may still be subject to further negotiation with the developer. The Council is also of the view that until the contract is unconditional, either party could terminate the contract and if this were to happen, the release of this information would be likely to prejudice its ability to re-tender the development and agree similar if not better terms and conditions with another developer.
 25. The Commissioner notes that this contract was signed in April 2003 and therefore he does not accept that the contract itself is subject to negotiation. He accepts that certain conditions may be subject to further change and that the Council anticipates further discussions taking place with the developer. However, the Commissioner is not satisfied that the Council has demonstrated to what extent its commercial interests and that of the current developer would or would likely to be prejudiced if this information were disclosed. As stated above in paragraph 19, for section 43 of the Act to be engaged there needs to be a real likelihood of prejudice if the requested information were disclosed. It is the Commissioner's view that the Council has not demonstrated clearly the likelihood of the contract being terminated by either party, how the release of the information would cause or influence such an event to happen and how potential future developers would be at an advantage if this information were released if it became necessary to re-tender for the development.
 26. Concerning the various sections of clause 3 listed in paragraph 9, it is the Commissioner's view that the majority of information contained in these sections is not commercially sensitive and that large sections of this clause, with the possible exception of a selection of subsections in clauses 3.3 and 3.6 (which are addressed below separately) appear to be general text outlining standard contractual terms that would be contained in a similar contract with any developer engaged in this particular development.
 27. The Commissioner notes that, in addition to containing general contractual text, sections 3.3 and 3.6 of the contract contain more specific information concerning the acquisition of certain sites required for the development and some financial arrangements between the Council and the developer. The Commissioner will now consider these specific sections in more detail.
 28. Section 3.3 is headed "Site Assembly" and subsections 3.3.1.1 to 3.3.1.5 inclusive describe the sites required for the development of East Street. The Commissioner has reviewed the information that is already in the public domain in relation to the development and the information available on the Council's website. He notes that with the possible exception of one site, the sites required for the development are listed in the Corporate Overview and Scrutiny Committee Report of a meeting held on 3 February 2003. It is the Commissioner's view that as this document predates and was available to the public prior to the signing of

the contract in question and the complainant's information request, disclosure of these specific subsections would not or would not likely to be prejudicial to the commercial interests of the Council and/or the developer.

29. The Commissioner notes that subsections 3.3.4.1 and 3.6.1 contain some financial information agreed between the Council and the developer when the contract was drawn up and signed. Subsection 3.3.4.1 relates to the exchange of a maximum sum of money relating to the release of a restrictive covenant on one of the sites listed in subsections 3.3.1.1 to 3.3.1.5. Subsection 3.6.1 contains information concerning what proportion of the profit from the development the developer will receive as a result of carrying out the development once it is completed.
30. Concerning subsection 3.3.4.1 the Commissioner accepts that this particular clause was still subject to negotiation at the time of the complainant's information request. This subsection relates to the release of a restrictive covenant and refers to negotiation yet to take place with another public authority. The Commissioner is of the view that as the matter was subject to negotiation and the subsection refers to a maximum sum of money to be exchanged, disclosure at the time of the complainant's request would have been likely to have been prejudicial to the commercial interests of the Council. The Commissioner accepts that if this financial figure were released prior to the negotiation that was required with another public authority over the restrictive covenant, the public authority would have been at a commercial advantage when entering into discussions with the Council, as it would have some indication of the amount the Council was willing to pay. The Commissioner is of the view that disclosure would therefore have hindered the Council's ability to negotiate a fair price and may have resulted in it having to pay more to the public authority than it would have done had the public authority not had prior knowledge.
31. Regarding subsection 3.6.1, the Commissioner accepts that this particular subsection contains financial details which are unique to the particular agreement reached between the Council and the developer contracted for the development of East Street. Although the details relate to unknown values (as the development is not yet complete and therefore the overall profit is not known), the Commissioner also accepts that this information provides some indication of the financial agreement between the Council and the developer, which is to come to fruition once the development is completed.
32. However, the Commissioner notes that the contract was drawn up and signed in April 2003, nearly two years before the complainant's information request. The Council confirmed that the financial values are fixed and are therefore not subject to any further negotiation with the developer. While the Commissioner may accept in some circumstances where contracts or terms are being negotiated that disclosure of information would be likely to be prejudicial to the commercial interests of either party, as it may hinder the negotiation process or an agreement being reached. He notes that this is not the case in these particular circumstances, as the contract was signed some time ago and once agreed the values were fixed. It is also the Commissioner's view that once such terms are agreed and the contract is signed the likelihood of prejudice to the commercial

- interests of either party is reduced. It is then further reduced with the passage of time.
33. The Council argued that disclosure would or would be likely to prejudice the commercial interests of the Council if the conditional contract with the developer was terminated and it became necessary to re-tender for the project. It stated that if it became necessary to re-tender, the requested information would put possible future developers at an advantage when negotiating terms with the Council. While the Commissioner appreciates this view, he does not consider that the Council has to date demonstrated the likelihood of the contract being terminated as a result of this information being disclosed or the likelihood of the Council being in a position where re-tendering may be necessary despite being asked several times to elaborate further. Given the passage of time and the fact that these terms were finalised nearly two years prior to the information request, on the face of it this appears even more unlikely. The Commissioner also remains unconvinced that, even if it became necessary to re-tender (which appears unlikely), other developers would be at an advantage when negotiating terms with the Council. The Council has failed to explain exactly how future possible developers would be at an advantage and it is the Commissioner's view that the financial agreement reached with the developer in April 2003 was based on market conditions at that time. Given the passage of time and the fact that market conditions change, it is the Commissioner's view that any new financial agreement would reflect current market conditions and therefore disclosure would not or would not be likely to prejudice the Council's ability to secure similar terms.
34. In conclusion, the Commissioner does not agree with the Council that the disclosure of the majority of section 3 of the contract and subsection 3.6.1 would or would be likely to prejudice the commercial interests of the Council and/or developer for the reasons explained in paragraphs 21 to 28 and 31 to 33. It is also not apparent by simply reviewing the contents of the requested information. He therefore does not accept that section 43 of the Act is engaged for these specific sections.
35. However, in respect of subsection 3.3.4.1 the Commissioner accepts that at the time of the complainant's information request disclosure of this specific information would have been likely to be prejudicial to the commercial interests of the Council for the reasons explained in paragraph 30. As a result the Commissioner is satisfied that for this subsection section 43 of the Act is engaged.

Public interest test

36. As this is a qualified exemption and the Commissioner has agreed that section 43 of the Act can be applied to the financial information contained within subsection 3.3.4.1, it is now necessary to consider the public interest arguments for and against disclosure of this specific section.

In favour of disclosure

37. The Commissioner accepts that there is considerable local interest in the development of East Street and, whether valid or not (it is not in the Commissioner's remit to comment or consider such allegations), there has been local publications raising concerns about the council's actions and the extent of the information being made available to the public. The Commissioner understands that there are concerns locally about the perceived lack of public involvement in the development and the decisions made by the Council and the perceived secrecy surrounding such issues.
38. The Commissioner also accepts that there is a public interest in public authorities acting in an open and transparent manner and members of the public being able to view how decisions of this nature are made. The complainant stated that he wishes to ensure that the proposed terms accepted by the councillors after public scrutiny were incorporated into the final contract that was ultimately signed. He is unable to do this, unless the Council releases a copy of the contract.
39. There is also a public interest in public authorities being accountable, particularly where its actions are in relation to the use of public funds. The Commissioner accepts that there is an interest in knowing how public money is spent and ensuring that best value for money is being obtained.

Against disclosure

40. However, the Commissioner accepts that there is a public interest in allowing public authorities the space and opportunity to contemplate courses of action and enter into negotiations with third parties free of disruption and possible scrutiny during the negotiation process. The Commissioner accepts that once decisions are made or in this case once negotiations are complete, the public interest is then more in favour of disclosure to promote the open and transparent environment referred to in paragraph 38. However, at the time of the complainant's request subsection 3.3.4.1 of the contract was yet to come into play as negotiations with another public authority concerning the release of a covenant had not commenced. This subsection contains financial information concerning the transfer of funds between two parties and the Commissioner accepts that at the time of the request this information was commercially sensitive. Disclosure prior to the commencement of the negotiation process would have been likely to have hindered the process and placed the Council at an immediate commercial disadvantage. Prior knowledge of the Council's position would have been likely to have hindered the Council's ability to negotiate effectively and secure a fair price for the transaction.
41. There is also a strong public interest in ensuring that public authorities are achieving best value for money and utilising public funds effectively. The Commissioner is of the view that disclosure of this information in this case would have been likely to have lead to the third party in the negotiations having prior knowledge of the Council's financial position prior to the negotiations commencing, placing the Council at a commercial disadvantage and in a weaker position when discussing monetary terms.

42. For any financial transaction that it is still subject to negotiation there is a public interest in ensuring that there is a level playing field for those parties involved, to ensure that value for money is achieved and that the process is fair and unbiased. Public authorities are subject to the provisions of the Act, whereas other organisations such as private companies are not. A level playing field could not be achieved if the provisions of the Act required financial information concerning a public authority's negotiating position to be released prior to the negotiation process. If there is no level playing field, it would be difficult for the Council and other public authorities to achieve best value for money and hinder their ability to manage public funds effectively.
43. The Commissioner has carefully considered the arguments for and against disclosure and he has concluded, for the reasons explained in paragraphs 40 to 42, that in respect of subsections 3.3.4.1 the public interest in maintaining the exemption outweighs the public interest in releasing this information.

The Decision

44. Concerning clause 3 of the contract, with the exception of the financial information contained in subsection 3.3.4.1, the Commissioner has concluded that the Council did not deal with the complainant's request in accordance with section 1 of the Act. This is because for this overall section of the contract, the Council inappropriately relied on section 43 of the Act and therefore failed to communicate this information to the complainant.
45. Regarding subsection 3.3.4.1, the Commissioner has concluded that the Council was correct to withhold the financial information contained within this subsection under section 43 of the Act.

Steps Required

46. In view of the matters referred to above the Commissioner gives notice that in exercise of its powers under section 50 he requires the Council to disclose the following information to the complainant within 35 days of the receipt of this Notice:
- a copy of clause 3 of the conditional contract, with the exception of the specific financial detail in subsection 3.3.4.1.

Other matters

47. Concerning subsection 3.3.4.1, the Commissioner understands that negotiations between the Council and another public authority regarding the covenant that was

in place over one site required for the development have now been completed. Although this cannot form part of the Commissioner's decision, as he must consider the Council's refusal to release information at the time of the complainant's request, the Council may wish to reconsider its position regarding this subsection. Given the passage of time and the fact that negotiations have been completed, it may be the case that disclosure is no longer prejudicial to the commercial interests of the Council.

Right of Appeal

48. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

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

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

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

Dated the xx day of xx 2007

Signed

**Steve Wood
Assistant Commissioner**

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

Legal Annex

Freedom of Information Act (2000)

Section 1

Provides that “any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 10(1)

Provides that –

Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

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 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).”