

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 9 January 2008

Public Authority: Sheffield City Council
Address: Town Hall
Pinstone Street
Sheffield
S1 2HH

Summary

The complainant requested correspondence between Urban Splash and the Council, as well as HMRC and the Council, on the issue of the 'shell test' and VAT in relation to the development of Park Hill. The Council refused to supply the information claiming that it was exempt under section 43 of the Act, in that the Council and Urban Splash's commercial interests would be affected by its release. After the intervention of the Commissioner, the Council agreed that much of the information could be released and agreed to reassess the information and redact the information that it would be prejudicial to release. The Commissioner is satisfied with the Council's redactions and believes that the remaining information engages the exemption. He is also satisfied that it is not in the public interest for the remaining information to be released. Therefore, the Commissioner requires that the Council release the information to the complainant after making the agreed redactions.

The Commissioner's Role

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

Background

2. Park Hill is a block of flats originally built between 1957 and 1961. Over the years, it has become run-down and this led the Council to seek a solution to revitalise the area. The flats sit on a prominent hillside site overlooking the city and provide a visual gateway for visitors entering the city. It has a unique design and was Grade II* listed in 1998 making it the largest listed building in Europe.

Sheffield City Council hoped this would attract investment to renovate the building, but this was not initially forthcoming. A part-privatisation scheme by the developer Urban Splash to turn the flats into upmarket apartments, business units and social housing is now underway alongside partners, the Council, Manchester Methodist Housing Group and English Partnerships.

3. The developers, Urban Splash, are responsible for any potential VAT liability on the project. If altering (not repairing or maintaining) a residential protected (e.g. listed) building, VAT can be zero rated if certain conditions are met. The protected building must be substantially reconstructed, therefore, either:
 - at least 60% of the total cost of the reconstruction (including materials and other items to carry out the work but excluding the services of an architect, surveyor or other person acting as consultant or in a supervisory capacity) could be zero-rated as 'approved alterations'; or
 - the reconstruction involves 'gutting' the building – that is no more of the original building is retained than an external wall or walls, or external walls together with other external features of architectural or historic interest. This is the so-called Shell Test.

The Request

4. The complainant made a request to Sheffield City Council (the "Council") on 1 March 2006. The request relates to the development of Park Hill. The complainant asked the Council to supply the following.
 - "...all the correspondence between Urban Splash and the Council as well as HMRC and the Council on the issue of the 'shell test' and VAT."
5. The Council issued a refusal notice on 31 March 2006 (erroneously dated 2005). The Council informed the complainant that there had been no correspondence between the Council and HMRC and therefore, there was no information to disclose relevant to that part of the request. The Council went on to explain that it had decided to refuse to disclose the information held, which constituted correspondence between Urban Splash and the Council, under section 43 of the Act, where disclosure would, or would be likely to, prejudice the commercial interests of anyone, including the Council. The Council set out its reasons for exempting the information in the refusal notice, stating that if released, the figures involved would allow at least partial determination of Urban Splash's financial commitment to the Park Hill Project. This in turn could prejudice the commercial interests of both Urban Splash and the Council and could even threaten the continued involvement of Urban Splash in the project and could therefore, lead to the Council being without a partner.
6. As section 43 is a qualified exemption, the Council went on to assess whether the public interest in disclosing the information outweighed the public interest in maintaining the exemption. It listed three factors in favour of disclosure, namely,

- furthering understanding and participation in public debate,
 - promoting accountability and transparency in decision-making, and
 - promoting accountability and transparency in the spending of public money.
7. The factors listed as being against the release of information in the public interest are as follows.
- Prospective partners need to be able to discuss and negotiate in the knowledge that their discussions will be kept commercially confidential and not be available to their competitors.
 - Decisions taken by private bodies are not subject to the same level of scrutiny than those of public bodies.
 - There are existing statutory mechanisms in place to ensure the accountability and transparency of the spending of public money.
 - The HMRC have considerable powers in relation to such transactions.
 - Finally, the prejudice may lessen over time and therefore, the information may become available at a later date.
8. The complainant subsequently wrote to the Council on 3 April 2006 seeking a formal review of its decision, specifying reasons why the decision was incorrect. The complainant contended that the information would not allow the financial commitment of Urban Splash to be determined or their quota of risk for the project and so no commercial interest was at risk. That the correspondence related to a very specific aspect of the project, the 'shell test', and estimates already existed in the public domain. In addition, that nowhere in the Act does it say that information is exempt if there is a risk of a partner walking away from a scheme. The complainant also raised one further point that is not relevant to the Act and so is not considered in this notice.
9. The conclusion of the internal review was communicated to the complainant in writing on 25 May 2006. The reviewer was satisfied that the original decision was reasonable and that it was correct and therefore upheld the decision to exempt the information.

The Investigation

Scope of the case

10. On 1 June 2006, the complainant contacted the Commissioner to complain about the way the request for information had been handled. The complainant specifically asked the Commissioner to overturn the decision and ensure that the information is made available. The complainant put forward arguments as to why the information had been withheld inappropriately.
- Release of information regarding the shell test would not allow others to work out the commercial decisions of Urban Splash.

- It would not matter when the information was released; information on the shell test is not time sensitive but is a material fact.
- It is not for a developer to say that information is confidential.
- The fact that a developer may walk away from a scheme cannot be a reason to withhold information under the Act.

Chronology

11. On 4 May 2007, the Commissioner telephoned the Council. As the Council had made a point in its communication with the complainant that the timing of the request was relevant to the information's sensitivity regarding commercial interests of the parties, the Commissioner asked the Council if it would be willing to reconsider its decision at this time and supply the information requested. The Council agreed to give this matter some thought. The Commissioner advised the Council that he would be making formal contact in writing.
12. The Commissioner wrote to the Council the same day, 4 May 2007. He informed the Council that if it wished to maintain its reliance on the exemption and continue to withhold the information, he would require it to send a copy of the information in question so that he could judge the merits of the application of the exemption. The Council was also asked to clarify further its reliance on the exemption, and particularly, to establish clearly the prejudice that would occur if the information were to be released. As the Council had claimed that release of the information when viewed alongside other information available publicly would allow the financial commitment of Urban Splash to be determined, he asked the Council to clarify the information to which it was referring. He also pointed out that in a Cabinet Report to the Council a figure was published as being the commitment of Urban Splash and questioned how this was related. In addition, the Commissioner was aware that the Council and Urban Splash had recently signed a partnership agreement, he asked the Council whether this had reduced the risk of the developer walking away from the project, and therefore, lessened the prejudice in release of the information.
13. The Council replied to the issue of timing on 16 May 2007. It informed the Commissioner that the circumstances had changed since the request was made. The Council had entered into a development agreement with Urban Splash (Group) Ltd and Urban Splash (Park Hill) Ltd, the project being managed by Urban Splash (Park Hill) Ltd an offshoot company established specifically to manage the project. The Council argued that the prejudice to the commercial interests of the company was now even greater as it had now formally committed itself to the project. In addition, as this company is exclusively dealing with this project, failure would mean its dissolution. The Council added that it was contacting Urban Splash and Urban Splash (Park Hill) and would wait for their responses before making any further representations.
14. The Council wrote again to the Commissioner on 1 June 2007. To avoid delay, the Council enclosed some of the information requested and a schedule detailing the correspondence. The Council indicated that it would send the remaining information as soon as it had been collated. The Council confirmed that there was no correspondence between it and HMRC. It pointed out that the

- correspondence itself demonstrated that the Council and Urban Splash had always treated the information as commercially sensitive and as contact between them had always been conducted at the highest level, this too was indicative of the sensitivity of the information.
15. The Council claimed that the tax arrangements between Urban Splash, a private company, and HMRC should not be public information. The method of assessing the shell test is already publicly available, as is the amount of Urban Splash's potential borrowing and the company publishes its accounts, as it is required to do. Release of the information requested, it argued, would therefore enable the tax arrangements between Urban Splash and HMRC to be deduced and this is information that should not be publicly available. The Council pointed out that the prejudice to Urban Splash may have been reduced by the execution of the partnership agreement, but that the burden of prejudice now fell upon Urban Splash (Park Hill) Ltd who would be particularly vulnerable.
 16. The Council confirmed that both Urban Splash and Urban Splash (Park Hill) Ltd had strenuously objected to the release of the information and enclosed a copy of the letter it received in response to its enquiry on this matter. It was claimed that the timescale of the project was also a factor to be considered. The development is not due to be completed until 2016 and the prejudice would not begin to lessen until a substantial proportion of the project had been completed and would not be eliminated entirely until 2022. The Council also pointed out that the tax arrangements as regards the shell test, whilst agreed in principle, would not be settled finally until the project's completion.
 17. The Council sought to ensure that the Commissioner was aware of the long-standing principle of taxpayer confidentiality, which protects the tax arrangements of taxpayers from release to the public. The principle of taxpayer confidentiality exists, in part, to prevent prejudice to the commercial interests of taxpayers. The Council also provided the Commissioner with a copy of a Hansard debate where the issue of taxpayer confidentiality was discussed in relation to the Act. The Council also raised the possibility of the application of section 41 of the Act. The Council explained that the reason it was in possession of the information was in relation to housing gap funding, a European-Commission-approved investment tool, which enables a public authority to support regeneration and housing supply, and to adequately assess a scheme, the fullest information regarding a developer's financial status is required. If this information were to be made public, the Council argued, developers would be reluctant to enter such partnerships with public authorities and projects such as Park Hill may not go ahead in the future.
 18. The Council sent the Commissioner copies of the outstanding information on 6 June 2007.
 19. The Commissioner responded to the Council in a letter dated 10 July 2007. The Commissioner questioned why release of the information would lead to investors withdrawing their support and why it would result in HMRC reassessing the project's eligibility for the shell test. He did not consider that in the particular circumstances of this case the reason it was in possession of the information was

a significant factor when considering its suitability for release. The issue of housing gap funding may be relevant to the public interest test, but for the exemption to be engaged the Council needed to link the actual information exempted with specific prejudice to commercial interests. Importantly, the Commissioner pointed out that much of the information was, in his opinion, relatively innocuous, for example emails discussing arrangements for meetings. He asked the Council to look again at the information and consider redaction of the specific information it believed it would be prejudicial to release.

20. On 10 August 2007, the Council wrote to the Commissioner to explain it was carefully considering his comments and making redactions and would reply as soon as possible.
21. The Council duly wrote to the Commissioner on 13 August 2007. The Council stressed the importance of the Park Hill project and outlined the risks that it believes are associated with disclosure of the information. The need for private sector funding was emphasised, as was Urban Splash's ability to maintain confidence in the project. The Council pointed out that all the partners to the project had already incurred substantial costs and that Urban Splash and Deloitte had threatened the possibility of legal action if the information were to be disclosed. Again, it was stressed that if the private sector lost confidence in public authorities' ability to retain commercially confidential information, councils' ability to appraise adequately the viability of schemes in the future would be compromised.
22. The Council summarised the potential consequences of the project not going ahead as follows:
 - Consequences to the Council
 - Unfulfilled promises to tenants
 - Loss of anticipated social housing
 - Loss of investment already made
 - Increased costs managing Park Hill whilst empty
 - Loss of housing market renewal funding
 - Loss of inward investment
 - Lost time whilst seeking alternative solution
 - Damage to reputation with Government and commercial sector in delivering big projects
 - Damage to relationships with Urban Splash and English Partnerships
 - Risk of litigation (from Urban Splash and Deloitte)
 - Urban Splash
 - Lost credibility
 - Loss of investment already made
 - Damage to relationships
 - Disclosure of tax and financial affairs
 - Lost opportunity elsewhere
 - Risk of litigation (from Deloitte)
 - English Partnerships
 - Loss of investment already made
 - Manchester Methodist Housing Group

- Loss of investment already made
 - Deloitte
 - Loss of intellectual property if arguments made to HMRC made public
23. The Council enclosed another copy of the information exempted. This time redactions had been made and figures relating to the financial aspects of the VAT issue had been removed, as had certain irrelevant paragraphs. The Council indicated that it would be content to release the remaining information. Redactions had been made for two separate reasons, namely, that some of the information was exempt under section 43, and that some of the information was outside the terms of the original request.
24. The Council outlined the specific prejudice that it believed release of the redacted information would cause. The Council went on to explain its reasoning behind these contentions in more detail. The Commissioner does not believe that it is necessary to include that detail in this notice and is mindful that its inclusion may itself add to the risk of prejudice to the commercial interests of those concerned.
25. Following telephone calls between the Commissioner and the Council, in which the Council impressed upon the Commissioner the importance of his decision in this matter, the Commissioner wrote to the Council on 12 October 2007, to inform it that he had taken a preliminary decision and would begin the process of issuing a decision notice.

Analysis

Exemption

26. The exemption set out in section 43 of the Act states that information is exempt if its release would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). In order for the Commissioner to be satisfied that the exemption is engaged, the authority must demonstrate that the prejudice is likely, real and of substance. The Commissioner is informed in this regard by the Information Tribunal's decision in *John Connor Press Associates Ltd v Information Commissioner (EA/2005/005)*, which outlined the tribunal's interpretation of "likely to prejudice". The tribunal stated that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must be a real and significant risk". As section 43 is a qualified exemption, the Commissioner must then consider the public interest test and whether the public interest in disclosure, outweighs the public interest in maintaining the exemption.
27. As the Council has already indicated to the Commissioner its willingness to release some of the original information exempted, the Commissioner's analysis and decision will focus on the remaining information that the Council still wishes to withhold.

28. The Council has claimed that release of the information would prejudice the commercial interests of itself and its development partners Urban Splash (Group) Ltd, Urban Splash (Park Hill) Ltd, English Partnerships, Manchester Methodist Housing Group, and consultants to Urban Splash, Deloitte. However, particular emphasis has been placed on the commercial interests of the Council and Urban Splash (Park Hill) Ltd.
29. The information in question relates to the tax arrangements between Urban Splash (Park Hill) Ltd and HMRC regarding VAT in respect of the regeneration of Park Hill flats. The liability for VAT rests with Urban Splash, not the Council.
30. The Commissioner has considered the Council's arguments very carefully, he is satisfied that it is likely that release of the redacted information would allow information regarding the tax liability of Urban Splash to be determined. The Commissioner is satisfied that release of the information would be likely to prejudice the commercial interests of Urban Splash in ways that might jeopardise the project. This would also affect the commercial interests of the Council and other partners who have already invested considerable sums of money in the project. The Commissioner is therefore, satisfied that the exemption as set out in section 43 is engaged.

The public interest test

31. It is therefore necessary for the Commissioner to consider the public interest in release of the information. The Council have put forward many public interest arguments in favour of withholding the information and the Commissioner has found them convincing. He is persuaded that the issue of taxpayer confidentiality is an important one and does not believe that it was the intention of the Act that this sort of information be routinely released. He is also very much aware of the concerns of private companies such as Urban Splash in their dealings with public authorities and believes that before jeopardising the commercial interests of organisations by ordering the release of sensitive information, there should be compelling public interest arguments.
32. There is a strong public interest in the public being able to scrutinise the spending of public money by authorities and making public authorities accountable for their decision-making and the Commissioner places great weight on the arguments made by the complainant in this regard. However, the Commissioner believes that release of the specific details of a private partner's tax arrangements with the HMRC would be excessive and go beyond that necessary to afford the public an adequate level of scrutiny of the Council's decision-making and public spending.
33. The Commissioner cannot discount the strong public interest arguments made by the Council. The Park Hill project is an important one which should bring significant benefits for the local area. If the project were not to go ahead, there would be a loss of confidence in the Council's ability to complete large projects successfully and it would face great difficulty in securing private partners for such projects in the future.

35. Having taken all the relevant factors into account, the Commissioner is satisfied that the public interest in maintaining the exemption in relation to the withheld information in question outweighs the public interest in its disclosure.
36. As the Commissioner has decided that section 43 is engaged and that the public interest dictates that the information is exempt, he has not found it necessary to make a judgement on the application section 41. He does accept, however, that at least some of the withheld information might well also be exempt under section 41.

The Decision

37. The Commissioner has decided that the following elements of the request were not dealt with in accordance with the Act:
 - The Council withheld all the information relevant to the request even though much of it did not engage the exemption set out in section 43 of the Act, as it claimed.
38. However, the Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
 - The Commissioner is satisfied that following the Council's redactions, the remaining information is exempt under section 43 of the Act and was correctly exempted from release.

Steps Required

39. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - The Council is to supply the complainant with the information requested following redaction of the exempt information, as agreed.
40. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

41. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

42. 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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

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

Dated the 9th day of January 2007

Signed

**Graham Smith
Deputy Commissioner**

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