Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 6 May 2010

Public Authority: Department of Culture, Media & Sport
Address: 2 – 4 Cockspur Street
London
SW1Y 5DH

Summary

The complainant requested information regarding the sale and development of land in the immediate vicinity of the British Library. The public authority initially released a small portion of the information, citing various exemptions to withhold the balance of the information held falling within the scope of the request. Following intervention by the Commissioner the public authority released most of the remaining information it held falling within the scope of the request but withheld some of the information relying on the exemptions at section 36 (Prejudice to effective conduct of public affairs), section 40(2) (Personal Information), section 41(1)(Information provided in confidence) and section 43(2)(Commercial Interest). The complainant challenged the use of sections 36, 41(1) and 43(2).

The Commissioner finds that the public authority correctly applied sections 36 and 41(1) to withhold the information to which these exemptions were applied. With regards to the information to which section 43(2) was applied the Commissioner finds this was applied correctly only to information relating to one element of the request. The public authority is therefore required to release the information in relation to the other two elements of the request.

The Commissioner's Role

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

Background

2. The request is focussed on the sale and development of land in the immediate vicinity of the British Library.

3. The complainant has made a number of requests to several public bodies about the sale and development of the land.

4. The complainant originally made a request to the DCMS that was refused on the grounds of cost. This decision notice concerns the revised request.

5. The land in question was owned and controlled by the DCMS and has been sold to a consortium headed by the Medical Research Council in conjunction with Cancer Research UK, the Wellcome Trust and University College London.

6. The consortium named above has proposed the building of a state of the art biomedical research centre on the site. The original request was about the sale of the land rather than the development of the land but these two elements are inextricably linked; in that the sale to any group, company or individual was mainly determined by the proposal put forward by the successful bidder.

The Request

7. The complainant wrote to the Department for Culture, Media and Sport (DCMS) on 16 December 2007 stating:

"I will narrow my request to data relating to the sale of the land to the north of the British Library which falls under these heads:

1. The names of the failed bidders.

2. The value of each bid including the winning bid.

3. The nature of each bid, i.e. what was proposed for the site by each bidder, for example, so much housing at market rates, so much "affordable housing", so much commercial development.

4. Discussions* between ministers and any of the bidders.

5. Discussions* between civil servants and any of the bidders before bids were made.

6. Discussions* among ministers, civil servants and legal advisers about the bids before the decision to sell to a particular bidder was made.

7. Discussions* between ministers, civil servants and legal advisers after the decision to sell to a particular bidder was made.

8. Any involvement of Gordon Brown in the decision to sell the land for a medical centre, whether that be as Chancellor or Prime Minister.

*Discussions to be taken to mean any record such as letters, memos, notes of meetings, notes of telephone calls, transcripts of recorded conversations."

8. The DCMS wrote to the complainant on 22 January 2008 confirming that it held information falling within the scope of the requests.

9. The DCMS provided the complainant with some of the information it held, but was unable to fulfil any of the requests in full. It withheld a portion of the information citing the following exemptions under the Act: section 35 (formulation of government policy), section 41 (information provided in confidence), section 43 (commercial interests).

10. The complainant wrote to the DCMS on 11 February 2008 appealing against the decision to withhold information falling within the scope of the requests. The complainant also queried the public authority's lack of a response regarding information concerning the involvement of Gordon Brown.

11. The DCMS carried out an internal review of its partial refusal and provided the complainant with its findings on 2 May 2008. This internal review upheld the decision to withhold the relevant information and cited sections 36, 41 and 43. The review also confirmed that documents referring to Gordon Brown were being withheld "as they contain information that falls within exemptions 36, 41 and 43".

The Investigation

Scope of the case

12. On 9 June 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the DCMS' use of sections 36, 41 and 43 of the Act.

13. At this point the DCMS also withheld the names of junior officials contained within the withheld information under section 40(2) of the Act. However the complainant has not pursued this point and the Commissioner has therefore not addressed this point within this decision notice.

14. The DCMS stated that it had provided all the information, subject to the above exemptions, falling within the scope of the request. The complainant has disputed this and has also asked the Commissioner to consider if, on balance of probabilities, more information is held.

Chronology

15. On 9 February 2009 the Commissioner contacted the DCMS and asked it to clarify its arguments in support of the use of sections 36, 41 and 43 of the Act.

16. On 9 March 2009 the DCMS provided the Commissioner with 20 documents containing information falling within the scope of the request. The DCMS stated that its position on some of the information had now shifted as the bidding process had now been completed. The DCMS therefore felt that the public interest test needed to be reconsidered and requested more time to do this and to consult with the various third parties involved.

17. On 3 July 2009 the DCMS provided the complainant with the majority of the information it held falling within the scope of the request. The DCMS withheld a small amount of the information citing sections 36, 40(2), 41 and 43(2) of the Act.

18. The Commissioner wrote to the complainant on 24 July 2009 asking whether the information provided was sufficient for his needs and whether he was prepared to drop his complaint.

19. The complainant wrote to the Commissioner on 18 August 2009 stating that he wished to continue with his complaint and that he wanted the

Commissioner to issue a decision on the information which continues to be withheld under sections 36, 41 and 43(2) of the Act.

20. The complainant also expressed dissatisfaction about the amount of information provided falling within the scope of his request that related to the involvement of Gordon Brown.

Analysis

Substantive Procedural Matters

21. The Commissioner considered the possibility that the information withheld could be environmental in nature and as such covered by the Environmental Information Regulations 2004 (EIR).

22. The Commissioner corresponded with the DCMS and examined the withheld information to determine whether it was environmental within the definition provided by the EIR. The Commissioner is satisfied that the remaining information is not covered by the EIR. The Commissioner is aware of other requests to other public bodies concerning the same piece of land and its development where it has been determined as Environmental Information. However, in this particular instance the Commissioner considers that the information in question is sufficiently removed from the planned development to be determined as not environmental. In deciding whether the information is environmental the Commissioner made close reference to the provisions of regulation 2(1)(a) to (f) of the EIR.

23. To be considered as 'environmental' under:
- Regulation 2(1)(a) the information itself must be **on** the state of the elements of the environment.
- Regulation 2(1)(b) the information must be **on** a factor and the factor (not the information itself) must affect or be likely to affect the elements in 2(1)(a).
- Regulation 2(1)(c) the information itself must be **on** a measure or an activity and the measure or activity (not the information itself) must affect or be likely to affect the elements and factors in 2(1)(a) and (b), or be designed to protect the elements in (a).
- Regulation 2(1)(d) the information itself must be **on** reports on the implementation of environmental legislation.
- Regulation 2(1)(e) the information itself must be **on** 'cost benefit and other economic analyses and assumptions'. The 'cost benefit and other economic analyses and assumptions' must be used

within the framework of the measures and activities referred to in 2(1)(c).

- Regulation 2(1)(f) the information itself must be **on** one of the following:
  i. the state of human health and safety (which may include contamination of the food chain)
  ii. conditions of human life
  iii. cultural sites and built structures.

  The information is environmental inasmuch as the state of the elements in 2(1)(a) or, through those elements, the matters in 2(1)(b) & (c) may effect i. to iii. above.

24. The complainant has asked the Commissioner to consider whether the DCMS has provided all the information falling within the scope of his request that references the involvement of Gordon Brown.

25. When considering the DCMS' assertion that it does not hold any further information falling within the scope of the request the Commissioner applies the civil standard of the balance of probabilities. The Commissioner has been in correspondence with the DCMS concerning this case and one linked case from the same complainant and is satisfied that it has found all the information relevant to the requests.

26. The complainant has argued that information released by the DCMS points to the involvement of Gordon Brown. He believes that if Gordon Brown is involved, in any way, then the seniority of his position must mean that there would be further documentation detailing his involvement.

27. The complainant has quoted directly from a letter sent to him by the DCMS on 3 June 2009:

> "In document 14, the second paragraph refers to a DCMS disagreement with the Treasury as to how the proceeds from the Land sale should be allocated within government. The Treasury and DCMS came to an agreement and ultimately – despite what the document suggests – the Prime Minister was never asked to arbitrate and he did not do so"

28. The Commissioner has examined this passage. It indicates that Gordon Brown is aware of the sale and development of the land and indeed has shown an interest in it. It does not however, suggest a detailed and prolonged involvement in the matter.

29. The complainant has suggested that his own experience as a retired civil servant leads him to believe that there would be more information regarding the involvement of Gordon Brown. The Commissioner has

noted this assertion but in the absence of any proof the Commissioner cannot take this into account in considering whether, on the balance of probability the DCMS is likely to hold such information.

30. The Commissioner is of the opinion that the DCMS has undertaken a thorough search for all information referring to Gordon Brown in this instance. It has released all the information falling within the scope of the request, which it does not continue to consider to be exempt from disclosure.

31. The Commissioner can see no reason to supplant the arguments presented made by the DCMS that it does not hold any further information falling within the scope of the request. The Commissioner therefore finds that, on the balance of probabilities, no further information falling within the scope of this request is held by the DCMS.

Exemptions

Section 43(2)

32. The DCMS has relied on section 43(2) of the Act to withhold certain pieces of information. The complainant has asked the Commissioner to examine its use to withhold the following:

    i. Figures indicating the respective share of contributions of the consortium partners involved.

    ii. One sentence from a letter dated 28 November 2007 to the Secretary of State for the DCMS, James Purnell from the Chief Operating Officer for the DCMS, Nicholas Holgate.

    iii. The names of the unsuccessful bidding companies and their partners.

33. **Section 43(2)** provides that –
"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

34. In order for a prejudice based exemption, such as section 43, to be engaged the Commissioner believes that three criteria must be met:

    - Firstly, the actual harm which the public authority alleges would or would be likely to occur if the withheld information was

disclosed has to relate to the applicable interests within the relevant exemption.

- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure would be likely to result in prejudice or disclosure would result in prejudice. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.

35. The Commissioner considered each of these steps in turn, for each of the pieces of information being withheld.

Information withheld at i. above

36. Firstly with regards to the information at i. above; this refers to two letters sent from Ian Watmore, the Permanent Secretary for the Department for Innovation, Universities and Skills, to the Permanent Secretary of the DCMS, Jonathan Stephens on 10 October 2007 and 9 November 2007.

37. The DCMS has used section 43 to redact a total of six figures from within the body of the letters. Two of these figures are obviously duplicated, as they appear in the same context, within the same wording in both letters. The Commissioner has therefore considered the use of section 43 to redact a total of four separate figures.

38. On the copy of the letters provided to the complainant the DCMS has redacted the figures and inserted "43". However, in the accompanying letter the DCMS made it clear that the exemption applied is section 43(2), commercial interests.

39. The figures in question relate to the proposed contribution to be made to the consortium by Cancer Research UK (CRUK), and the total amount bid, from which the CRUK contribution could be deduced. When considering prejudice to a third party's commercial interests the Commissioner considers that the public authority must have evidence that this does in fact represent or reflect the view of the third party. The public authority cannot speculate in this respect; the prejudice must be based on evidence provided by the third party, whether during the time for compliance with a specific request or as a result of

prior consultation, and the relevant arguments are those made by the third party itself.

40. The DCMS has taken advice from CRUK with regards to the release of these figures and it has been advised that release of the figures could 'cause operational issues for CRUK' and it believes that it is 'likely to damage the CRUK's reputation'.

41. The Commissioner accepts that the amount any party is contributing to a financial consortium is commercial in nature. However, it is not sufficient to state that the information is commercial. It must be demonstrated that release of the information would, or would be likely to, prejudice the commercial interests of an involved party.

42. The Commissioner in his Guidance No.20[1] advises that although 'prejudice' is not defined within the Act it is given its normal legal meaning of 'harm'. It must therefore be considered if the release of the information concerned "would, or would be likely to harm or damage the commercial interests of any person (including the public authority holding it)".

43. The Commissioner is sympathetic to the comments made by CRUK but he cannot see the how any prejudice which may occur would be real, actual or of substance. The Commissioner does not feel that either the DCMS or CRUK have sufficiently argued the connection between the particular information in question being released and it affecting the commercial interests of either party.

44. The Commissioner notes that CRUK's funding for its contribution has not yet been finalised and accepts that this is commercial in nature. However, the Commissioner feels that it has not been made clear how disclosure of the redacted figures would adversely affect CRUK operationally. That is to say the DCMS has not identified an obvious causal link between disclosure of these figures and how future funding will be damaged.

45. The evidential burden rests with the public authority, as the decision maker, to establish that the risk of prejudice occurring must be real and significant. The Commissioner therefore considers that section 43(2) cannot be engaged in this instance and the figures redacted in the two letters should be released.

[1] Available on the ICO website www.ico.gov.uk

Information withheld at ii. above

46. The DCMS also used section 43(2) to redact a sentence from a letter dated 28 November 2007 to James Purnell from Nicholas Holgate. The DCMS has stated that the information contained within the letter is factually incorrect and that its release could possibly harm the commercial interests of the Medical Research Council.

47. The complainant has argued that the fact that the information was factually incorrect is "highly suspicious" and has asked for its release on that basis.

48. The Commissioner notes that the fact that the information redacted is factually incorrect is, in itself, neither a reason to withhold or release it. Rather, the information as it stands must be examined within the remit of the interests protected by section 43(2) of the Act.

49. The DCMS has provided the Commissioner with sight of the information and provided its explanation as to why the information is covered by the exemption. The Commissioner has examined the information withheld and does not consider that the DCMS has sufficiently established the causal link between the potential disclosure of the information and the harm or prejudice occurring.

50. The redacted information concerns the ownership and possible future disposal of another piece of property. The DCMS has again asked the third party involved if it believes the disclosure would harm its commercial interests. The third party, the Medical Research Council, stated that it would harm its commercial interests thus establishing that section 43(2) may be applicable. However, the DCMS explains that should this second piece of property be disposed of in the future it "would be disposed of in line with Treasury Office of Government Commerce rules."

51. The Commissioner believes that the possible disposal of the site in the future would follow the same process whether this information were released or not. The Commissioner does not therefore believe that the DCMS has established a causal link between the release of the information and the body concerned suffering commercial harm. The Commissioner therefore considers section 43(2) is not engaged and the information should be released.

Information withheld at iii. above

52. Finally the DCMS has used section 43(2) to withhold the names of the unsuccessful bidding companies and their partners.

53. The DCMS state that the tendering exercise was carried out in confidence and that the companies would have had an expectation of confidentiality. The Commissioner notes this stance but is of the view that all companies bidding for public funds and projects should expect a degree of transparency to ensure fair and open processes when allocating public funds.

54. Once again the Commissioner accepts the commercial nature of the withheld information but must again consider the possibility of whether release of the information would be detrimental to the parties involved.

55. In this instance the DCMS set out an explanation as to why the disclosure of the names would be detrimental to the failed bidders. The DCMS has already released the amounts involved in the bids, and the nature of the development stated in each bid. The DCMS has argued that if the names were now released then the failed bidders would be disadvantaged with regards to any future bids as this would 'give rival competitors information that would enable them to calculate how much was being charged per square metre, and broken down explanations of their competitors' strengths and weaknesses'. The DCMS has based this argument on evidence presented by the third party builders involved.

56. The Commissioner believes that the information is commercial in nature. The Commissioner is also satisfied that release of the figures would be likely to give rival competitors an unfair advantage in possible future cases. This unfair advantage could obviously lead to the named bidders losing out on future jobs. Inevitably this will damage the commercial interests of the parties involved. The Commissioner is also satisfied that there is a sufficient causal link between the release of the information in this instance and that specific harm occurring. The Commissioner therefore accepts that section 43(2) is applicable in respect of this information.

57. Having established that section 43(2) is engaged the Commissioner must now examine the public interest in disclosing the information against the public interest in maintaining the exemption.

Public interest arguments in favour of disclosing the requested information

58. The complainant has argued that there are only a small number of contractors capable of undertaking large public contracts and that there is effectively a 'cartel' formed by these organisations.

59. The Commissioner accepts that when bidding for public funds there should be an inherent transparency to ensure the just allocation of public monies. It is important to promote participation in the process, promoting public understanding in the kinds and range of companies involved. This in itself should lead to encouraging competition and providing accountability for decisions taken.

Public interest arguments in favour of maintaining the exemption

60. The DCMS has stated that it would have a detrimental impact on the commercial reputation of these companies were it known that their bids failed. The DCMS further argued that as the description and values of the bids have already been released then there would be little benefit in releasing the names of the companies that were unsuccessful in the bidding process.

Balance of the public interest arguments

61. The Commissioner has noted the concerns of the complainant but on balance believes that the names of the failed bidders would not add significantly to public understanding of the process. Therefore the arguments in favour of disclosure are outweighed by the strong arguments in favour of maintaining the exemption. The DCMS took the decision to release the nature and value of the failed bids believing that this was of greater public interest than the names of the companies involved. The Commissioner is mindful that a public authority should not arbitrarily decide what information it sees fit to release when considering a response to a request for information under the Act. A public authority should release all information it holds relevant to a request or withhold information if it is covered by a relevant exemption. However, the Commissioner accepts the DCMS' stance that little would be gained by the public at large by release of the information regarding the names of the failed bidders. Whereas the consequence of disclosure would be likely to be detrimental to the parties involved.

Section 41

62. Section 41(1) provides that –

"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."

63. The DCMS has relied on section 41 to withhold the name of a third party that made tentative enquiries regarding the purchase of the land in question. The Commissioner is satisfied that the name of this potential bidder clearly came from a third party and therefore this information meets the requirements of section 41(1)(a).

64. The identity of the prospective bidder is obviously not widely known and the Commissioner is persuaded that the approach made regarding the purchase of the land was made in a manner which would have given rise to an expectation of confidentiality.

65. However, the DCMS is not only withholding the name of a potential bidder under section 41 but is also seeking to withhold the whole email chain in which it occurs. This chain of emails is essentially an internally created stream of correspondence and in the Commissioner's opinion cannot be described as being obtained from 'any other person (including another public authority)'. In view of this it cannot be withheld under section 41. The DCMS has stated that this information can also be withheld using section 36(2)(b)(ii) and 36(2)(c); this is considered at a later stage in this notice.

66. The Commissioner believes that a breach of confidence will be actionable, and thus section 41(1)(b) will be met, if:

- the information has the necessary quality of confidence;
- the information was imparted in circumstances importing an obligation of confidence; and
- there was an unauthorised use of the information to the detriment of the confider.

These are the basic terms regarding the law of confidentiality set down in the case of Coco v AN Clark.[2]

67. The Commissioner is mindful that although section 41 is an absolute exemption the law of confidence does contain its own inbuilt public interest test, in that an action for a breach of confidence would not

[2] Coco v AN Clark (Engineers) Limited [1968] FSR 415

succeed if a public interest defence can be demonstrated to justify disclosure.

Does the information have the necessary quality of confidence?

68. The Commissioner believes that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. Information which is known only to a limited number of individuals will not be regarded as being generally accessible, though it will be if it has been disseminated to the general public.

69. The information in question, the name of a third party, is contained within internal communications between two individuals which is not generally accessible by others. It is therefore only known to a limited number of individuals and would not ordinarily be disseminated to the general public. The information can therefore be said to have the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

70. The Commissioner recognises that an obligation of confidentiality may be expressed **explicitly** or **implicitly**. Whether or not there is an implied obligation of confidence may depend on the nature of the information itself, and/or the relationship between the parties.

71. The name of the interested party was provided in confidence, the representative made it clear that the tentative inquiry was to be treated in confidence. It was communicated to and between a small number of individuals. It was not intended to be publicly revealed. The Commissioner therefore believes that the information has the necessary quality of confidence.

Would disclosure be of detriment to the confider?

72. The DCMS has suggested that to release the name of the individual concerned could have a detrimental impact on the business dealings of the individual. The individual had suffered a number of unsuccessful land bids and they were concerned that another potential knockback could cause embarrassment and therefore create uncertainty in future business dealings. The Commissioner is persuaded that on the balance of probabilities, disclosure would be likely to cause detriment to the confider.

73. With regards to the third test - that detriment be harmful to the confider - even in Coco v Clark it was acknowledged that the detriment

is not always a prerequisite of an actionable breach. Coco focussed on commercial detriment but now 'detriment' goes beyond this to encompass personal privacy. Therefore, it must now be considered in conjunction with Article 8 of the Human Rights Act, in that the importance to the individual to have the privacy of their affairs respected is sufficient for there to be an actionable breach of confidence.

74. The Commissioner has considered the above factors and considers that the information was provided with an explicit expectation of confidentiality. The information is not trivial in nature and has the potential to be detrimental to the party involved if released, the Coco v Clark criteria is therefore satisfied.

Public interest defence

75. The public interest test in deciding if a duty of confidence is actionable is the reverse of that normally applied under section 2 of the Act. That is to say it assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.

76. Having established that the name of the prospective bidder is covered by section 41(1)(b) the Commissioner must therefore consider the arguments put forward to defend this use of section 41 and those of the complainant opposing this view.

77. When determining if section 41 should be upheld the Commissioner must give consideration to the wider public interest in preserving the principle of confidentiality and the impact that disclosure would have on the confider.

Public interest arguments in favour of disclosing the requested information

78. The Commissioner is mindful that there is a competing human right as detailed in Article 10 of the Human Rights Act, the right to freedom of expression, which includes the freedom to receive and impart information. In essence then the public interest between maintaining the exemption must be balanced against the public interest in revealing the information.

79. The complainant has argued that "the name of any third party interested in buying the land is of public interest for they may have been a much more palatable (to local residents and other affected

parties) purchaser of the land and could have been driven off by inequitable treatment by the DCMS".

80. More generally there is a public interest in a public authority being completely open and transparent about its actions. There is also public interest in promoting accountability and public understanding of the workings of public authorities. Particularly if the information concerns a project that may be viewed, by some, to be controversial.

Public interest arguments in favour of maintaining the confidence

81. The Commissioner's view is that a duty of confidentiality should not be overridden lightly. The relationship between confider and confidant could be put at risk and individuals may become less willing to confide in public authorities without this degree of certainty. The Tribunal in Bluck v ICO and Epson & St Hellier University NHS Trust[3] quoted from Attorney General v Guardian Newspapers[4]:

"…as a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence…"

82. The Commissioner must consider the possible detriment to the confider should the information be released. It is suggested in this instance that the confider could possibly suffer economically if the information is disclosed. The Commissioner accepts this is a real possibility.

Balance of the public interest arguments

83. It is difficult to argue what 'names' would have been more or less palatable to the local residents. It is also difficult to see why revealing the identity of the party concerned would shed any light on whether they received fair treatment by the DCMS.

84. On balance, taking into account the facts of this case, the Commissioner does not feel that public interest arguments in favour of disclosing this information are sufficiently strong to override the public interest in maintaining the confidence. The identity of the third party can therefore be redacted using section 41(1) of the Act.

85. The DCMS has stated that this particular piece of information would also be exempt under section 36 of the Act (prejudice to effective

[3] P Bluck v ICO and Epsom & St Helier university NHS trust EA/2006/0090
[4] Attorney General v Guardian Newspapers[4] [1990] 1AC109

conduct of public affairs). The Commissioner has not considered this aspect as he has deemed the information to be exempt under section 41(1).

Section 36

86. The full text of section 36 is included in the legal annex. For section 36 to be engaged, information is exempt only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to prejudice any of the activities set out in subsections of 36(2).

87. In this case the DCMS has relied upon 36(2)(b)(ii) and 36(2)(c) to withhold the email string as noted in paragraph 65 above.

88. In order to establish whether the exemption has been applied correctly the Commissioner has:
- Ascertained who is the qualified person or persons for the public authority in question;
- Established that an opinion was given;
- Ascertained when the opinion was given; and
- Considered whether the opinion given was reasonably arrived at and reasonable in substance.

89. Section 36(5) states that a "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".

90. The DCMS is a central government department and the qualified person in this instance must therefore be a government Minister. in this case the DCMS made a formal submission to Barbara Follett, a government Minster, to canvass her opinion on 15 June 2008.

91. The public authority wrote a detailed submission to the designated qualified person detailing what information it felt should remain exempt and why.

92. The public authority has shown evidence to the Commissioner that the Minster in question did receive the submission and the Commissioner accepts that the Minister's agreement to this submission is sufficient to accept that the designated qualified person has given an opinion.

93. A public authority relying on section 36 to withhold information should seek the opinion of a 'qualified person' before the exemption is communicated to the requester. However, it is accepted that the

opinion can be sought at the time of the internal review into the initial decision. The Information Tribunal in the case of McIntyre v the Information Commissioner[5] confirmed this approach at paragraph 31 of its ruling where it stated:

"even if there are flaws in the process these can be subsequently corrected, provided this is within a reasonable time period which would usually be no later than the internal review".

94. It should be noted that the quotation in the previous paragraph indicates that flaws in the process should usually be addressed by the internal review stage. The Commissioner has interpreted this to mean that there may be circumstances where the reasonable time period could be later than the internal review stage.

95. When the opinion of the qualified person is provided at a stage later than the internal review, it will be at the Commissioner's discretion on the facts of the case whether to allow the use of section 36.

96. In this instance the DCMS sought the opinion of the qualified person whilst carrying out discussions with other departments in an effort to release some of the information requested. Indeed during the course of these discussions some of the information previously withheld was released.

97. The DCMS advised the complainant of the results of its internal review on 2 May 2008 and requested the opinion of the 'qualified person' on 15 June 2008. Before this date the DCMS had been in communication with other departments in an attempt to drop some exemptions, thus delaying the submission to the qualified person. The Commissioner must therefore consider whether the timing of the opinion, although strictly late, is reasonable in the circumstances. In practice the Commissioner may exercise his own discretion to consider the opinion of the qualified person even when it is received late so long as the opinion of the designated qualified person is based on the facts when the request was made.

98. When deciding whether the opinion given is 'reasonable' the Commissioner is guided by the Tribunal's decision in the case Guardian Newspaper & Brooke v the Information Commissioner & BBC[6] in which the Tribunal considered the sense in which the qualified person's opinion is required to be reasonable. It concluded that 'in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at' (paragraph 64). In relation to the

[5] McIntyre v Information Commissioner EA/2007/0068
[6] Guardian Newspaper & Brooke v the Information Commissioner & BBC EA/2006/0011

issue of reasonable substance, the Tribunal indicated that 'the opinion must be objectively reasonable' (paragraph 60).

99. The Commissioner has also been guided by the Tribunal's findings in which it indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant'. Therefore, in the Commissioner's opinion this means that when assessing the reasonableness of an opinion the Commissioner is restricted to focussing on the likelihood of that inhibition or harm occurring, rather than making an assessment as the severity, extent and frequency of prejudice or inhibition of any disclosure.

100. With regard to the degrees of likelihood of prejudice the Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' in a number of Information Tribunal Decisions. In terms of 'likely to' prejudice, the Tribunal in John Connor Press Associates Ltd v The Information Commissioner[7] confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in Hogan v Oxford City Council & The Information Commissioner[8] commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (paragraph 36).

101. In order to assess whether an opinion provided by a qualified person was reasonably arrived at the Commissioner asked the DCMS to provide:

- A copy of the submissions given to the qualified person in order for them to reach their opinion.
- Confirmation as to whether the qualified person was in fact provided with any contrary arguments supporting the position that the exemption was not engaged.
- A copy of the reasonable opinion which was subsequently provided.

102. In response the DCMS provided the Commissioner with a copy of a submission asking the qualified person their opinion of whether section 36 should be applied to exempt various pieces of information. Some of this information has subsequently been released but it also covered the

[7] John Connor Press Associates Ltd v The Information Commissioner EA/2005/0005
[8] Hogan v Oxford City Council & The Information Commissioner EA/2005/0026 & 0030

information that the DCMS is still seeking to withhold. This submission did not offer any opposing arguments.

103. The opinion provided took the format of an email from the office of the qualified person stating that she had seen the submission and was in agreement with its proposals.

104. The submission stated that a portion of the information should be withheld under section 36(2)(b)(ii) (would, or would be likely to, inhibit the free and frank exchange of views for the purpose of deliberation). The Commissioner finds that, given the facts of this case, the opinion of the qualified person is reasonable and has been reasonably arrived at.

105. The DCMS has stated that the information contains comments that are clearly not meant for public consumption and that senior officials need space for personal comments. Such arguments are about the need for a "safe space" to make decisions and debate "live" issues without being hindered by external comment and/or media involvement. The Commissioner's view is that, whilst part of the reason for needing a "safe space" is to allow free and frank debate, the need for a 'safe space' exists regardless of any impact on the candour of debate of involved parties which might result from a disclosure of information under the Act.

106. In this instance the Commissioner accepts that the information concerned is frank in nature and not intended to be for public consumption. It would also seem appropriate that the "chilling effect" argument is examined, i.e. should the information be disclosed this may lead to a future loss of frankness and candour in debate or advice. This may in turn lead to poorer quality advice and less well formulated policy and decisions.

107. The Commissioner has considered the "chilling effect" argument and the "safe space" argument and considered whether disclosure of the information will affect the frankness or candour of future debates by relevant parties. The Commissioner accepts that in this case the language used and the candour shown illustrate that were the information released it would be unlikely that this form of communication would be repeated in the future. It is therefore fair to assume that release of the information would be likely to lead to a possible loss of frankness or candour. The Commissioner is therefore satisfied that section 36(2)(b)(ii) of the Act applies to the information contained within the internal string of emails.

108. As section 36 is a qualified exemption it is necessary to consider the public interest arguments on either side.

Public interest arguments in favour of disclosing the requested information

109. As stated above there is a general public interest in a public body being completely open and transparent about its actions, particularly if the information concerns a project that may be viewed, by some, to be controversial.

110. The public interest in accountability and transparency is key and inherent to the Act. However, the weight which it will attract is dependant upon how informative and illuminating the withheld information would be regarding the decision making process if it was disclosed. In this instance the Commissioner feels that were the information released it would not add much to the public debate and therefore the public interest in disclosure would be limited.

Public interest arguments in favour of maintaining the exemption

111. As discussed when considering the "chilling effect" if the information were to be released it would be likely to ultimately result in less robust and frank decision making on future projects. This could lead to poorer decision making and less well considered or effective policies and decisions.

112. Having examined the information in question the Commissioner notes that the manner in which it is written is very obviously free and frank in its nature. At the time of the request the DCMS still had decisions to make relating to the land in question and as such the matter concerned was a 'live' issue. Disclosure of this information is very likely to have a chilling effect in that such free and frank expression of views may not be offered in the future if revealed in this instance.

Balance of the public interest arguments

113. The Commissioner has considered how informative the information being withheld is likely to be to the public at large if released. He has also considered the manner in which it is stated. The Commissioner is persuaded that the weight given to the possible chilling effect, in this instance, outweighs the public interest in the information being released.

114. Having examined both sides of the argument the Commissioner believes that taking into account the particular facts of this case the DCMS was correct to use section 36(2)(b)(ii) to withhold the information in this instance. The Commissioner has therefore not felt it necessary to consider the exemption at section 36(2)(c).

Procedural Breaches

115. In its initial refusal dated 22 January 2008 the DCMS stated that the information was being withheld under the exemptions at sections 35, 41 and 43 of the Act. At that time the DCMS did not advise the complainant of which subsection of sections 35 and 43 it was relying on. Consequently the Commissioner finds that the DCMS is in breach of section 17(1)(b) which states that the public authority must provide the applicant with a notice that 'specifies the exemption in question'.

116. The public authority is also in breach of section 17(1)(b) of the Act by not introducing the section 36 exemption within 20 working days of the request.

117. The public authority incorrectly applied section 43(2) to redact a sentence from the letter dated 28 November 2007. In doing so the public authority failed to comply with section 1(1)(b) of the Act in that it incorrectly refused to disclose the information requested. The public authority is also in breach of section 1(1)(b) for its failure to disclose the contribution figures.

118. In failing to comply with section 1 of the Act, as stated above, within 20 working days of the request the public authority also breached section 10(1) of the Act (time for compliance with request).

The Decision

119. 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 public authority has correctly complied with the requirements of the Act at section 1 by providing all the information falling within the scope of the request concerning the involvement of Gordon Brown.
- The public authority has correctly used the exemption at 43(2) of the Act to withhold the names of the unsuccessful bidding companies and their partners.
- The public authority has correctly used section 41(1) to withhold the name of a third party that made tentative enquiries regarding the purchase of the land in question.

- The public authority has correctly used section 36(2)(b)(ii) to withhold the whole of the email string containing the name of the tentative enquirer.

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

- The public authority has incorrectly used the exemption at 43(2) of the Act to withhold the figures indicating the respective share of contributions of the consortium partners involved and therefore breached section 1(1)(b).
- The public authority incorrectly applied section 43(2) to redact a sentence from the letter dated 28 November 2007, in doing so the public authority failed to comply with section 1(1)(b) of the Act in that it incorrectly refused to disclose the information requested.
- The public authority breached section 10(1) of the Act by not complying with section 1 of the Act by releasing the information the Commissioner has now stated should have been released, within 20 working days.
- The public authority breached section 17(1)(b)for failing to specify the subsections of sections 35 and 43 it was relying on and for failing to specify section 36(2)(b)(ii) within 20 working days of the request.

Steps Required

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

122. Release the figures indicating the respective share of contributions of the consortium partners.

123. Release the letter dated 28 November 2007 from James Purnell to Nicholas Holgate in full.

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

Other Matters

125. Although they do not form part of this decision notice the Commissioner wishes to highlight the following matters of concern:

126. The Commissioner has issued guidance on the time limits on carrying out internal reviews under the Act.[9] This guidance explains that in the Commissioner's opinion 20 working days constitutes a reasonable amount of time to conduct an internal review. In exceptional circumstances it may be reasonable to take longer but in no circumstance should the total time taken exceed 40 working days. In this case, the Treasury received correspondence from the complainant dated 11 February 2008 asking it to conduct an internal review of its handling of his request. The Treasury did not inform the complainant of the outcome of the review until 2 May 2008.

Failure to comply

127. 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.

[9] Freedom of Information Good Practice Guidance No. 5

Right of Appeal

128. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 sent.

Dated the 6th day of May 2010

Signed ……

Gerrard Tracey
Principal Policy Adviser

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

Legal Annex

Freedom of Information Act 2000

General Right of Access

Section 1(1) provides that -
"Any person making a request for information to a public authority is entitled –

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

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

Section 1(2) provides that -
"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

Section 1(3) provides that –
"Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."

Section 1(4) provides that –
"The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

Section 1(5) provides that –
"A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b)."

Section 1(6) provides that –
"In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as "the duty to confirm or deny"."

Time for Compliance

Section 10(1) provides that –
"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Section 10(2) provides that –
"Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt."

Section 10(3) provides that –
"If, and to the extent that –

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given."

Section 10(4) provides that –
"The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations."

Section 10(5) provides that –
"Regulations under subsection (4) may –

(a) prescribe different days in relation to different cases, and
(b) confer a discretion on the Commissioner."

Section 10(6) provides that –
"In this section –
"the date of receipt" means –

(a) the day on which the public authority receives the request for information, or
(b) if later, the day on which it receives the information referred to in section 1(3);

"working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom."

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –
"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.

Section 36(2) provides that –
"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.

Section 36(3) provides that –
"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)."

Section 36(4) provides that –
"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".

Section 36(5) provides that –
"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."

Section 36(6) provides that –
"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."

Section 36(7) provides that –
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.

Personal information

Section 40(1) provides that –
"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."

Section 40(2) provides that –
"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."

Information provided in confidence

Section 41(1) provides that –
"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."

Section 41(2) provides that –
"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."

Commercial interests

Section 43(1) provides that –
"Information is exempt information if it constitutes a trade secret."

Section 43(2) provides that –
"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

Section 43(3) provides that –

> "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)."

Human Rights Act 1998

ARTICLE 8 RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 10 FREEDOM OF EXPRESSION

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.