

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 June 2015

Public Authority: Haringey Council
Address: Alexandra House
10 Station Road, Wood Green
London, N22 7TR

Decision (including any steps ordered)

1. The complainant has requested information relating to a contract between Haringey Council (the council) and 'Fusion'.
2. The Commissioner's decision is that the council has incorrectly applied sections 40(2), 43(1) and 43(2) to some parts of the withheld information. It correctly applied section 40(2), section 41 and section 43(2) FOIA to some parts of the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information identified in the confidential annex which was incorrectly withheld under section 40(2), 43(1) and 43(2) FOIA. Redact the information which the Commissioner has found was correctly withheld under section 40(2) FOIA from the information which is to be disclosed
 - Disclose the remaining schedules which the public authority has indicated it is content to disclose as outlined in paragraph 10 of this notice
 - Disclose those parts of the 'Electronic bible' identified in paragraph 13 of this notice to which no exemptions have been applied
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

5. On 12 February 2014, the complainant wrote to the council and requested information in the following terms:
 - i. *"Copy of contract between Haringey and Fusion and Council minutes approving this with any further documents containing variations.*
 - ii. *Bid from Fusion for the contract referred to above.*
 - iii. *Minutes of original decision to make changes to Park Road leisure centre and proposal from Fusion which was approved by the Council.*
 - iv. *Minutes of decision to change the spec for the changes to Park Road pool to remove the diving boards, information presented by Fusion to Haringey Council to support this and reasons given by Haringey and Fusion for removing the boards.*
 - v. *The obligations of Haringey and Fusion to consult before deciding to remove the diving boards.*
 - vi. *Fusion's business plan for all Haringey leisure centres.*
6. The council responded on 13 March 2014 and provided information relating to parts 3-6 of the request.
7. On 28 March 2014 the council provided a further response and explained that information requested at parts 1 and 2 of the request had been withheld by virtue of sections 40(2), 41(1) and 43(1) and 43(2) of the FOIA.
8. Following an internal review the council wrote to the complainant and stated that the appropriate regime for consideration of the request was the Environmental Information Regulations 2004, but that the withheld information remained exempt under regulations 13(1) and 12(5)(e) of the EIR.

Scope of the case

9. The complainant contacted the Commissioner on 3 July 2014 to complain about the way his request for information had been handled.
10. Following correspondence with the Commissioner the council confirmed it was relying on the exemptions cited under the FOIA, that is, sections 40(2), 41(1), 43(1) and 43(2). It further confirmed that the information it was withholding was contained in schedules 2, 3, 6, 7, 8, 9, 11, 13, 16 and 19. The council confirmed that it was content to disclose the remaining schedules. These have not however as yet been disclosed, as the Council is not applying any exemptions to this information, the Commissioner would expect this information to now be disclosed to the complainant. In addition, it listed specific clauses within the contract itself that it considered to be exempt.
11. The Commissioner considers the scope of this case to be to determine if the council has dealt with the request under the correct access regime and if it has correctly applied the exemptions to the withheld information listed in paragraph 10.
12. The council provided the Commissioner with an electronic copy of the withheld information and indicated to which documents it was applying the exemptions. The council did not however mark all material as being exempt.
13. As it does not appear that any exemptions have been applied to the following parts of the "Electronic Bible": Volume 2 part 3; Volume 3 part 2; Volume 3 part 4; Volume 4, the Commissioner considers that this information should be disclosed to the complainant.

Reasons for decision

Is the appropriate legislation FOIA or EIR?

14. The complainant stated that his request had firstly been dealt with under FOIA. However, at the internal review stage it was dealt with under the EIR. The Commissioner has reviewed the withheld information and is satisfied that it was correctly dealt with under FOIA in the first instance.
15. The council considered that Schedule 9 (Method statements) of the contract was exempt by virtue of section 43(1).

16. The council has applied section 43(1) and 43(2) to the following withheld information:

Clause 12.8 – VAT

Clause 14.1 - Obligation to carry out the Works

Schedule 6 – Clarifications

17. The council has applied section 43(2) to information contained in clause 1.1 of the contract along with schedules 7, 8 and 19. A full list of the individual items can be found at Annex A at the end of this decision notice.
18. The council explained that all of the above were subject to commercial negotiations between the parties. The agreed position represents Fusion's commercial position in relation to each particular provision.

Section 43 – commercial interests

19. Section 43(1) of FOIA sets out an exemption to disclosure if the information requested is a trade secret. Section 43(2) sets out an exemption to disclosure if release of the information is likely to prejudice the commercial interests of any person, including the public authority holding the information.
20. In this case, the council has applied section 43(1) to some of the withheld information as set out at paragraph 15 above. In addition it has applied section 43(2) to the majority of the withheld information as set out at paragraphs 16 and 17 above.
21. The Commissioner has first considered the council's application of section 43(1), specifically in relation to schedule 9 – Method Statements. In total there are 47 documents contained in:
- Volume 3 Part 1: Method Statement Executive Summary
 - Volume 3 Part 1: Method Statement Technical Service Delivery & Innovation
 - Volume 3 Part 2: Investment Proposals
 - Volume 3 Part 3: Method statement costs proposals

Is the information a trade secret?

22. The trade secret exemption within section 43 is a class based exemption. That means that if information is a trade secret it is exempt - whether or not harm results from its disclosure.
23. The Commissioner recognises that the term 'trade secret' is not defined in the FOIA. The Commissioner also accepts that the term can have a fairly wide meaning. In his view, it covers not only secret formulae or

recipes, but can also extend to such matters as names of customers and the goods they buy, or a company's pricing structure, if these are not generally known and are the source of a trading advantage.

24. In deciding whether the information in this case is in fact a trade secret, the Commissioner, in line with his guidance on the commercial interests exemption, has found it helpful to ask the following questions.
- Is the information used for the purpose of trade?
 - Is it obvious from the nature of the information or, if not, has the owner made it clear, that he or she considers releasing the information would cause them harm or be advantageous to their rivals?
 - Is the information already known?
 - How easy would it be for competitors to discover or reproduce the information for themselves?
25. In the Commissioner's view, generally the less skill, effort, or innovation that was required to generate the information in the first place, the less likely the information will constitute a trade secret. Similarly, he considers that the easier it would be for a competitor to recreate or discover that information through his own efforts, the less likely it is to be a trade secret.
26. The Commissioner has reviewed all the documents within schedule 9. The council has not provided the Commissioner with any arguments to explain why this information could be classed as a trade secret.
27. The Commissioner has also considered the application of section 43(1) to clauses 12.8 and 14.1, as well as schedule 6. Having viewed the information withheld by virtue of section 43(1), the Commissioner is not satisfied that the council has demonstrated that that information constitutes a trade secret. He therefore does not find that section 43(1) is engaged in respect of this information. The Council has not applied section 43(2) to schedule 9.
28. The council considers that section 43(2) does however apply to all of the remaining withheld information and to clauses 12.8 and 14.1, as well as schedule 6.
29. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is subject to the public interest test.

30. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43. This comments that:

*"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."*¹

31. The Commissioner has reviewed the withheld information and concludes that it falls within the scope of the exemption. The contract relates to the provision of leisure services at three leisure centres in the area. He has therefore gone on to consider the prejudice which disclosure would cause and the relevant parties which would be affected.

Whose commercial interests and the likelihood of prejudice

32. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.
33. The council has stated that at the time of the request disclosure of the information would be likely to prejudice its own commercial interests and Fusion's.

The nature of the prejudice – the council

34. The council explained that this particular information would be useful to other parties with whom the council may negotiate in future comparable contracts for the provision of services (not limited to leisure and sporting services).
35. It argued that disclosure would be likely to weaken the council's bargaining position and therefore its ability to secure the best possible commercial terms. Future bidders, for leisure services or other types of service in the council's area, would be given very reliable indications as to the terms which the council would find acceptable. Their negotiating position would be strengthened, with bids and proposals clustering

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http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

around those terms. This would substantially hamper the council in securing the best possible commercial terms in such contracts.

The nature of the prejudice – Fusion

36. The council explained that Fusion's competitors, as well as those with whom they seek to do business in the future, would use this information to strengthen their competitive or negotiating positions at Fusion's expense.
37. Fusion's competitors would also obtain – for free, and with no corresponding access to their information – valuable insights into commercially sensitive aspects of Fusion's business propositions. This would be useful to those competitors and unfairly prejudicial to Fusion in future bids and procurement exercises for contracts, such as for leisure services elsewhere.

Likelihood of prejudice

38. The council explained that although it refers to December 2012 on its cover sheet, the contract was signed in January 2013. The complainant requested it 13 months later, in February 2014. The likelihood and potential extent of the commercial prejudices outlined above remained as acute in February 2014 as they were when the contract was signed.
39. The council emphasised that, in this context, 13-month old information is recent enough to provide very reliable insights into the parties' commercial thinking. Its disclosure in February 2014 would have provided other parties with the competitive edges outlined above. Fusion's business proposals and the terms agreed by the parties in January 2013 offers reliable guides to the same in February 2014.
40. It therefore considered that its disclosure in February 2014 would be likely to be prejudicial to Fusion in future bids and procurement exercises for contracts, such as leisure services elsewhere.
41. The council further stated that over the next two years it would be seeking to outsource a number of its services and enter into a number of contracts for regeneration work in the Tottenham area. Disclosure of the information requested would provide insights into the council's approach to management of risk in its contracts. The council was confident that that disclosure would be likely to cause the types of prejudices described above.
42. The withheld information is a number of schedules relating to the contract and parts of the contract itself. Having being provided with a full copy of the contract the Commissioner has reviewed each part to which section 43(2) has been applied.

Schedule 7 – Payment mechanism

43. This schedule contains 9 separate documents which the Commissioner has considered.
- i. Definitions. This contains a list of the definitions used within the schedule. The Commissioner considers that this is not exempt by virtue of section 43(2) as there is no clear explanation as to why this information is commercially sensitive. In addition it would be unlikely that disclosure would cause any prejudice to either party.
 - ii. Part 1: Calculation of management fee. This contains the formulae used to calculate the management fee and clearly relates to commercial activity.
 - iii. Part 2: Monitoring of service and categorisation and reporting of events. This part of the schedule relates to the process of logging customer complaints or 'events' such as health and safety issues. It outlines the process the contractor will use to log and categorise such matters. The Commissioner would expect any provider of leisure services to have such procedures in place as a standard requirement. Although it relates to the delivery of the commercial leisure service there does not appear to be anything unique to the contractor in this document. The Commissioner does not consider that the council has provided any evidence of how disclosure could prejudice its or Fusion's commercial activity and therefore is not exempt by virtue section 43(2).
 - iv. Part 3: Unavailability deductions. This contains the formulae used to calculate the unavailability deduction for each 'event' or Contract Day and clearly relate to commercial activity.
 - v. Part 4: Monthly performance deductions. This contains the formulae used to calculate the monthly performance deductions and clearly relates to commercial activity.
 - vi. Part 5: Annual Performance Deductions. This contains the formulae used to calculate the annual performance deductions and clearly relates to commercial activity.
 - vii. Part 6: Failure points – not used. This is a blank document and therefore there is no information to consider.
 - viii. Part 7: Utility rates adjustment. This contains details of the contractor's responsibility for the provision of utilities. It also contains the formulae used to calculate any utility rate adjustments for the period of the contract and clearly relates to commercial activity.

- ix. Part 8: Acknowledgements. This relates to the contractors acceptance of deductions 'flowing' from the Payment Mechanism. Again, this clearly relates to the commercial activity of the contractor and the council.
44. The council explained that between the date of the request and its response to the Commissioner, Fusion had been participating in the tender processes for leisure service provision for five other local authorities. Those tender processes were in contemplation at the time of the request.
45. The council considered that disclosure of the withheld information would have directly impacted upon Fusion's position in those tenders. The council further explained that Fusion's 'pipeline' of future work included early-stage market testing for contracts with eight other local authorities – that early stage work has been conducted in 2014 and was in prospect at the time of the request.
46. Having considered the council's explanation with regard to parts 1, 3, 4, 5, 7 and 8 above, the Commissioner considers that section 43(2) is engaged and that disclosure would be likely to cause the types of prejudices to Fusion as described above in paragraphs 36-41. The Commissioner has not therefore gone on to consider whether disclosure of this information would cause prejudice to the Council.

Schedule 8 - Required Insurances

47. The Commissioner has reviewed this schedule and notes that it is made up of a blank template form, aside from named individual contact details. It also contains copies of letters directly relating to the insurance policies themselves. The Commissioner considers that the template form is not commercially sensitive and should be provided to the complainant with the contact details redacted.
48. The remaining withheld information contains details of the limits of indemnity which clearly relates to commercial information. The Commissioner is satisfied that disclosure of this information would be likely to prejudice the council and Fusion in future contract negotiations. This is because it would disclose the amount of risk that Fusion is prepared to take with regard to this contract. As set out above, this is particularly relevant as at the time of the request other similar tender processes were in contemplation. The Commissioner considers that section 43(2) is engaged and that disclosure would be likely to cause the types of prejudices to Fusion as described above in paragraphs 36-41. The Commissioner has not therefore gone on to consider whether disclosure of this information would cause prejudice to the Council.

a) Schedule 19 – Contractor Guarantee

49. This information relates to the amount of bond Fusion is required to obtain and is a specimen contract with a covering letter. From the information provided it appears that the specimen does not contain any specific commercially sensitive information. The Commissioner considers that this should therefore be disclosed to the complainant, with third party contact details redacted. The covering letter, however, remains exempt by virtue of section 43(2). The covering letter provides details of the fiscal amount of the bond required. As set out above, this is particularly relevant as at the time of the request other similar tender processes were in contemplation. The Commissioner considers that section 43(2) is engaged and that disclosure would be likely to cause the types of prejudices to Fusion as described above in paragraphs 36-41. The Commissioner has not therefore gone on to consider whether disclosure of this information would cause prejudice to the Council.

Specific Contract Clauses

50. The Commissioner has reviewed the contract in full and considered each clause that the council deemed to be exempt. For brevity and to avoid the risk of disclosing the withheld information itself he is not able to provide in-depth details of each clause. As set out above, he has taken into account that at the time of the request other similar tender processes were in contemplation. In light of this he is satisfied that taking into account the nature and detail contained in these clauses, section 43(2) is engaged and that disclosure would be likely to cause the types of prejudices to Fusion as described above in paragraphs 36-41. He has not therefore gone on to consider whether any prejudice would be likely to be caused to the Council's commercial interests. His findings are that section 43(2) is engaged with regard to the following clauses:

3.1; 7.4; 7.6.4; 7.8; 12.6 (table only); 12.10; 13.4; 14.2.3 – 14.2.9; 14.7 (table only); 15.6; 19.1.1 b) to e); 19.1.1 (additional wording); 19.1.5; 19.3; 19.3(a); 19.7.4; 19.8.2; 26.1 – 26.4; 52.6.

51. The only exception is clause 1.1 which contains definitions within the contract. The Commissioner considers that this is not exempt by virtue of section 43(2) as there is no clear explanation as to why this information is commercially sensitive. In addition it would be unlikely that disclosure would cause any prejudice to either party. Clause 1.1 should therefore be disclosed.

The Commissioner will finally consider the public interest test.

The public interest test

Arguments presented by the council

52. The council considered there is a very weighty public interest in preserving its ability to secure the best possible commercial terms in its negotiations with external parties.
53. It further considered that there is substantial public interest in ensuring that unfair commercial harm does not come to private contractors who do business with public authorities.
54. The sorts of harm that would be likely to arise in the circumstances of this case would be detrimental to the fairness of competitive markets. Bidders would not be operating on an even footing. Rather, some would have an unfair competitive insight into their rival's approach. Bids would cluster artificially.
55. Disclosure would be damaging to the commercial interests of local authorities other than the council, as Fusion is bidding for other contracts, and thus to the public purse in a wider sense.
56. It would also damage relations between the council and its private sector partners. The council would be less trusted to keep commercially confidential information out of the public domain. Aside from contracts, this would have the wider impact of discouraging private sector partners from sharing such information with the council. That in turn would impede its ability to make properly informed commercial decisions or negotiate from a fully informed position.
57. The council recognises the importance of transparency and public scrutiny of its arrangements with private contractors. It considers, however, that these interests are very significantly served by the disclosure of the contract in its redacted form. The redacted contract, taken together with other information in the public domain, meets to a very significant extent the public interests in transparency and scrutiny of the council's arrangements with Fusion. Any incremental public interest is in the council's view outweighed by the prejudicial commercial consequences which disclosure of this information would be likely to have.

The Commissioner's position

58. The Commissioner has first considered the public interest arguments for maintaining the exemption. Having accepted that the exemption is engaged he must also find that there is some public interest in not prejudicing the commercial interests of Fusion. The Commissioner's approach is that a private company's commercial interests should not be

unduly prejudiced as a result of doing business with the public sector. However, the Commissioner does not accept that disclosure would have the wider impact of discouraging private sector partners from sharing such information with the council.

59. The argument for withholding the information is strengthened by the fact that at the time of the request, other similar tenders were in contemplation which Fusion is now involved in. He has also taken into account that a redacted version of the contract has already been disclosed to the complainant which goes some way to meeting the general public interest in transparency and accountability.
60. However, the Commissioner notes that the contract dates back to 2012 (signed in January 2013) and although the council has argued that it was still pertinent at the time of the request, the Commissioner recognises that over time an organisation's approach to risk will change which does to some extent reduce the impact of the prejudice the council has outlined.
61. The Commissioner does however accept that the public interest is best served by maintaining a competitive and fair environment for all competitors in respect of existing or potential business. In considering the balance of the public interest therefore he has taken into account that at the time of the request the council was seeking to outsource a number of its services over the next two years.
62. Therefore on balance the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption in this case.

Section 40(2) – third party personal data

63. The council has applied section 40(2) to the following information:

Schedules 2, 3, 11 and 13.

Part of clause 1.1 – The name of the Independent Certifier.

Clause 39.

The Commissioner has reviewed this information and his findings are detailed below.

64. Section 40(2) provides an exemption for information which is the personal information of an individual other than the complainant and where one of the conditions listed in section 40(3) or 40(4) is satisfied.
65. Section 40(2) states 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."

66. Section 40(3) provides that –

"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."

67. In this case the relevant condition is contained in section 40(3)(a)(i). This applies where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act (DPA).

68. The council applied section 40(2) to: schedules 2, 3, 11 and 13. In addition it also applied it to part of clause 1.1 and clause 39. The Commissioner has reviewed this information and his findings are detailed below.

69. The council considered that disclosing the information which is still being withheld under section 40(2) would breach the first data protection principle. The first principle states that the processing of personal data shall be fair and lawful and that there must be a relevant condition under the DPA for processing that data. Personal data is defined as being information which both relates to and identifies a living individual.

Does the withheld information constitute personal data?

70. In order to establish whether section 40(2) has been correctly applied, the Commissioner first considered whether the withheld information is the personal data of parties other than the complainant.
71. Personal data is defined in the DPA as information about a living individual who can be identified from that information, or from that information and other information in the possession of, or likely to come into the possession of, the data controller. As noted, the information must relate to a living individual.
72. Schedule 2 of the withheld information contains details of employees including names, job titles, location, payroll numbers and pension information. Clearly this is information that relates to living individuals and also identifies them. The Commissioner is satisfied that the information in schedule 2 is third party personal data.
73. Schedule 3 of the withheld information appears to be a standard template of an 'Admissions Agreement'. The Commissioner has reviewed the document and notes that, the only third party data contained in it is under 'Eligible Employees'. Although this is less detailed than that in schedule 2 it still relates to identifiable living individuals. Therefore the Commissioner considers that the section of Eligible Employees is also third party personal data.
74. Schedule 11 of the withheld information is titled 'Bulk Transfer Terms'. The Commissioner has again reviewed this information and does not consider it to be third party personal data. The document appears to be a template document relating to the potential transfer of pension benefits. It does not contain any information of named individuals or any information that could identify individuals.
75. The council has confirmed that schedule 13 is in fact a blank document and therefore there is no information to disclose.
76. The Commissioner has concluded that schedules 2 and 3 contain third party personal data. However, schedule 11 does not contain any personal data and therefore cannot be considered to be exempt by virtue of section 40(2) of the FOIA. Schedule 11 should therefore be disclosed to the complainant.
77. Clause 39 is entitled 'Notices'. This clause contains, amongst other things, contact details of two individuals. It is clear that the majority of the information aside from this is not personal data and therefore is not exempt. The Commissioner has next considered whether the details of the two named individuals are exempt by virtue of section 40(2).

78. One of the individuals is a council employee. The Commissioner has referred to his guidance "*Requests for personal data about public authority employees*"². The other is a contractor, employed by a private company.
79. Clause 1.1 contains the definition of "Independent Certifier". The definition of "Independent Certifier" relates to a named company rather than to an individual and therefore is not classed as personal data as outlined above.
80. Having accepted that the schedules 2 and 3 contain personal data the Commissioner must next consider whether disclosure would breach one of the data protection principles.

Would disclosure contravene the first data protection principle?

81. The first principle deals particularly with the privacy rights of individuals and the balance between those rights and other legitimate interests in processing personal data. It states:

"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".

82. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

Would it be fair to disclose the requested information?

83. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:

- the individual's reasonable expectations of what would happen to their information;

² https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

- the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); and
 - the balance between the rights and freedoms of the data subject and the legitimate interests of the public.
84. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public.
85. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in its disclosure.
86. In order to reach a view on whether the disclosure of this information would be fair, the Commissioner has considered the nature of the information itself. The requested information, if disclosed, would reveal information about individuals who were eligible to transfer their pension arrangements as well as revealing their salary details and the site they worked at.
87. The individuals concerned are not senior members of staff. The pension and salary details relate primarily to their private life. Therefore the Commissioner does not accept that releasing this information would be fair and considers it may cause distress to the individuals involved.
88. The Commissioner recognises that there is a legitimate public interest in the release of information which increases transparency and accountability about the way in which public authorities operate. However, in this case he does not consider that disclosure of this information would add greater understanding of how the council works.
89. The Commissioner therefore accepts that the rights and freedoms of the data subjects outweigh the public's legitimate interest in disclosure of this information. The Commissioner has concluded that disclosure of this information would be unfair and in breach of the first data protection principle. As such section 40(2) is engaged and schedule 2 should be withheld in its entirety. Schedule 3 should be disclosed aside from the list of eligible employees.
90. With regard to clause 39 and the personal data of the council employee, the Commissioner considers that there is likely to be a reasonable expectation that this information would be in the public domain. The Commissioner has carried out an internet search relating to this particular individual and found a number of results. The Commissioner does not consider it would be unfair to disclose this particular withheld

information as it relates to the employee's working life and does not provide any personal contact details outside of the council.

91. With regard to the second individual, although the contact details are related to his employment, he is an employee of a third party. The Commissioner does not consider that he would have any expectation of his details being made public and therefore it would be unfair to do so. This information should continue to be withheld by virtue of section 40(2).

Section 41 – information provided in confidence

92. The council has applied section 41 to the following withheld information:

- Clarifications (Schedule 6) volume 1 part 1
- Costing Document

93. Schedule 6 contains 15 separate documents which the Commissioner has reviewed and considered. The majority of this information is correspondence where the parties are clarifying conditions and definitions within the bid and the contract. The withheld information is:

- i. 29.11.12 Updated payment mechanism (email)
- ii. 29.11.12 Management Fee (email)
- iii. 29.11.12 Leisure Investment Finance (email)
- iv. 29.11.12 Office space BWFCC (email)
- v. 29.11.12 Financial issues in relation to the capital works (email)
- vi. 05.10.12 NNDR WHL (email)
- vii. 23.08.12 ISFT Costing document and email (email)
- viii. 02.08.12 Clarification doc
- ix. July 12 Clarification doc
- x. 21.06.12 Combined contract (email)
- xi. 29.03.12 VAT Structures
- xii. 29.02.12 Legal Clarifications (table)
- xiii. 07.02.12 Minutes regarding Risk Register
- xiv. 09.01.12 Clarification doc

xv. 19.12.11 Clarification doc

94. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and disclosure would constitute an actionable breach of confidence. This exemption is absolute and therefore not subject to a public interest test.

Was the information obtained from another person?

95. The Council explained that the withheld information relates to pre-contractual negotiations, prior to the agreed terms of contract being signed.

96. Upon considering the information withheld under section 41, the Commissioner considers that it is information provided to the Council by a third party (Fusion).

Would disclosure constitute an actionable breach of confidence?

97. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:

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

Does the information have the necessary quality of confidence?

98. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.

99. The Council said that the withheld information has the necessary quality of confidence, as it is pre-contractual negotiations. It is not publicly available.

100. Based on the above the Commissioner accepts that the information is not trivial and is therefore satisfied that the information has the necessary quality of confidence.

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

101. The Council explained that the information was communicated in circumstances importing an obligation of confidence. The circumstances in which the information referred to was provided was in the context of confidential pre-contractual negotiations. It considers that the duty of confidence was explicit, within the communications and implied given the nature of the discussions.
102. Having viewed the withheld information, the Commissioner accepts that there is an explicit and implied obligation of confidence on the part of the Council that it will not share information provided as part of this pre-contractual process.

Would disclosure be of detriment to the confider?

103. The Council said that it is likely that disclosure of this pre-contractual confidential information would amount to an actionable breach of confidence. As stated above, in relation to other information within the contract, disclosure would be likely to prejudice the commercial interests of Fusion if it were to be disclosed into the public domain. Disclosure of the information withheld under section 41, could similarly cause a commercial detriment to Fusion and therefore detriment to the confider.
104. The Commissioner accepts that disclosure would amount to an actionable breach of confidence, particularly as it is likely that disclosure would cause a commercial detriment as the withheld information contains pre-contractual negotiations.

Is there a public interest defence for disclosure?

105. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a *defence* to an action for breach of confidentiality. The Commissioner is therefore required to consider whether the Trust could successfully rely on such a public interest defence to an action for breach of confidence in this case.
106. The Council does not consider that it would have a defence to any action brought in respect of the disclosure of the information identified based on the public interest. This is because of the nature of the information itself and the circumstances in which it was obtained. Fusion provided the information in confidence, in the context of pre-contractual negotiations.

107. For his part, the Commissioner considers that there is a general public interest in the Council being open and transparent about the contracts it is entering into.
108. In weighing the above public interest arguments for and against disclosure, the Commissioner has been mindful of the wider public interest in preserving the principle of confidentiality. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure of the information requested against both the wider public interest in preserving the principle of confidentiality and the impact that disclosure of the information would have on the interests of the confider. As the decisions taken by courts have shown, very significant public interest factors must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality. To the Commissioner's knowledge, there is no suggestion in this case that the information concerns such matters.
109. Having considered all the circumstances of this case, and the withheld information, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information.
110. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA.

Right of appeal

111. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

112. 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.

113. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex A

Definition of Breakage costs
Definition of Change in costs
Definition of Contractor's share
Definition of Contract Sum
Definition of Council Default
Definition of Eligible Employees
Definition of Long Stop Date
Definition of Performance Standard Benchmarking Exercise
Definition of Persistent Breach
Definition of Qualifying Change in Law (Limb (c) only)
Definition of Works
Definition of Works Programme
Guarantee (Clause 3.1 only)

Clause 7.4 - Indemnity in relation to Any Measures
Clause 7.6.4 - Indemnity in relation to Redundancy Costs
Clause 7.8 - Indemnity in relation to Employees at the Expiry or Termination of the Contract
Clause 7B – Pensions
Clause 11 - Performance Standard Benchmarking
Clause 12.6 - Profit Sharing
Clause 12.10 – Savings
Clause 13.4 - Latent Defects
Clause 14.2.3 - 14.2.9 - The Council's entitlement to make unavailability deductions
Clause 14.5 - Necessary Consents
Clause 14.6 – Surveys
Clause 14.7 - Capital Works Draw Down
Clause 14.8 - Building Contractor's Programme
Clause 14.9 - Building Contractor's Guarantee
Clause 15.6 - Ground Conditions
Clause 19.1.1 - Limbs (b) to (e) - Termination for Contractor Default
Clause 19.1.1 - Additional wording at the end of Clause 19.1.1 relating to the Definition of Facility
Clause 19.1.5 - Consequences of Termination for Contractor Default
Clause 19.2.2 - Final Notice for Persistent Breach
Clause 19.3 - Voluntary Termination by the Council
Clause 19.3(a) - Termination of the White Hart Lane Facility
Clause 19.7.4 - Compensation Arising from Termination Event
Clause 19.8.2 - Retention Fund Account
Clause 26.1 - 26.4 - Contractor's Indemnity
Clause 27.1.1 Insurance of the Property and Works
Clause 52.6 - Contractor's Share in relation to any Capital Expenditure

Reference: FS50546714

Schedule 7 - Payment Mechanism
Schedule 8 - Required Insurances
Schedule 19 - Contractor Guarantee