

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 27 May 2008

Public Authority: Leeds City Council
Address: Civic Hall
Leeds
LS1 1UR

Summary

The complainant requested information from the council about "Innovation Leeds", a team in the council's Information and Communication Technologies (ICT) Department. He further requested information on the relationship between Innovation Leeds and Destiny Wireless ("Destiny"), a private company which entered into an agreement with the council to jointly provide and sell digital pens, equipment and related services to other public authorities. The council refused the request on the basis that sections 43 (commercial interests) and 41 (information provided in confidence) applied. The council also claimed section 40 (personal data) as regards information on the funding of Innovation Leeds.

The Commissioner's decision is that the council was able to withhold information about the contract it has agreed with Destiny under section 43, but that some information it held on the funding of Innovation Leeds was not able to be withheld under the exemption in section 40 of the Act. The Commissioner has considered the application of section 41 to information which does not fall within the other exemptions. His view is that it is not applicable as the information was generated by the council and not provided to it by "another person".

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.

The Request

2. On 12 February 2007 the complainant, a solicitor at McGrigor's Solicitors, requested the following information from the council:

"On behalf of a client could you please provide us with all information you hold relating to:

- The funding and ownership position of Innovation Leeds. In particular we would like to know how Innovation Leeds is funded and guaranteed.
- Information relating to Innovation Leeds relationship with Destiny Wireless."

3. The council responded to the complainant on 28 February 2007. In that response it provided very general information in response to the questions asked.

4. The complainant wrote back to the council on 1 March 2007 stating that the council's response was inadequate. He asked the council to review its decision not to disclose the information to him. He pointed out to the council that he had not asked for a summary of the situation between the council and Destiny but had asked for "information" relating to that relationship, which included all documents falling within the scope of the request including any contractual agreements between the parties. The Council acknowledged the receipt of that request on 28 March 2007.

5. Having received no further reply to that request the complainant wrote to the council again on 24 April 2007 stating that in his view, the council's lack of response was a refusal to answer his request, and that he would therefore contact the Information Commissioner.

6. On 25 May 2007 the Commissioner wrote to the council and asked it to respond to the request for a review. He also wrote to the complainant informing him that he had done this.

7. On 29 May 2007 the complainant wrote to the Commissioner stating that he did not believe it should be necessary to wait for the internal review to be carried out because he had already notified the council that their lack of response to his request amounted to a refusal to review the decision.

8. The Commissioner wrote back to the complainant on 4 June 2007 stating that he would allow 20 working days for the council to respond prior to considering the complainant's request further.

9. On 13 June 2007 the council wrote to the Commissioner acknowledging the receipt of the Commissioner's letter of 25 May.

10. On 6 July 2007 the complainant wrote again to the Commissioner stating that he had still not received a reply from the council.

The Investigation

Scope of the case

11. On 4 May 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider the following points:
 - that the council had provided an inadequate response to the request,
 - that it had not provided help and advice, and
 - that it had not carried out a review as requested.
12. The complainant also asked the Commissioner to consider whether the council should have supplied the information to him in response to his request.
13. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

14. On 11 July 2007 the Commissioner wrote to the council stating that the complaint would now be allocated to a case officer to investigate further. On the same day the Commissioner telephoned the council asking if it intended to respond to the request for internal review. The council stated that it would respond to the complainant and the Commissioner before the end of that week.
15. On 20 July 2007 the Commissioner wrote to the council requesting confirmation that the review response had been issued and asking for a copy of that response. The Commissioner also telephoned the council, and was assured that a response had been sent.
16. On the same day the Commissioner received a letter from the council (dated 18 June), providing its response to the complainant. In that letter the council claimed that the information was exempt under sections 41 and 43 of the Act.
17. On 23 July 2007 the Commissioner wrote to the council asking for further information about the application of the exemptions to the information. The Complainant was also sent a letter asking if he was now satisfied with the council's response to his request.
18. On 25 July 2007 the complainant wrote to the Commissioner stating that he wished the Commissioner to continue with the investigation and that he was not satisfied with the council's response.
19. On 26 July 2007 the Commissioner contacted the council by telephone and stated that the complainant wished the Commissioner to investigate the council's

- response. The Commissioner therefore asked the council to respond to his letter of 23 July 2007 within the timescales given.
20. On 31 July 2007 the council wrote to the Commissioner providing a copy of the information which it had exempted from disclosure.
 21. On 3 August 2007 the complainant provided the Commissioner with a copy of a letter he had written to the council in response to the internal review letter. This stated that the complainant was also taking a separate action against the council with the European Commission. This was for breach of laws against the provision of state aid.
 22. On 9 August 2007 the Commissioner wrote to the council stating that he had concerns over the amount of information which the council had provided to him. He reminded the council that it had previously stated that the information was voluminous, and asked if any further information was held which fell within the scope of the request which had not been provided.
 23. The council wrote to the Commissioner on 24 August 2007, providing a copy of a separate letter it had written to the complainant dated 21 August 2007 in response to his letter of 3 August 2007. This letter sought to rebut the arguments that state aid was being provided by the council.
 24. On 12 September 2007 the council wrote to the Commissioner and provided a copy of further documents it held, but which contained substantially the same information as had previously been provided. It also provided further copies of correspondence it had had with the complainant relating to his complaint to the European Commission. The information also included some invoices and reports which fell within the scope of the request.
 25. On 19 December 2007 the Commissioner wrote to the council setting out the facts of the case as it stood at that time and asking the council to address any disputes of fact in the case.
 26. The council responded on 21 December 2007 agreeing with the facts of the case as laid out in the letter of 19 December 2007 and stating that it would provide a fuller response shortly.
 27. On 30 January 2008 the council wrote to the Commissioner again and provided further arguments regarding its claim to the exemptions. It also provided further information relating to the funding of Innovations Leeds. This information amounted to accounting information for the ICT section at the council as a whole, which included a section about the Innovations Leeds team.

Analysis

Procedural matters

28. Under section 10 of the Act public authorities are required to respond to Freedom of Information requests within 20 working days. The complainant requested the information from the council on 12 February 2007. The council initially responded to the complainant in a letter dated 28 February 2007. This period falls within the 20 working day period which the Act requires.
29. Although the complainant first complained to the Commissioner on 4 May 2007, that complaint was initially considered ineligible as at that time the council had not replied to the request for internal review as provided in section 50(2)(a) of the Act. However the Commissioner also wrote to the council at that time and informed it that it needed to carry out a review of its refusal notice or to state specifically that it did not intend doing so. The council did neither within the time period stipulated by the Commissioner, and the complainant therefore made a further complaint to the Commissioner on 6 July 2007. The Commissioner therefore considers that his decision must be made based on the circumstances of the case at 6 July 2007.
30. In its letter dated 28 February 2007 the council only provided a summary response to the request. This did not address the information the council actually held which fell within the scope of the request. The response therefore did not inform the complainant about information it held which fell within the scope of the request, this amounts to a breach of section 1(1)(a) of the Act.
31. Nor did the response communicate that information to the complainant as required by section 1(1)(b), or state that that information was exempt from disclosure under the Act. The Commissioner considers that this amounts to a breach of section 17 (1) of the Act.
32. The council also did not provide the complainant with details as to how to appeal that decision, although the Commissioner recognises that this was primarily because the initial response provided a very basic summary response to the request rather than providing or refusing the actual information it held which fell within the scope of the request.
33. The Commissioner considers that this is a breach of section 17(7) of the Act. This requires that a refusal notice contains the particulars of any procedure an authority has in place for dealing with complaints about the handling of requests for information, and also details of the right to complain to the Commissioner as conferred by section 50 of the Act.
34. The complainant then wrote back to the council on 1 March 2007 stating that the council had not properly responded to his request. He stated that he had not asked for summary answers to his questions but had that he wanted copies of all of the information he had asked about in his request. He therefore asked the council to review its response.

35. The council acknowledged the receipt of that letter on 28 March 2007, but did not provide a substantial response to the request for a review until the letter dated 18 June 2007 was sent. That letter was not received by the Commissioner until 20 July. Given the timing of the previous telephone calls and correspondence between the parties the Commissioner presumes that this letter was dated incorrectly and that it was not in fact sent until 18 July. A similar letter from the council was received at about the same time, also dated June, by the complainant. Again the Commissioner understands that the date on this letter was incorrect.
36. This means that a gap of over 4 months occurred between the request for the decision to be reviewed and the receipt of the outcome of that review by the complainant.
37. Although the council responded to the complainant's initial request for information within the 20 working day period defined in the Act, the Commissioner considers that it did not carry out and communicate the results of the review of its decision within a reasonable time. The Commissioner has dealt with this further in the other matters section of this Decision Notice.

Exemption

- 38.. The exempted information includes a copy of the agreement between the council and Destiny, internal reports to senior managers at the council which show the development of the Innovation Leeds project together with subsequent performance updates, and invoices and sales information tables. There is also a table showing the overall accounts of the ICT department at the council which includes a section on the Innovation Leeds salary costs.

Section 40(2)

The funding and guarantee information

39. The council says that the information it holds about the funding and guarantee of Innovation Leeds contains personal data and is therefore exempt from disclosure under section 40(2) of the Act. This allows information which is the personal data of a third party to be exempt from disclosure where disclosing it would breach one of the Eight Data Protection Principles. The test for this is therefore
 - a) is the information the personal information of a third party, and
 - b) would disclosing the personal information breach one of the Data Protection Principles.

Is the information personal data?

40. The definition of personal data is provided in section 1 of the Data Protection Act 1998. The relevant part of this section is included in the legal annex at the end of this Decision Notice. For the purposes of this investigation the important

consideration is that personal data is defined as information which identifies a living individual or which can be used in conjunction with other information which is held by the data controller to identify a particular individual.

41. The council informed the complainant that Innovation Leeds is a team set up within the council's ICT department which is funded through the normal ICT department's budget. It is not a separate legal entity to the council. However the complainant has reiterated that he would like copies of all information held by the council about the funding of the Innovation Leeds team.
42. The council states that the only information it holds is held in the council's accounts for the ICT department. These accounts contain detailed information about individual salaries, national insurance payments, pensions etc of the council staff involved. The council therefore states that section 40(2) applies and it drew the Commissioner's attention to his decision in case FS50092819 in support of this view.
43. The Commissioner makes a decision based upon the merits of each case individually, and so different factors in this case may lead the Commissioner to come to a different decision to that of a case with different circumstances.
44. The council provided the Commissioner with an extract of its accounts showing the costs to the council for various sections in its ICT department. That information includes amalgamated information for teams within the ICT department, including a section relating to employees employed on the Innovation Leeds team. This highlights the number of staff, the amount which is paid in total in salary to those staff, the overall national insurance and pension amounts payable and the overall total cost to the council of the salaries for the team.
45. The Commissioner does not consider that this amalgamated information amounts to personal data – no individual salaries are shown and no individual is mentioned by name or is identifiable from the information. All that would be disclosed through the information in this document would be a very general idea that a certain amount of money is paid to a certain number of staff, with no information on individual differences, (if any exist) between the pay levels of those employees. No information which would allow employees to be identified as receiving specific amounts from the overall total would be disclosed.
46. Even if the recipient of the information were aware of the grades and identities of individuals on the Innovation Leeds team he would still not be able to ascertain the amounts paid to or on behalf of each individual team member from this information.
47. The Commissioner is therefore satisfied that this information is not personal data. As this is the case, the exemption in section 40 of the Act cannot be engaged.
48. This would be different for information which identifies specific employees such as specific salary details, copies of wage slips etc which the council will also hold, and which also potentially fall within the scope of the request. The council did not state that it held such information, nor did it provide any such information to the

Commissioner in response to his request for the relevant information. He is aware however that the council must hold information of this type. The Commissioner therefore contacted the council who stated that it did hold such information but had not initially considered it relevant to the request. The Commissioner's view is that specific, personal information such as this will, in any event, fall within the definition of personal data and will engage the exemption in section 40(2) of the Act. Employees on the Innovation Leeds team are not particularly senior in the council's hierarchy, and the Commissioner does not believe that there would be any expectation held by those individuals that their salary information would be disclosed upon request. He concludes that a disclosure of specific information on salaries etc in this instance would be a breach of the First Data Protection Principle and therefore that that type of information is exempt under section 40(2) of the Act.

49. The council has confirmed that it holds information about pay bands applicable to different grades within the team. This information should be disclosed. This follows the arguments put forward by the council in case FS50092819 as noted above. The information would, in any event, be provided to potential employees in recruitment exercises, and potentially provided through advertisements highlighting vacancies at the council at similar grades or levels. The Commissioner's decision is that this information, if held, should therefore be disclosed.

Section 43

50. The council argues that a disclosure of the information requested by the complainant would be detrimental to its and to Destiny's commercial interests. It states that through its partnership with Destiny, the council is selling professional and technical services and materials to public bodies, that this is a commercial activity and that in doing so it is competing with private commercial suppliers for the provision of the same or similar goods or services. The council states that although it is doing so with a view to break even, this does not prevent the activity being commercial in nature. It is also clear that Destiny Wireless is a private company carrying out a commercial business trading in electronic and hi-tech equipment and services. Hence any detriment suffered to any of the parties' commercial interests through the disclosure of the information will fall within the scope of section 43.
51. The Commissioner has broken down the different types of information held in order to address the applicability of section 43 to the information. The information in question amounts to a copy of the contract between it and Destiny, various background reports and updates on the setting up of Innovation Leeds, project updates and a limited amount of financial information relating to Innovation Leeds dealings.

The contract

52. The contract in question is between the contractor, Destiny and the council. Each party has contracted to carry out specific tasks in relation to the sale of digital pen and paper equipment to third party public authorities. The Commissioner

understands that this equipment allows written information to be transmitted to prearranged destinations such as a particular database, within seconds of the information being recorded, or otherwise stored on the pen and downloaded onto computer at a later time.

53. The Commissioner notes that the agreement does not fall within the normal scope of activities carried out by a local authority. This is not a contract where the council purchases services from a vendor or a contractor to provide goods or services to it for the benefit of its electorate. It is also not a contract in which the council seeks to delegate out part of its functions to a private partner. It is a 'partnership agreement' wherein both parties agree to sell and provide equipment and services together to third party public authorities, with both of the parties working to benefit from the agreement by producing a competitive commercial business.
54. The council's argument is that a disclosure of the information in question would be detrimental to its, and to Destiny's commercial interests. It states that the activity is being conducted in a highly competitive market, and that disclosure would, in simple terms, allow any competitors of the council to know exactly how to beat the council's terms with Destiny. The Commissioner also notes that there are terms within the contract for either party to terminate the agreement without contractual penalties ensuing after a specified period of notice. The Commissioner therefore notes that if better terms were offered to Destiny then there is a very real and significant possibility of the council losing its position with Destiny to a commercial competitor.
55. Further to this, the council states that Destiny's commercial interests may be prejudiced if this information is disclosed. If information from the contract is disclosed Destiny could be prejudiced when negotiating with third parties for new contracts in the future.
56. The Commissioner notes that the terms of the agreement could contain information on rates or agreements the contractor has agreed with the council because the council could provide an overall benefit to the contractor through its experience and through its connections with other public authorities. The contractor would not want details of rates to be disclosed as private companies dealing with it may then seek to achieve similar terms. The Commissioner considers that the contractor would be able to negate such demands on the basis that each deal is based on its own circumstances, which includes the likely future returns that each individual deal might provide. However Destiny could choose not to put itself in such a position, and could instead terminate the contract with the council in favour of private company partners which are not subject to the same levels of scrutiny as public bodies. This argument holds greater weight in this instance as there are relatively weak ties holding the agreement between the parties in place.
57. The Commissioner agrees that there is a commercial relationship between the two parties. He also agrees that a disclosure of this information could be prejudicial to both party's commercial interests. He notes, for example, that the complainant is acting on behalf of a private company which competes with the

council to sell similar equipment and services to third parties. Clearly competitors to the council (and to Destiny) would like access to this information in order to aid them with their own contracts, agreements or legal claims. The Commissioner therefore considers that there is a real and significant risk that disclosure could result in detriment to the parties' commercial interests.

58. In highlighting the business of the requestor in this way the Commissioner points out that he has not considered the purpose behind this request specifically for the purposes of reaching his decision in this case – requests under the act are treated as purpose blind and the Commissioner has reached his decision with that in mind. However, the Commissioner considers the fact that this information has been requested by a commercial competitor of the council does provide evidence to indicate that there is a real interest in this information by commercial competitors of the council and/or Destiny.
59. The Commissioner's decision is therefore that a disclosure would, or would be likely to prejudice the commercial interests of the council and/or Destiny.
60. Section 43 is a qualified exemption under the Act which requires a public interest test to be carried out in order to determine whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. This is carried out in paragraphs 70 to 93 below.

The reports

61. The reports held by the council outline the agreement with Destiny from its inception, together with subsequent reports on the ongoing progress of the team and information on the sales figures agreed with third parties. Some of these reports highlight informally agreed terms which were eventually written into the contract. They also include discussions around other potential contractual terms which were not eventually included. Where this is the case the Commissioner considers that the information engages section 43 for the same reasons as provided in paragraphs 52 to 60 above. The public interest test for this information is also contained within paragraphs 70 to 93 below.
62. However sections of the reports discuss the lead up to the signing of the agreement and the direction the project should take overall; these include the various strategies which could be used by the council. They also discuss long term plans for Innovations Leeds in a very general way, together with providing advice to senior managers on the legal basis for allowing the council to trade.
63. The Commissioner has considered the content of these reports. Much of this information would have been historical in nature at the time of the request as it dates back prior to the agreement with Destiny being signed. They show the options which were available to the council in introducing commercial trading into its remit in this way, and by default some of the decisions it took based upon these reports would now be obvious from the subsequent development of Innovation Leeds to its current state.

64. Other than the information highlighted in paragraph 61 above, the Commissioner is satisfied that a disclosure of the rest of the information held in these reports would not be prejudicial to either party's commercial interests. Section 43 is not therefore applicable. He has therefore gone on to consider this information under section 41 in paragraphs 94 and 95 below.

Invoice information

65. The information includes invoices pertaining to Innovation Leeds trading activities. These provide a breakdown of the income received from Innovation Leeds trading activities.
66. As a public body, the council has a responsibility to be accountable, to show that it is achieving value for money and that its decisions are sound and follow broadly sound principles. Income generated from the contract with Destiny is ostensibly being offset against the costs of the team to the council, thereby reducing to a minimum tax payer's money which would otherwise need to be used to fund the team.
67. The Innovations Leeds partnership with Destiny also only deals with other public authorities who will also be subject to the Act. The authorities purchasing equipment from Innovation Leeds will be doing so using public funds. The Commissioner has considered requests which included in their scope the costs for services purchased by public authorities in cases FER0073984 (Brighton & Hove Council) and FER0099394 (East Sussex County Council). It is his view that purchasing costs should in general be disclosed under the Act. This is because truly sensitive information such as the profits and costs levels of the vendor or the service provider will not be ascertainable from the bare costs of the products being sold and because there is a greater public interest in knowing that public money is being spent wisely.
68. The Commissioner considers that in this case the information in this amalgamated form would be slightly more sensitive to the council or Destiny than it otherwise would. This is because it indicates the levels of trade for Innovation Leeds, and names the authorities with which Innovation Leeds is doing business. Disclosure might therefore be of use to Innovation Leeds' competitors. However the paradox to this is that the information held in the invoices would be obtainable from each of the authorities separately through Freedom of Information requests in any event. The Commissioner therefore considers that the amalgamated information on the invoices held by the council cannot be treated as commercially sensitive as there must already be an expectation that it would be disclosed if requested from any of the other authorities on an individual basis. It would not be particularly difficult for a competitor to make a request to all local authorities with a view to obtaining such information.
69. The Commissioner therefore considers that section 43 is not applicable to the invoice information held by the council.

The public interest test

70. From the above, the Commissioner's decision is that a disclosure of the contract between the parties and the information on contractual terms held in the reports would, or would be likely to prejudice the commercial interests of the council or of Destiny as considered in paragraph 60 above.
71. The Commissioner must therefore carry out a public interest test to ascertain whether the information should be disclosed. The test he must apply is whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. If these two competing interests balance then the information should be disclosed.

Public interest factors in favour of maintaining the exemption

72. The Commissioner considered the public interest factors in favour of maintaining the exemption for contractual terms held in the reports, as well as for the contract itself. As stated, the Commissioner notes that the nature of the contract between the parties is not one where public money is being provided to a third party private concern. In essence the agreement combines the knowledge, experience and contacts of the council with Destiny's products. The council is actively trading with a limited view to making money, but in doing so it is also providing a trusted, assured and competitively priced method for other authorities to purchase digital media. The council provides direct evidence of the goods and services usefulness in specific areas of local authority functions, and can aid authorities in introducing such systems into their own functions.
73. By doing so the council also enhances its own standing in the ICT field and puts itself in the forefront as an innovator in new technologies suitable for public bodies. It may then attract other companies to deal with it along similar lines, to the benefit of it, other public authorities and the communities they serve.
74. It is clear that a project that seeks to integrate new and more efficient ways of working into the public sector, and which seeks to do so from a reduced cost base position is in the public interest. The council has trialled the equipment and services of the contractor to ensure that they are robust, workable and useful to it and similar public authorities. As a result the council is seeking to extend this experience and knowledge to other public authorities, realising the benefits that this can bring to those authorities. The partnership therefore provides benefits to both the contractor, the council and also to authorities seeking to purchase such equipment as they have a trusted, knowledgeable and experienced body with similar circumstances to their own with which to do business.
75. It is also clear that the intention of parliament in introducing the right for local authorities to trade is to allow some degree of independence to obtain or recover capital through trading if it is in the interests of the community it serves. Guidance issued by the Office of the Deputy Prime Ministers Officer in July 2004 stated that:

"trading will help create a dynamic and entrepreneurial public sector that will increase diversity and choice in the delivery of public services. Trading should encourage local authorities to extend and improve the range of services they offer and will introduce new players into the market. Trading with a wider range of bodies should help to increase the scope for partnership working and provide business opportunities for the private sector."

76. The Commissioner has already considered that disclosing this information could cause the contractor to discontinue doing business with the council on the basis that it would prejudice its own commercial interests by continuing to do work in partnership. The Commissioner has further noted that prejudice to the commercial interests of the parties is likely should this information be disclosed – most notably, any negotiated discounts or deals agreed by the contractor with the council would become known about. There is also a genuine potential for other parties to seek this information in order to offer Destiny better terms.
77. Destiny is not dependent upon partnerships with public bodies in order to do business. A withdrawal from doing so could be detrimental both from the point of view of how the products are introduced, tested and sold to other authorities, but also on a wider scale where private companies may reconsider entering into agreements of a similar and innovative nature with this council or with other public bodies.
78. If detrimental information on Destiny's dealing terms is disclosed in this instance then in similar circumstances Destiny or other private companies may decide that it is safer to limit their agreements to private organisations which can provide a similar service but which are not subject to the same levels of scrutiny as public authorities. This "chilling effect" would be detrimental to public authorities as a whole, and also to taxpayers and beneficiaries of the services being provided. Public bodies would then need to rely upon private companies who may not have the same level of experience in the needs of public authorities, and who will also want to take their own profit from such deals. This would increase the costs of goods or services to public bodies. Such a move could also stifle the intentions of parliament to encourage such innovation in public bodies in the future.
79. The council has drawn the Commissioner's attention to the EGovernment priority set by the eEurope 2005 Action Plan. It states that this focuses on providing more efficient and better quality public services, and increased services between public bodies. The council argues that this agreement, where a public body is providing complementary services to private sector technology in order to harness the benefits to the public sector generally, undoubtedly contributes to that plan.

Public interest factors in favour of disclosing the information

80. Against this the Commissioner has considered the public interest in allowing this information to be disclosed.

81. The public interest in disclosing this information rests in transparent and accountable government and in the general public being able to scrutinise decisions and actions taken by public authorities that act on their behalf using public funds.
82. The Commissioner firstly addressed a point made by the complainant to the council; that it's engagement with Destiny amounts to the provision of unlawful state aid. Clearly there is a public interest in knowing that public authorities are complying with European Union requirements, and that the status of the agreement does not amount to an unlawful provision of state aid.
83. The complainant told the council that he has lodged a complaint with the European Commission regarding this point. For its part the council has argued that it has been provided with the statutory powers to trade in the way it is, that this project will help authorities to meet government guidelines on more efficient government, and that the agreement it has with Destiny does not amount to the provision of state aid.
84. The Commissioner considers that this aspect of the complaint is not one for him to take a judgement on. The complainant has made a parallel complaint to the European Commission, and it is for this body to consider the merits of the arguments concerned. If necessary the Commission will have rights to access all of the information it needs in order to make that decision, and these rights fall outside of Freedom of Information rights. The Commissioner does not therefore consider that this factor is relevant to his considerations in this case.
85. Innovations Leeds is neither a wholly owned company nor a separate legal entity in its own right to the council. A team in the council's ICT department is dedicated to the Innovations project, and the team is funded through normal council funds. These funds are offset by the sales returns the council makes through the agreement.
86. There is a public interest in knowing what resources the council has invested into this project. The cost to the council of running Innovation Leeds are a direct deduction from public funds, and the people and services employed in carrying out the Innovation Leeds project will be resources drawn away from other functions which the council provides to the community.
87. Knowledge of any funding the council puts into this, and of the returns it has been able to generate through the partnership is also in the public interest. In order to know this, it is necessary to know the initial set up costs and the running costs the council spend on the contract in order to know whether the income made from selling the products offsets those costs. Any losses overall will be relevant to the tax payers in the local community as they will take away funding from other services. Any surplus will provide further capital which could be used to either reduce local taxes or to provide further or better services to the public in the future. The Commissioner has taken this public interest factor into account in deciding that the invoice information should be disclosed.

88. There is also a strong public interest in knowing that the council's recommendation and sale of these products and services is well founded and is itself in the public interest.
89. The Commissioner recognises the argument put forward by the complainant that other private companies do not have the overall levels of funding available that the council has, and will not necessarily have the same level of access to other public authorities which the council has. This may therefore provide a competitive advantage to the council which other private organisations cannot share, particularly during periods where the market is slow. There is therefore the potential for the council's project to disrupt the competitive balance in this market.
90. However the council is under a duty to act responsibly and in the best interests of the public it serves. In times where markets are slow the council could not justify funding a loss-making endeavour indefinitely, and this will act as a degree of restraint on their ability to ride out slow periods in the market. The Commissioner also considers that Innovations Leeds only sells to other public authorities, thereby its effect on competition in the market will be limited. He does note however that the nature of the goods and services on offer lend themselves to large and diverse organisations such as public authorities, and therefore the potential market within this sector is ostensibly very large.

Balancing the public interest factors

91. After considering the above, the Commissioner is satisfied that the public interest in maintaining the exemption outweighs the public interest in disclosing the information in this instance. The potential for detriment to the commercial interests of the private company, together with the potential to drive such companies away from doing business with public sector organisations in the future weighs strongly in favour of maintaining the exemption as regards this information. Although the Commissioner has taken into account that partnerships with local authorities in this way may be attractive to private companies because they open doors to more sales, he does not consider that this benefit has an attraction to the extent that a contractor will overlook the potential negatives of contracting with an authority in this instance. Once Destiny had achieved deals to provide goods and services with a small number of other authorities it would be able to market its products in a similar way without need for Innovation Leeds contacts or input. It would then be in a stronger position to abandon its ties with the council. This clearly weakens the council's position in any agreement of this nature.
92. In making this decision the Commissioner reiterates that this is not a normal contract between a public body and a private company for the procurement or sale of goods or services – the Commissioner recognises that this is not a public body purchasing services from a private organisation and thereby delegating functions to that organisation, (such as the council purchasing waste management services for a period of years from the contractor). Rather it is an agreement between the council and the company to combine and work in true partnership to sell products and services to third parties using the benefit of both organisations' contacts, experience and their market position. Although council

resources are targeted at this project, the Commissioner has recognised this by ordering the disclosure of the financial costs to the council of this agreement through the disclosure of the ICT accounts information. However he also recognises the public benefit of this activity and believes that public interest in maintaining the exemption, and thereby protecting the mechanics of the agreement between Destiny and the council, is of greater public value than allowing increased levels of scrutiny in this instance.

93. His decision is therefore that a disclosure of the contract between the parties and the information on contractual terms held in the reports would, or would be likely to prejudice the commercial interests of the council or of Destiny as considered in (paragraph 60 above), and that the public interest in maintaining the exemption for this information outweighs the public interest in disclosing it.

Section 41

94. The council has also applied section 41 to the information. As the Commissioner has decided that the council was able to apply section 43 to the contract and information held in the reports which refer to contractual terms, he has not gone on to consider the application of section 41 for those sections. He is left to consider the applicability of section 41 to the remaining information. This is remaining information held in the financial and account information discussed above in paragraphs 39 to 49 and the information remaining in the internal reports from paragraphs 61 to 64 above.
95. The Commissioner has considered these and does not consider that either of these sections can be considered to be confidential for the purposes of section 41. Section 41 requires that information is obtained by the public authority "from another person" (including another public authority). The Commissioner notes that the information held in the reports which he considers is not subject to section 43 is internal only, and does not contain information from Destiny or any other party. Section 41 cannot therefore be applicable. Similarly the account information will be generated by the council and also cannot be considered to fall within the scope of section 41. The Commissioner therefore considers that section 41 does not apply to this information and that it should therefore be disclosed.

The Decision

96. 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 council was able to withhold the contract it holds with Destiny under section 43 of the Act.

- The council was also able to withhold information from the reports which contain information on the contractual terms or pre-contractual terms it agreed with Destiny under section 43 of the Act.
- The council was able to withhold information it holds regarding the specific salaries of its employees such as identified in paragraph 45 above under section 40 (2) of the Act.

97. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The council breached section 1(1) of the Act in that its responses prior to 6 July 2007 did not inform the complainant of the information the council held which fell within the scope of his request, nor did they provide that information to him.
- The council breached section 17(1) of the Act in that it did not state what information was exempt from disclosure nor provide details of which exemption applied and why that exemption applied to the information.
- The council breached section 17 (7) of the Act in that it did not provide the complainant with details of the appeals procedure it has in place together with details of the right to make a complaint to the Commissioner under section 50 of the Act with its initial notice.
- The council was not able to apply the exemption in section 40(2) of the Act to information it holds about the funding of Innovation Leeds as held in the ICT department costs overview.
- The council was not able to apply section 40 of the Act to information it holds on the various pay bands employees in the Innovation Leeds team fall within.
- The council was not able to apply the exemption in section 43 of the Act to information it holds in the project reports which do not contain contractual terms or pre-contractual terms which have been discussed or agreed with Destiny.
- The council was not able to apply the exemption in section 43 of the Act to information it holds in the sales invoices.
- The council was not able to apply section 41 to the information held in the internal reports, and the financial and account information.

Steps Required

98. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- To disclose information about the funding of Innovation Leeds as held in the ICT department costs overview to the complainant.
 - To disclose any information on pay bands which the council holds which are relevant to employees of the council on the Innovation Leeds Team.
 - To disclose any information from the project reports to the complainant that does not contain contractual terms or pre-contractual terms which were discussed or agreed with Destiny.
 - To disclose the information it holds on the sales invoices to the complainant.
99. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Other matters

100. In his Freedom of Information Good Practice Guidance No. 5 (published in February 2007), the Commissioner provides reasons why he believes that a reasonable time for completing an internal review should be 20 working days from the date of the request for review. He considers that there may however be a small number of cases which involve exceptional circumstances where it may be reasonable for a public authority to take longer than this period. In those circumstances, the Commissioner considers that the public authority should, as a matter of good practice, notify the requester and explain why more time is needed. In his view, in no case should the total time taken exceed 40 working days. He would also expect a public authority to be able to demonstrate that it had commenced the review procedure promptly following receipt of the request for review and had actively worked on the review throughout that period.
101. The Commissioner notes that in this case, the review took substantially longer than the maximum he advises, and that the complainant and the Commissioner needed to contact the council on more than one occasion before the review was in fact carried out and the response provided to the complainant.
102. The Commissioner therefore considers that the council did not comply with the requirements of Part VI the section 45 code of practice when dealing with the request for internal review.
103. In light of concerns relating to the handling of the review process by the council this case will be referred to the Commissioner's Good Practice and Enforcement

Team which will consider whether any further action is appropriate in the context of the ICO's FOI Enforcement Strategy.

Right of Appeal

104. 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 27th day of May 2008

Signed

**David Smith
Deputy Commissioner**

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

LEGAL ANNEX

The Freedom of Information Act 2000

Section 40

Personal Information

40. - (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.

(3) The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

(5) The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-

- (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
- (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

(7) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

Section 41

Information provided in confidence.

41. - (1) Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.

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).

Data Protection Act 1998

Section 1(1)

...

“personal data” means data which relate to a living individual who can be identified—

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

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

The First Data Protection Principle

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.