

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 16 June 2008

**Public Authority:** Warwickshire County Council  
**Address:** P O Box 9  
Shire Hall  
Warwick  
CV34 4RR

### Summary

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The Complainant requested a section of an internal audit report of a contract between the council and a private company for the purposes of highway maintenance. The council refused the request claiming that it engaged the exemptions of the Act in section 43 (commercial prejudice) and section 36 (prejudice to the effective conduct of public affairs). The Commissioner's decision is that section 43 does not apply to the information. He has also decided that although section 36 is applicable, the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information.

### The Commissioner's Role

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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.

## The Request

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2. On 1 January 2006 the complainant emailed the council requesting a copy of an audit report carried out by the council on performance under a contract between itself and Carillion, a private contractor contracted to carry out road maintenance on behalf of the council. This request stipulated that the information was being requested under the Freedom of Information Act ('the Act').
3. The council responded to the complainant by email dated 7 March 2006. In that response it provided the majority of the information requested, however it refused to provide information relating to:
  1. Contract management.
  2. The contractor's profit margin.
  3. The names of unsuccessful companies who had tendered for the contract and the evaluation scores decided by the council for the tender.

It stated that information relating to these matters which is held in the report is exempt from disclosure under section 43 of the Act (commercial interests).

4. The complainant wrote back to the council on 17 March 2006 asking for the council to review its decision as regards point 1- contract management. However he did not request a review of the decision on points 2 and 3 above.
5. The council replied to the complainant on the 26 June 2006, stating that it had reviewed its decision and that it still considered that the exemption in section 43 was applicable. It also provided a further opportunity for the complainant to request an internal review by the Chief Executive's Office. The complainant wrote to the council asking for this decision to be reviewed again however the Commissioner does not hold a copy of that letter.
6. The council responded on 10 August 2006. In that letter it confirmed that the information is exempt from disclosure under section 43, but also stated that it believes that the information is also exempt from disclosure under section 36(2), (prejudice to effective conduct of public affairs).

## The Investigation

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### Scope of the case

7. On 15 August 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

## Chronology

8. The Commissioner wrote to the council on 30 August 2006 stating that it had received a complaint from the complainant, and that the complaint would be investigated in due course. That letter did not require the council to do anything at that time. The Commissioner wrote to the council again on 18 July 2007, stating that the complaint would shortly be allocated for investigation. That letter also requested a copy of the information which had been exempted, together with any further arguments the council wished to submit in support of its claim that the information is exempt.
9. The council acknowledged the letter on 24 July 2008.
10. The council telephoned the Commissioner's office on 4 August 2007 stating that due to staff problems there would be a slight delay before the request for the information could be responded to.
11. On 24 August the Commissioner emailed the council asking when it would respond to the request for copies of the information.
12. The council responded on the same day, stating that it would reply shortly and apologising for the delay.
13. The Commissioner emailed again on 5 September asking when he would receive the information.
14. The council responded on the same day stating that the information would be sent in the next day or so.
15. On 17 September the Commissioner again wrote to the council, stating that the information should be sent to him by the end of that week.
16. The council responded, providing the information on 18 September 2007. In that letter it provided the requested information, but stated that it did not wish to expand upon the grounds for withholding the information which had been provided to the complainant in the third stage review of his request.

## Analysis

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### Procedural matters

17. Under section 10 of the Act public authorities are required to respond to Freedom of Information requests within 20 working days
18. The Complainant requested the information from the council in an email dated 1 January 2006. It would have therefore been received by the council on 3 January 2005, (the first "working day" after the New Year period).

19. The council initially responded to the complainant in a letter dated 7 March 2006.
20. This period falls outside of the 20 working day period required by the Act.
21. By virtue of section 17 of the Act, where a public authority is to any extent relying on a claim that any of the exemptions in Part II apply to the request it 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,
  - (c) states (if that would not otherwise be apparent) why the exemption applies,
  - (d) contain particulars of any procedures provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
  - (e) contains particulars of the right conferred by section 50 to apply to the Commissioner for a decision as to whether a request for information has been dealt with in accordance with the requirements of Part I of the Act.
22. The Commissioner's decision on this matter is that the council has not dealt with the complainant's request in accordance with the requirements of Part I of the Act in that it has failed to either comply with section 1(1) or section 17 within the time limit set out in section 10(1).
23. The Commissioner also notes that the council did not state that the exemption in section 36 of the Act was applicable until its letter to the complainant dated 10 August 2006. It did not therefore state to the complainant that it was applying section 36 in its refusal notice to the complainant, and only made claim to this exemption in the second review of its decision.
24. The Commissioner's decision is that this amounts to a breach of sections 17(1)(b) &(c), and of section 17(3) of the Act. This is because the authority did not provide the complainant with an adequate refusal notice, stating that it was also relying upon the exemption in section 36(2) of the Act and providing reasons why it believed this exemption was applicable. It also did not provide a statement of reasons to the complainant stating why its decision was that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

## **Exemption**

### Section 43

25. The council claims that the information is exempt from disclosure because section 43(2) of the Act applies. This states that information will be exempt if its disclosure would or would be likely to prejudice the commercial interests of any party (including the public authority). The text of section 43 is provided in the legal annex to this Decision Notice. In the Information Tribunal decision *John Connor Press Associates Limited v The Information Commissioner* 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.” (para 15) This interpretation follows the judgement of Mr Justice Munby in *R (on the application of Lord) v Secretary of State for the Home Office* [2003]. In that case, the view was expressed that, “Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there ‘may very well’ be prejudice to those interests, even if the risk falls short of being more probable than not.” In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote.

26. The information itself is a section of an internal audit report carried out by the council on the running and management of a contract for highway maintenance. The complainant believes that the council initiated the audit to investigate claims of poor performance made against the contractor. It is important to note however that the focus of the report was actually to audit the council’s procurement procedures and its subsequent management of the contract.
27. The council claims that section 43 of the Act is engaged because a disclosure of the information would jeopardise the ongoing relationship it has with the contractor. It states that the contract is based on a ‘partnering’ agreement, and that disclosure could lead to detriment to its open working arrangements with the contractor. It states that openness in the arrangements is essential for a contract of this type to be managed successfully. The partnership agreement relies on a mutual level of trust and confidence between the parties, who work in conjunction with each other to provide the best possible services under the agreement. A disclosure of the information in the audit report could undermine that trust and confidence, thereby disrupting the effectiveness of the partnership agreement by making the parties more guarded in their relationship.
28. The council also explained that a breakdown in the relationship could disturb the maintenance of the services covered by the contract and that this would be detrimental to the local community benefiting from the services provided under the contract.
29. The Commissioner has considered this argument. He believes that a disruption of the sort the council argues would only occur if:
  - disclosure would be detrimental to the commercial interests of the contractor,
  - if the information would be detrimental to the reputation of the contractor, or,
  - if disclosure would cause ill feeling or a lack of trust between the parties for another reason. For instance because the contractor shared information openly and honestly with the council about its performance in line with the spirit of the partnership agreement. If its subsequent disclosure would be potentially detrimental or embarrassing to the contractor the danger would be that the contractor would not proactively pass on such information so openly in the future. This could undermine the agreement and create a risk that the council would fail to obtain best value for money in the future.

30. The Commissioner has considered why the open relationship the council has with the contractor might be damaged if the information in the audit report is disclosed.
31. It is a core duty of the council to maintain the roads in the county. This duty has been contracted out to the contractor via a contract which is intended to run until 2010 or 2011. This is a relatively short period of time in commercial business, and the Commissioner therefore considers that in the reasonably near future the council could begin to prepare for another procurement exercise to cover the period directly after this contract has expired. The Commissioner has therefore considered whether this information might be useful to the competitors of the current contractor when tendering for the next contract, potentially against the current contractor.
32. He has also considered that in the interim it is possible that the contractor may seek to tender for other contracts of a similar nature with other councils. If a disclosure of the information is harmful to such tenders then the information would be commercially sensitive. This could occur either by a disclosure of information which might give the contractor's competitors an advantage over it when tendering for a contract or by providing a poor reflection of the services provided by the contractor, thereby making it less likely that tenders they submit to other authorities or private companies will be successful. If either of these scenarios is likely then the commercial interests of the contractor are at risk and section 43 will be engaged.
33. The Commissioner has considered the first of these scenarios. The section of the report which is in question does not provide an overview of the manner in which the services are provided by the contractor to the council, or of the costs and profit margins of the contractor in carrying out the work involved. Nor does it indicate how the contractor's tender was successful over that of its competitors for this contract. Some of these matters are considered elsewhere in the report, however these are not the sections which have been requested in this instance. Some non-sensitive information relating to the tender process has also already been provided to the complainant. The Commissioner is therefore satisfied that a disclosure of this section of the report would not provide information of commercial significance to the contractor's competitors to any great degree.
34. In considering the second scenario, the Commissioner is satisfied that the information is not targeted at providing an audit of the performance of the contractor. Rather, it concentrates on the performance of the council in managing the contract, and in suggesting methods of increasing the efficiency of that management in the future. The Commissioner is satisfied that a disclosure of the information would not cast a poor reflection on the performance of the contractor as this has not been addressed in the information which has been requested to any great extent. There are areas where the actions of the contractor are considered, however these are generally considered for the purposes of evaluating the councils performance management rather than a direct consideration of the contractors services. Therefore the second scenario is also not likely for the purposes of section 43.

35. The Commissioner is therefore satisfied that a disclosure of this information would not be likely to prejudice the commercial interests of the contractor. The Commissioner has also considered whether disclosure would be to likely prejudice the commercial interests of the council, set out below.
  36. The Commissioner has considered whether a disclosure of this information would in fact disrupt the relationship between the contractor and the council. The Commissioner has already taken the view that the reputation of the contractor would not be damaged by a disclosure of this information. He does not consider that a disclosure of the information would show the council making negative remarks about the contractor. He is also aware that if the council made changes to its management of the contract in line with the suggestions in the audit report there would necessarily have been some interaction between it and the contractor regarding the issues it had found. The contractor would therefore already be aware of some of the problems the council found, and of any steps they as partner to the contract could take to alleviate those problems. Therefore, the information, if disclosed would not be particularly surprising to the contractor.
  37. The Commissioner also considered whether a disclosure of the information might cause disruption to the relationship because information which the contractor shared proactively with the council would be disclosed which showed problems it was having in providing the services. However the Commissioner's view is that this is not the case in this instance. He considers that the information looks at the performance and efficiency of the council in managing the contract, and has been gained through interviews with employees and observations in the relevant departments at the council. It does not include information which the contractor proactively provided to the council under the terms of the partnership agreement. The Commissioner is therefore satisfied that a disclosure of the information would not cause ill feeling or a lack of trust between the parties which might disrupt the efficacy of the partnership agreement.
  38. The council also argues that disclosure could impact upon the wider commercial interests of the council by affecting its reputation and the views held by the market about the way in which it operates. The Commissioner considers that this might occur in one of two ways:
    - a) Disclosure of the information could cause businesses to consider the council's management to be deficient or poor, thereby causing potential contractors to reconsider whether to do business with the council in future tenders.
    - b) Disclosure of the information could cause a loss of business confidence in other parties which deal with the council, i.e. by making them cautious in providing information to the council on the basis that it may be disclosed in response to a future FOI request – that the council cannot be trusted to hold information of a sensitive nature securely.
- a) In response to the first argument (a), disclosure would provide some degree of understanding of the problems the council had when managing the contract. It would also highlight how the council has considered



managing those problems. It is a function of such audits to look for inefficiencies and problems and to consider ways of avoiding or solving these. The fact that the audit has recognised problems and has addressed these would not therefore be particularly detrimental to the council's commercial reputation if disclosed. Audits are always likely to highlight problems or consider more efficient ways of carrying out tasks to a certain extent.

The Commissioner has also considered the nature of the information and of the problems the audit identified. He is satisfied that a disclosure would not have an impact on the council's wider commercial interests given the nature of the problems identified. They are specific to the management of this contract and, in any event, the fact that the problems have been identified and addressed by the audit would provide other contractors with reassurance that similar problems would be unlikely to arise with any contracts they enter into with the council.

- b) The Commissioner has considered the second argument (b), and is satisfied that the commercial relationships of the council are not likely to be prejudiced on a wider scale simply because sections of an audit report carried out by the council are disclosed. Sensitive commercial information on the contractor would not be disclosed, and no detriment to the commercial interests of the contractor is likely. The Commissioner is also satisfied that other contractors are aware of the access rights under the Act, and it will not come as a great surprise to them that information of the sort caught within the scope of this request would be considered disclosable under the Act. The Commissioner's view is therefore that disclosure would not be likely to prejudice the wider commercial interests of the council in this instance.
39. The Commissioner is therefore satisfied that a disclosure of this information would not be likely to prejudice the commercial interests of any party, and therefore his decision is that section 43 is not engaged.

### Section 36

40. Section 36(2)(c) allows information to be exempt from disclosure where, in the reasonable opinion of the qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs. Section 36 is provided in the legal annex to this Decision Notice.
41. In this case the qualified person was consulted as part of a review of the initial decision to refuse the request under section 43, and made a decision that the council could rely on the exemption in section 36(2)(c) of the Act in addition to its reliance upon section 43. This was on the basis that disclosure may have a negative effect on the future willingness of people to be open and cooperate fully and frankly with audit officers. Its argument is that this would "impact upon the council's corporate governance arrangements for internal control, which could in turn prejudice the council's ability to offer an effective public service".



42. When considering the application of the exemption the Commissioner is mindful of the Information Tribunal's decision in EA/2006/0011 and EA/2006/0013 of *Guardian/Brooke v The Information Commissioner* issued on 8 January 2007. In its decision, the Tribunal concluded that in order to satisfy the statutory wording in s36 - '*in the reasonable opinion of a qualified person*' - the opinion must be both reasonable in substance and reasonably arrived at. If the qualified person's opinion meets these criteria then the exemption in section 36 of the Act is engaged.
43. The Commissioner recognises that in areas where individuals or individual departments within an authority may be seen to be at fault they may take action to minimise their degree of culpability, or become reticent when investigations are carried out to establish culpability. This is particularly so where it is evident that a report is to be produced and provided to senior management within the council. This is however part of the process of scrutiny which is relied upon by councils, and which is driven by the need of the council to achieve best value or best efficiency in the functions it carries out.
44. The Commissioner has taken into account that council officers will be under a duty to provide auditors with a full account of their actions in spite of any reservations they may have. He understands that a failure to do so may be considered a serious disciplinary offence in the majority of, if not all public authorities. Nevertheless in situations where employees fear that being fully open with auditors may result in some criticism to themselves, their department or other colleagues, it is possible that there will be an impact on their conduct in the audit process. The Commissioner therefore recognises and accepts that a degree of inhibition may already exist where audits are being carried out.
45. In this case the audit report is reasonably critical of the council's performance in some aspects of its contract management. Some of the problems identified are associated with particular departments at the council.
46. Although the Commissioner places weight on the fact that officers of public authorities must abide by their duty to be honest and open in investigations, he recognises that in reality a degree of inhibition may in fact occur, and that it is therefore reasonable for the qualified person to recognise this and apply section 36 to such information where the situation merits it. In this case, because specific departments are identified as being more at fault than others, the Commissioner recognises the possibility that disclosure may have had an effect on future investigations to some extent.
47. The Commissioner therefore accepts that the qualified person's view was both reasonably arrived at and was reasonable in substance. His decision is therefore that section 36 is engaged by this information.
48. Section 36 is a qualified exemption. The Commissioner therefore needs also to decide whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

## Public interest arguments

49. In *Guardian & Heather Brooke v The Information Commissioner*, the Information Tribunal considered and refined an earlier judgement where they provided some principles about the application of the public interest test in section 36 cases. The Tribunal provided the following factors for consideration:
- a) The lower the likelihood is shown to be that the free and frank exchange of views would be inhibited, the lower the chance that the balance of the public interest will favour maintaining the exemption.
  - b) Since the public interest in maintaining the exemption must be assessed in all the circumstance of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought. The authority may have a general policy that the public interest is likely to be in favour of maintaining the exemption in respect of a specific type of information, but any such policy must be flexibly applied, with genuine consideration being given to the circumstances of the particular request.
  - c) The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a general rule, the public interest in maintaining the exemption will diminish over time.
  - d) In considering factors that militate against disclosure, the focus should be on the particular interest that the exemption is designed to protect, in this case the effective conduct of public affairs through the free and frank provision of advice and the free and frank exchange of views by public officials for the purposes of deliberation.
  - e) While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process.
50. The Tribunal qualified the first of these tests, (a), by stating that it was for the qualified person to decide whether prejudice was likely, and thereby whether the exemption was engaged. However in making a decision on the balance of the public interest, the Tribunal, (and therefore the Commissioner) would need to make a decision as to the severity, frequency or extent of any prejudice which was likely.
51. The Commissioner has considered these principles against the information in this case. He has addressed these in the order provided above.
- a) The severity, frequency or extent of the prejudice that is foreseen

52. The Commissioner has accepted that in reality there is always a possibility that council officers will feel inhibited when providing information to audit investigators if they are aware that this may lead to direct criticism of themselves, their colleagues or their department. There will already be a degree of inhibition due to the very nature of audit investigations. It is a human attribute not to want to be criticised and to be seen to be doing a good job. The question which the Commissioner has considered however is whether a disclosure under the Act would in itself create or add to any inhibition that already exists.
53. The council is presumably arguing that the additional rights provided by the Act provide an added insecurity to those providing information to an audit investigator. If an audit report is subsequently disclosed in response to a request under the Act, it could then go on to be published and commented upon by the media or political opponents of the council. The argument must be that this 'additional' concern may be persuasive enough to inhibit some council officers from being fully open with auditors where otherwise they would have been. There is also then a question as to how great an extent any additional pressure might result in prejudice to the council's functions in any event.
54. The main concern council officers will have is whether the report shows them or their department in a good light. The Commissioner accepts that in circumstances where press coverage or direct political comment would be likely, there may be an additional pressure to accentuate the positive and/or minimise any negative aspects to investigators. He considers however that the main pressure on interviewees will be to ensure that the report provides their employers with a good reflection of their work.
55. In this case there is a possibility that the media may have considered the report a potential story due to the size of the contract and the nature of the parties involved. The contract involved a substantial amount of public money and is directly relevant to road users who could be affected if the contract was run poorly. If press coverage specifically named departments at the council as being responsible for some of the failures then additional pressure may be felt by any officers whose departments are investigated in the future to show their department in a good light.
56. However, the Commissioner considers that the vast majority of council officers would act professionally and would be as full and frank as possible with investigators. If any individual officers were inhibited when being interviewed by auditors it would therefore be less likely to have an effect on the final outcome of the audit as auditors would receive the full, frank and truthful version from the other officers.
57. Additionally, the Commissioner recognises that there is an additional counter pressure on officers to be full and frank with audit investigators. The result of not being full and frank would be potential disciplinary action being taken against them and/or the potential of an attempted 'cover up' by particular officers or departments being reported in the press. This counter pressure would to a great extent, balance the reluctance felt by any individual officers as they would be

aware that other officers will be full and frank and any attempt to hide information or to deceive the investigators would be likely to fail in any event.

58. The Commissioner also considers that the possibility of a few officers being inhibited or even seeking to deceive audit investigators would be unlikely to sidetrack audit investigations in the vast majority of occasions. Such investigations will be carried out under a robust auditory regime and would take into account the occasional individual's reluctance to be fully honest and open. It is likely that the audit investigators will have corroboratory methods or systems in place to ensure that they are not being deceived.
59. The Commissioner therefore considers that although there is a possibility that a disclosure of this information could cause a degree of additional inhibition by some staff in audit investigations, the overall result would be unlikely to be severe or frequent, and it would not be likely to disrupt audit investigations to any great extent.
60. In conclusion, the pressure on council staff to be open and honest is inherent in any event, given that they will be aware that other staff will be open and honest and that audit investigations are likely to be robust enough to take into account officers being inhibited in their responses to questions. The fear of being 'found out', together with the fear of disciplinary action or publicity if any deception was uncovered will, in the vast majority of cases ensure that any individual inhibition will be negated to a great extent. The Commissioner therefore considers that the likely prejudice would not be severe and would not affect the council's audit processes to any great extent.
- b) Was a blanket exemption applied by the qualified person?
61. The Commissioner has considered the arguments of the council and whether they are a result of the specific circumstances of the case or whether the qualified person has sought to apply a blanket exemption to this type of information. He is satisfied that the qualified person's arguments do take into account the information to hand in that there may be additional criticism of specific departments at the council, (as well as the council as a whole) if this information is disclosed, and hence additional pressures on officers to show their actions in a good light.
- c) Has the sensitivity of the information waned over time?
62. The Commissioner notes that the audit report was published in September 2005. It was requested by the complainant on 1 January 2006. It is also noted that the contract with the contractor has over 3 years left to run. It is likely that at the time of the request the issues raised in the report were still relevant and that suggested actions to rectify the problems the report highlighted may not have been taken by the council by that time. The council also stated to the Commissioner that the internal audit report is still considered current and relevant to the ongoing contract management arrangements with the contractor. The Commissioner therefore considers that the passage of time has not substantially reduced the public interest in maintaining the exemption.

d) Specific public interest factors in favour of maintaining the exemption

63. The council applied a public interest test to the information in order to decide whether it should be disclosed in spite of the fact that section 36 is engaged. It stated that there is a strong public interest in the exemption being maintained based on the impact that disclosure could have on the council's ability to have a proper internal discussion and debate about how its contracts are managed, together with the future willingness of staff to be open and to cooperate fully and frankly with audit arrangements. It also said that in the wider sense, the council's corporate governance arrangements for internal control could be prejudiced in this way.
64. If council officers were inhibited and audits were affected then the efficiency and effectiveness of the council's management could be prejudiced. Any disruption to the ability of the council to properly scrutinise the actions of its departments leaves open the possibility that problems remain unidentified and ongoing, with the potential for greater losses or ongoing inefficiency draining public resources.
65. If the council does not receive full information from audits it may be deceived into thinking that it is running an efficient service, when in effect the service to the community could be better. The council must therefore be able to obtain honest and open facts and figures about its performance in order to best manage its functions in an effective way. Any disruption to that could prejudice its ability to manage effectively. A failure in management of this sort would ultimately drain council resources, thereby requiring an increase in taxpayer's contributions, or alternatively result in cuts in service being necessary to save council funds.
66. However the Commissioner has already stated (in paragraph 60) that in his view the likely prejudice would not be severe and would not affect the audit process to any great extent. Hence his view is that little weight can be placed on the above arguments.

e) Public interest factors in favour of disclosing the information.

67. The Commissioner considers that there is a strong public interest in the disclosure of this information. There is a strong public interest in transparent and open government, and in allowing taxpayers and interested parties to scrutinise the decisions and actions of local authorities in their management of expensive and core function contracts such as this one. There is also a strong public interest in showing that public funds are being managed and spent appropriately.
68. The contract between these parties is a major contract for road maintenance, a core function of the council. The council has contracted out this function, and the effectiveness of its management of that contract was being considered by the auditors in this report.
69. If the council's management of the contract was brought into question there is a great deal of public interest in the public being made aware of this, and in knowing the actions that have been taken to alleviate any problems which were

uncovered. There is also a strong public interest in tax payers being able to scrutinise the spending of public money and the effectiveness with which the council is managing the contract to obtain best value. This is particularly important given that the contract still has a number of years left to run. If problems are highlighted which are ongoing, or the action the council has taken to rectify the problems highlighted by the audit is inadequate then it is important that the council can be held to account for this. It is only by being able to obtain information of this sort that the public can understand whether there is a need to question further the actions and decisions taken by the council on this matter.

70. In delegating the function of road maintenance to a third party the council cannot delegate its duty to provide an efficient and good value service to its tax payers. In order for tax payers to be assured that the council is providing such a service through the contract then the council must be open and transparent in its management of the contract, unless in doing so it damages its ability to act effectively, or damages its ability to maintain good services and provide good value for money.
71. The Commissioner has therefore considered all of the above arguments in order to make his decision.

#### Conclusion on the public interest test

72. Although he recognises the importance of the council's ability to be able to obtain accurate and full information from its officers and staff during an audit, he has not been convinced that a disclosure of this information in this instance would lead to the problems the council has foreseen when applying section 36 to any great extent. A robust audit system would negate the majority of the damage the council foresees, and the Commissioner is not satisfied that any additional pressure council officers may feel when being interviewed because of a wider disclosure of the information would be sufficiently prejudicial or sufficiently wide spread.
73. Further, he has considered the public interest in this information being disclosed, and is satisfied that in circumstances of this case, given that he does not consider the effect of disclosure to be severe on the council's ability to function, the public interest in maintaining the exemption does not outweigh the public interest in disclosure of the information.

#### **The Decision**

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74. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.
- The council did not respond to the complainant's request within the 20 working day period required. The Commissioner's decision is therefore that the Council did not deal with the complainant's request in accordance with the



requirements of Part I of the Act in that it failed to either comply with section 1(1) or section 17 within the time limit set out in section 10(1).

- The council also breached sections 17(1)(b) &(c) of the Act in that it did not provide the complainant with an adequate refusal notice, stating that it was also relying upon the exemption in section 36(2) of the Act and providing a statement of reasons why it believed this exemption was applicable.
- The council also breached section 17(3) of the Act in that it did not provide the complainant with a statement of reasons why it was claiming that in its application of section 36, its decision was that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- The Commissioner's decision is that section 43 was not applicable to the information in the first instance.
- Furthermore, although section 36 (2) was engaged, the Commissioner's decision is that the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information.
- The council therefore breached the requirements of section 1(1)(b) of the Act (a general right of access to information held by public authorities), by not communicating the information to the complainant in response to his request.

## Steps Required

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75. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

to disclose to the complainant the information he requested from the management performance section of the audit report dated September 2005 concerning the highway maintenance contract between Warwickshire County Council and Carillion.

76. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

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77. 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

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78. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

79. 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.
80. 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 16th day of June 2008**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
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## **Legal Annex**

### **Section 36**

#### **Effective conduct of public affairs**

36. - (1) This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
  - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
  - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
  - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
  - (i) the free and frank provision of advice, or
  - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

(3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).

(4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

(5) In subsections (2) and (3) "qualified person"-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
- (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
- (d) in relation to information held by the House of Commons, means the Speaker of that House,

- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
  - (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
  - (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
  - (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
    - (i) the public authority, or
    - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
  - (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
  - (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
  - (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
  - (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
    - (i) the public authority, or
    - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
  - (m) in relation to information held by the Greater London Authority, means the Mayor of London,
  - (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
  - (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
    - (i) a Minister of the Crown,
    - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
    - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.
- (6) Any authorisation for the purposes of this section-
- (a) may relate to a specified person or to persons falling within a specified class,
  - (b) may be general or limited to particular classes of case, and
  - (c) may be granted subject to conditions.
- (7) A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-
- (a) disclosure of information held by either House of Parliament, or
  - (b) compliance with section 1(1)(a) by either House, would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

### **Section 43**

## **Commercial interests**

43. - (1) Information is exempt information if it constitutes a trade secret.

(2) 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).

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).