

## **Freedom of Information Act 2000**

### **Decision notice**

**Date:** 27 March 2013

**Public Authority:** Lewisham Council

**Address:** Town Hall  
Catford Road  
London  
SE6 4RU

#### **Decision (including any steps ordered)**

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1. The complainant has requested information regarding a private finance initiative (PFI) contract which led to the construction of new school buildings in Lewisham.
2. Lewisham Council (the Council) had originally stated that minutes relating to the PFI contract were not held, and that the contract itself was being withheld as disclosure would prejudice its commercial interests (exemption at section 43 of the Act). However, the Council subsequently confirmed to the Commissioner that copies of the minutes are held and has also informed him that it has removed its reliance on section 43 to withhold the PFI contract.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Issue a fresh response to the complainant in light of its revised position regarding the requested information it has not disclosed.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

#### **Request and response**

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5. On 23 August 2010, the complainant wrote to the Council and requested information in the following terms:

*"1. All accounts for the last six years for Forest Hill School*

*2. All minutes from meetings regarding the PFI contract that secured the new build at Forest Hill. (there must have been many meetings at Lewisham level regarding this)*

*3. A copy of the PFI contract itself (apparently it has been lost), but this just seems to convenient. Can you dig a little deeper? I would like to know whose signatures are on the final deal."*

6. The Council responded on 8 September 2010. It provided the information for item 1 of the request, stated no relevant information was held for item 2, and applied section 43 of the Act for item 3.
7. Despite the complainant requesting an internal review on 1 December 2010, to date an internal review has not been carried out.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 3 November 2011 to complain about the way his request for information had been handled.
9. In view of the complainant's representations to him, the Commissioner considered the scope of the case to be whether any minutes relevant to the PFI contract are held and whether the contract itself is exempt under section 43.

### **Reasons for decision**

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#### **Item 2 – Minutes of Meetings**

10. Section 1 of the Act states that:
  - (1) 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.
11. In its response to the complainant the Council stated that: "The procurement of the project commenced in 2000 and the contract was completed in 2006. We therefore no longer hold these minutes".

12. When the Commissioner asked the Council to provide copies of the withheld information relevant for item 3 of the request, the Council included copies of minutes relating to the PFI contract which would be relevant to item 2 of the request.
13. This prompted the Commissioner to ask why this information was being withheld. The Council responded by stating that it considered the request related to minutes concerning the "application of the contract once it was in place" and not those which "secured the contract". The Council also stated that if the Commissioner considered that the information was relevant he was free to search through the 4GB of data held regarding the PFI contract and try to locate further information.
14. However, the Council has subsequently acknowledged that the minutes are relevant to item 2 of the request and confirmed that further minutes are held concerning the procurement of the PFI contract. The Commissioner considers that these minutes are relevant to the complainant's request. The Council must therefore issue a fresh response to the complainant regarding all the information it holds falling within item 2 of his request.

### **Item 3 – PFI Contract**

15. Section 43 of the Act states that:
  - (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).
16. This exemption is designed to protect the ability of an individual or organisation to act competitively in a commercial activity. As a prejudice-based exemption, section 43(2) will only be found to be engaged where a public authority can demonstrate that disclosure would, or would be likely to, result in harm to the commercial interests of an involved party. However, even if this initial test is satisfied, section 43 is a qualified exemption which means that a public authority must weigh up the public interest in disclosure.
17. The Council's original position was that disclosure of the contract would prejudice its commercial interests. However, having discussed the matter further with the Commissioner this position was altered and he understands the Council's new position to be that the information should be disclosed.
18. During the course of his investigation, it was brought to the Commissioner's attention that one of the schedules contains the personal data of third parties who would be employed at the school. The Commissioner accepts that this information constitutes personal data

and that this data should be withheld if its disclosure would constitute a breach of the Data Protection Act 1998.

19. With this in mind, the Commissioner's decision is that the Council should provide a fresh response to the complainant regarding item 3 of his request in light of its altered position on the PFI contract.

## **Other matters**

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### **Internal reviews**

20. The complainant requested an internal review, yet to date one has not been provided. There were complications with the request as the complainant asked his local councillor to submit it on his behalf which led the Council to try and find alternative ways to resolve the complaint. However, the Commissioner does not consider that this is the fault of the complainant.
21. The Act does not provide a timescale for conducting internal reviews. Instead this is guided by the section 45 Code of Practice. At paragraph 42 it states that "target times" for responding should be "reasonable", although no definitive figure is given. The Environmental Information Regulations 2004 state that the time limit for a review is 40 working days, and the Commissioner considers that this is a useful guide for a "reasonable" time limit for requests made under the Act.

### **Inspecting records**

22. As mentioned previously, the Council stated that the Commissioner could search through its records in order to find information relevant to item 2 of the request.
23. The Commissioner considers that this shows a misunderstanding of a public authority's duties under the terms of the Act. It is the responsibility of the authority to locate information relevant to the request and disclose it in line with sections 1 and 17 of the Act. The Commissioner's role under section 50 of the Act (Application for decision by the Commissioner) is not to search through a public authority's records to ensure that these duties have been carried out correctly.

## Right of appeal

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24. 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,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

25. 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.
26. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Alexander Ganotis**  
**Group Manager – Complaints Resolution**  
**Information Commissioner’s Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**