

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 December 2015

Public Authority: Kent County Council
Address: County Hall
Maidstone
Kent
ME14 1XQ

Decision (including any steps ordered)

1. The complainant has requested information relating to the successful contractor who won a tender for the provision of the Kent Public Service Network, a shared ICT platform to deliver services to a large number of public authorities within the county. The council refused the request under section 43(1) and 43(2) (trade secrets and prejudice to commercial interests), section 40(2) (personal data), section 42 (legal professional privilege) and section 41 (information provided in confidence).
2. The Commissioner's decision is that the council has correctly applied sections 43(2), 40(2) and 42. He had therefore not gone on to consider the application of section 43(1) or section 41.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 18 November 2014, the complainant wrote to the council and requested information in the following terms:
"1) A copy of the final tender submission (including all indexes, appendices and supplements) between KCC and DUCL for the Provision of KPSN 2015? and
2) A copy of all communication between KCC and the suppliers

following release of the Invitation to Submit Final Tenders

3) A copy of all evaluation guidelines and any other instructions / direction provided to the evaluation team or individual members of the team."

5. The council responded on 22 January 2015. It provided some information however it applied the following exemptions as regards some of the requested information:

Section 12 – cost of compliance

Section 43 – commercial interests

Section 41 – information provided in confidence

Section 38 – Health and Safety

Section 31(a) – Law Enforcement (the prevention & detection of crime)

6. Following the initial response the complainant wrote back to the council asking it to review its decision, however following the advice as regards the volume of information falling within the scope of the request the complainant narrowed his request. For part 1 he narrowed his request to only cover the commercial response of DUCL, and he also asked the council to fully respond to part 2 of the request.
7. Following an internal review the council wrote to the complainant on 19 March 2015. Following the reframing of the request it provided further information however it redacted sections under sections 43 and 41. It also continued to rely upon section 40(2) (personal data) for the names of individuals who worked for third parties.
8. During the course of the investigation the council also applied section 42 (legal professional privilege) to some sections of the withheld information.

Scope of the case

9. The complainant contacted the Commissioner on 28 April 2015 to complain about the way his request for information had been handled. He complained that:
 - the council's response to question 1 applied the exemption in a wholesale manner, redacting virtually everything but the headings, which the he considered cannot be correct, and,

- question 2 on the basis that the council has not provided any information pertaining to the clarification questions between the council and bidders. The complainant considers that it is unlikely that section 43 could apply to this information.
10. The Commissioner has therefore concentrated his investigation on the matters raised by the complainant rather than his wider request for information. This primarily relates to the tender submitted by the successful company, and copies of the post tender clarification process.

Reasons for decision

Section 43(2)

11. Section 43(2) of FOIA states 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)."

12. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers 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; and
 - 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. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.

13. On its website at , <http://kpsn.net/about-us> KPSN describes its function as

"a single ICT infrastructure for Kent Connects' alliance of Kent and Medway authorities, Kent Police and Kent Fire & Rescue. Serving 1,100 sites and 250,000 users, KPSN has increased ICT capacity, resilience and security to deliver faster, more accessible, and better public services to residents. Overcoming technological barriers to collaboration, KPSN has already saved £9m with plenty more to follow.

14. Following the tendering exercise the contract was awarded to Daisy Updata Communications Ltd (DUCL) and has been reported to be worth in the region of £24 million over the course of the 6 year contract.
15. The council said that a disclosure of the information would, or would be likely to harm the commercial interests of both the council and DUCL. As the council has relied upon both parts of the test ('would', and 'would be likely'), the Commissioner has considered the application of the lower threshold of the test; 'would be likely'.
16. DUCL told the council its position on a disclosure of the information. It argued that its disclosure would be likely to:
- Damage its business reputation or the confidence that customers, suppliers or investors may have in it,
 - Have a detrimental impact upon its commercial revenue or threaten its ability to obtain supplies or secure finance, and
 - Weaken its position in a competitive environment by revealing market sensitive information or information of potential usefulness to its competitors.

The DUCL stated that the last of the above was particularly relevant to this information.

17. DUCL also submitted arguments regarding the application of section 43(1) to specific sections of this information.
18. The council argues that the information relates to the resources, technologies, pricing and systems of DUCL. It said that this detailed information encapsulates those elements which give one bidder the commercial edge over another. The elements which make up a good commercial package as opposed to an average or bad one ultimately lead to a company being successful or unsuccessful in its bid for a contract. It argues that the release of this information, even at the post award stage, would damage the commercial interests of DUCL in future

tenders as competitors may use the information to develop their own packages to perform better against DUCL's tendering strategies. This may lead to DUCL not being awarded contracts which it would otherwise have won.

19. The withheld information is essentially a package of information which, together, identifies how DUCL would go about carrying out the requirements of the contract in substantial detail. Essentially it is DUCL's business model for addressing the contract and details the information which DUCL provided which formed the successful bid. The package includes details such as information on logistics, staffing levels, resources, technical information on third party suppliers and on service capabilities as well as other information. Together it forms a clear picture on how DUCL approached the tender bid.
20. It is important to note that the headings for the tender were disclosed to the complainant in response to his request. It is the details under each heading which have, for the most part, been redacted under section 43(2) and 43(1).
21. The Commissioner recognises that where joint services networks are tendered for in the future it would be likely that competitors of DUCL would consider parts of its bid which might have been considered to be better than their own from the disclosed information. It would also be likely that if this occurred the competitors would take steps to amend their future bids to meet or beat any competing bid from DUCL where it was possible for it to do this. This would be prejudicial to DUCL's commercial interests as it would lessen any commercial advantage which it might have had over these companies in the bid. Information on resources, technical capabilities and support mechanisms etc. could be analysed and a third party may then take steps to ensure that its capabilities match or better those of DUCL's in future bids to better their competitiveness in future tenders against DUCL.
22. DUCL also argued that the commercial sensitivity of the information had not waned over time as the bid was a recent process. The contract was awarded for 2015, with the tender taking place in 2014. The sensitivity of the information has not waned in the interim period since the tender.
23. DUCL has argued that the way in which this information is presented is part of the competitive aspect of its tender bid. It considers this information provides a major part of its 'selling point', and argues that its commercial competitiveness relies in part on protecting this information from disclosure in order that its competitors do not copy the manner in which it approaches the provision of such services.

24. The Commissioner recognises that this argument is fairly general and could be applied to the majority of tender bids. He accepts however that when considering the nature of the tender in this case such details could be analysed and copied by competitors to the disadvantage of DUCL but recognises that this is likely to be similar in many tenders.
25. However having considered the above the Commissioner is satisfied that the arguments do raise issues of commercial sensitivity.
26. With regard to the three limb test referred to in paragraph 12, the Commissioner is satisfied that the first limb is met given that the nature of prejudice envisaged to the DUCL's commercial interests are clearly ones that fall within the scope of the exemption provided by section 43(2).
27. With regard to the second limb, the Commissioner accepts that there is some causal link between disclosure of the bids and prejudice to the commercial interests of DUCL. This is because he accepts that it is logical to suggest that the bids are likely to be used by other organisations to inform their future bids that they may make for similar contracts. Furthermore, in the Commissioner's view it seems reasonable to suggest that access to such information would be likely to provide these other organisations with some inherent advantage in any future bidding process given that that they could tailor their own tenders in light of the content of the withheld information. Furthermore, the Commissioner is satisfied that the resultant prejudice which is alleged is real and of substance.
28. With regard to the third limb, given the content and indeed the length of each of the DUCL's bid, it seems clear to the Commissioner that some parts of each tender are likely to be more commercially sensitive than others. That is to say disclosure of particular parts would be likely to provide a greater insight into the specific approach to the contract a particular organisation intended to take. The Commissioner accepts that such a level of detail could be used by competitor organisations to effectively (and potentially successfully) inform future bids they may make for similar contracts in the future. Consequently, the Commissioner accepts that the likelihood of prejudice occurring is one that is more than hypothetical.
29. The Act does not quantify commercial prejudice in any way. It only requires an authority to demonstrate that commercial damage would occur, and the Commissioner agrees that disclosing the tender bid as a package may damage the commercial interests of DUCL.

30. The Commissioner therefore considers that the exemption in section 43(2) is engaged. He has therefore gone on to consider the public interest test required by section 2 of the Act below.

Unsuccessful bidders

31. The council argues that disclosing information relating to unsuccessful bidders would be commercially detrimental to those organisations for the same reasons. It initially argued that disclosing the identity of the unsuccessful bidders would also be likely to be cause commercial harm to those organisations because it considered that the association of the unsuccessful bid with the company might in itself be detrimental to the commercial interests of the companies concerned. However following further consultation with the unsuccessful bidders, two companies dropped their objection to being identified as unsuccessful bidders, and one of these also said that it had no objection to the disclosure of information on its overall score being disclosed. Both parties however considered that further details of their bid should remain exempt as they were commercially confidential information about their business and bidding strategies.
32. Again the same reasons as outlined above apply. Some parts of the information submitted with the tender would presumably be more competitive than those of other bidders and these could be copied and used by their competitors in their own tenders in the future, prejudicing the commercial interests of the company. Although DUCL was successful in this case, this may have been based upon the weighting systems used to decide the successful bid for this particular contract. In other tenders other companies' bids may have fit the requirements of the contract better. The fact that DUCL was successful in this case does not therefore prevent other companies wishing to protect the information they supplied in their bids. The tender effectively sets out the bidding companies' plans for addressing the requirements of the contract.
33. The Commissioner is also satisfied that section 43(2) has been applied correctly to this information.

The public interest

34. As the Commissioner is satisfied that the exemption in section 43(2) is engaged he has gone on to carry out the public interest test required by section 2 of the Act. The test is whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The public interest in the information being disclosed

35. There is a general public interest in creating transparency and allowing scrutiny of decisions which involved large amounts of public money. Tax payers have a right to understand how public money is being spent, what is being obtained for that money and what they can expect in return. The public also has a right to know that an open and proper process has been followed in the awarding of contracts.
36. A disclosure of a successful companies tender bid should also create greater public confidence in the authority's decision making. Clearly allowing greater scrutiny of such decisions, and greater transparency on the spending of public money will create greater public trust and confidence in the council's decision making.
37. The KPSN contract provides services across a number of public authorities in the area, and the decision to award the tender to a particular company ultimately effects the functioning of many of these for the duration of the contract. The introduction of the new system may well affect the public who deal with these authorities as the success of the systems introduced by DUCL will, to an extent, partly determine the efficiency of the authorities for that period. Clearly therefore the public has a right to understand that an appropriate decision has been reached in awarding the contract to DUCL.
38. The Commissioner has taken into account the '*Office of Government Commerce (Civil Procurement) Policy and Guidance (version 1.1)*' which specifically analyses information submitted by companies bidding for tenders with public authorities and provides the authorities with guidance as to how to approach requests for information submitted as part of a tender bid. Although the guidance was issued prior to the Act coming into force, and may have been intended for information held in legacy contracts falling within the scope of the Act for the first time, its analysis of the information held within many tender bids is still highly relevant to newer bids.
39. The Commissioner has considered areas which the OGC guidance suggests the starting point for such information is that the public interest is in the information being disclosed. These include such information as service level agreements, reporting and performance measures. The Commissioner notes that the OGC guidance provides some examples where it considers information should be considered discloseable once a tender has been accepted and a contract signed (as in this case). However in this case, for the reasons outlined in para 21 he can see that disclosing some of the details which the OGC guide proposes as potentially discloseable would be of issue in this case given the nature of the tender submitted. He notes, in any event, that many

of the details which would explain how the council has approached issues such as termination notices etc. are not held in the withheld information but are likely to be held within the contract between the parties.

40. The headings relating to these have been disclosed in response to the request, however the detailed breakdowns held inside the tables for each section have been redacted.
41. Other information outlines the technical capacities and the systems which DUCL would introduce and the pricing structures and costs for particular areas of the contract.

The public interest in maintaining the exemption

42. The main public interest factors weighing on the side of maintaining the exemption rest within the reasons for the exemption in the first instance; the protection of commercially sensitive information.
43. The Commissioner notes that in the case of largescale IT contracts such as this one, bids contain technical and commercial information which would clearly be of use to competitors to the bidder. Details such as service provision, capacities, staffing and resource levels across a number of sites to ensure smooth running of the systems in place etc. may well be details which competitors would take into account in future bid.
44. Whilst technical or commercial details of the contract are of prime importance to the authorities using the systems, much of this information would be of little importance to the general public providing that the public authorities have an effective working IT service which aids them in carrying out their functions.
45. The Commissioner recognises that there is a general public interest in this information being disclosed from the point of view of greater transparency on the details of what public money was being spent on and the specific safeguards in place to protect that public money (and public services) if things go wrong.
46. However disclosing the nature of the information held in the commercial bid would effectively provide details of how DUCL approached the tender, the business model it proposed to win the contract and it would also provide detail on its resources, technical capabilities and resources and its pricing mechanisms.
47. The Commissioner accepts that there is a public interest in allowing the public to know how the contract will be carried out, and how this might affect the costs of the contract when compared to the benefits and the

efficiency that this might bring. However he considers that this should not jeopardise DUCL's ability to compete for future tenders should competitors change their own approach to this area.

48. As an example, sharing information on the number of staff available for client service inquiries or the speed at which DUCL can react to IT issues may be of importance to its competitors. Sections of the bid relate to the provision of resources to the contract, outlining the number and roles of staff who will be dedicated to a task, or the percentage of their time which will be dedicated to a particular task. This may obviously be a major factor in the consideration of likely customer service efficiency which, on a largescale contract across many different sites, might be of primary importance in winning a bid. A disclosure of this information would allow competitors to copy or better this if their own bid for this current contract did not already do so.
49. In the decision of the (then) Information Tribunal in *Visser v ICO EA/2011/0188* the First-tier Tribunal found (at paragraph 20) that prejudicing the commercial interests of one player in the market would distort competition in that market, which in itself would not be in the public interest. There is therefore a public interest in protecting the commercial interests of individual companies:

"If the commercial secrets of one of the players in the market were revealed then its competitive position would be eroded and the whole market would be less competitive with the result that the public benefit of having an efficient competitive market would be to some extent eroded."
50. The Commissioner accepts that there is a strong public interest in organisations being able to provide detailed and commercially sensitive information, including technical and pricing information to a public authority as part of a tender. This allows the organisation to set out in the clearest possible terms the benefits of its bid over others, which ultimately results in a more competitive tendering environment. If however there is a risk that that information might be disclosed in response to a request then companies may feel disinclined to provide a level of detail which might ultimately be copied and disadvantage its competitive position within the market. This is particularly the case where the company concerned considers some parts of its bid to contain elements it considers to be its trade secrets.
51. Clearly some tenders will stipulate the degree or level of information which is required in order to bid for the tender. There is a risk, albeit slight, that some companies might decide that they are unable to bid for a tender where detailed information is required which amount to a company's trade secrets or is highly commercially sensitive and there is

a possibility that this information may subsequently be disclosed. This might occur in particular where a company generally tenders for private commercial contracts and risks tendering against competitors who do not contract with public authorities (and who would not therefore have details of their bids disclosed under FOI).

52. From the authority's point of view, being able to receive information of this kind allows it to make a much more informed decision. It allows the organisation to explain more clearly what agreeing a contract with the bidder will entail, how much this will be likely to cost taxpayers, and what to expect from the organisation placing the bid. Again this provides for better decision making and ultimately safeguards public money. If companies withhold sensitive information because of the risk of disclosure the council would have decisions on a less informed basis.
53. In the Commissioner's opinion disclosure of the withheld information clearly risks undermining the 'selling points' of DUCL's tender; it would allow its competitors to copy its approach, both in respect of drafting the tender and providing the services in question. In the Commissioner's opinion such an outcome actually risks the homogenisation of the tenders with DUCL being unable to provide a genuinely distinct proposal to local authorities without this potentially being replicated by a competitor. In the Commissioner's view such an outcome would be firmly against the public interest as it would actually result in the Council being less likely gain best value for money.
54. Furthermore, the Commissioner believes that there is an inherent public interest in ensuring fairness of competition; in that respect he concurs with the Council that it is firmly against the public interest for the commercial interests of third parties to be undermined simply because they have submitted a tender to a local authority. This is certainly the case with the unsuccessful bidders.

Conclusions

55. Having considered the above, the Commissioner has taken into account that DUCL argues that many features of the bid are trade secrets because they offer a unique approach/solution to meet parts of the requirements of the tender, and that information is not available to the general public or competitors. Whilst the Commissioner considers that DUCL may have overstated the position in respect of the argument that the information is its 'trade secrets' nevertheless he has taken into account the fact that DUCL's arguments are strongly in favour of withholding particular sections of information based on the harm which would be caused to its business activities and its competitiveness in the market if the information were to be disclosed.

56. The arguments have substance, and the Commissioner recognises that it is not in the public interest to disadvantage one particular player in a competitive market providing that the information which is disclosed allows transparency over what has been purchased, how much this will cost and what the public will receive in respect of that cost. In this case this information is already available to the public.
57. Having considered the above arguments the Commissioner is satisfied that the public interest rests in the maintenance of the exemption.

Section 43(1)

58. The council has followed DUCL's argument that the withheld information is exempt under section 43(1). It said that some sections of the tender include DUCL's trade secrets. Given that the Commissioner has found that section 43(2) is applicable to the information he has not found it necessary to consider the application of section 43(1) further.

Section 41

59. Again, as the Commissioner considers that section 43 applies to the information which the council has also applied section 41 to he has not found it necessary to consider the application of section 41 in this instance.

Section 40

60. The council has applied section 40 to the names provided within the tendering bids. It said that DUCL has specifically stated that it did not wish its employees names to be disclosed as it has not asked them whether they consented to that or not. The council also argued that there is absolutely no public interest in this information being made publically available as it simply amounts to the names of various individuals employed by third party companies and as such is information which delivers no insight or clarity into the award of this contract.

61. Section 40 of the Act states that:

"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."

62. Section 40(3) provides that –

"The first condition is-

(c) 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-

any of the data protection principles, or...

63. The Commissioner has considered the most relevant data protection principle, which in this case is the first data protection principle. The first data protection principle states that:

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

(a) at least one of the conditions in Schedule 2 is met, and

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

64. In his approach to the application of the first data protection principle the Commissioner concentrates in the first instance on whether the disclosure of the information would be 'fair'. This primarily focuses on whether the individuals would have any expectation that their information would be disclosed in response to a request, or whether it would have been obvious to them at the time that they provided their information to their employer.

65. The names of the individuals, together with their role in the DUCL contract are disclosed within the tendering documents. In essence, although they may not necessarily be senior within DUCL they will have responsibility for carrying out specific roles to meet obligations in the contract.

66. The Commissioner considers that as part of their role the individuals would have an expectation that their details would be provided to potential clients as part of a bid. However as regards this request, their details would be disclosed from a public authority which DUCL have supplied a tender to and won the contract. A disclosure under the Act is considered to be to the whole world. The disclosure would therefore be much wider than the individuals would have expected as part of their role and from a source which they would have no expectations would disclose their details.

67. The main detriment to the individuals would be the loss of personal privacy such a disclosure would entail.
68. The Commissioner is therefore satisfied that the individuals would have no expectations that their information would be disclosed to the extent which an FOI disclosure would entail.
69. If there is a pressing social need for the information to be disclosed then this can make a disclosure fair even where the individuals would not have expected that their information might be disclosed in response to an FOI request. The Commissioner therefore considered this, however he has been unable to identify any pressing social or legitimate interests in the public having access to that information. The individuals are not public servants and there is little public benefit in the public knowing the names of privately employed individuals who are carrying out specific roles for DUCL in ensuring that it provides an efficient and maintained process across all of KPSN sites.
70. The Commissioner therefore considers that the council was correct to apply section 40(2) in this instance.

Section 42

71. A section of information has been withheld under section 42. The council argues is subject to legal professional privilege. This information falls within the scope of part 2 of the complainant's request for information.
72. Section 42(1) provides that –

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."
73. The council has provided the information withheld under section 42 to the Commissioner. The Commissioner is not able to explain within this decision notice what the withheld information is in any detail without discussing the withheld information itself. He is however satisfied that the information is subject to legal professional privilege and that information is not otherwise in the public domain.
74. The Commissioner has therefore considered the public interest test in relation to this information.

The public interest in the disclosure of the information

75. The Commissioner considers that some weight must always be given to the general principles of accountability and transparency which are achieved through the disclosure of information held by public

authorities. He recognises that disclosure of publicly held information can assist the public in understanding the basis and how public authorities make their decisions. In turn, this can foster greater trust in public authorities and may allow greater public participation in the decision making process.

76. The Commissioner recognises that a disclosure of the requested information would help the public to understand some of the issues considered by the council in relation to aspects of the procurement and the tender bid. It would help to shed greater light on the processes undertaken and be likely to improve public confidence in the decision making of the council. It would help in demonstrating that the tendering process was fair and appropriate.
77. Disclosure of the withheld information would also allow the public to consider the quality of the legal advice given by the Council's Legal Department and also how officers within the Council acted on the advice they received.
78. The information held in this case relates to a large contract which is intended to run for a period of 6 years. The council is spending a large amount of public money on the contract.
79. There is a general public interest in allowing the public to access any information which relates to the awarding of the contract and/or how it is being run for the above reasons.

The public interest in maintaining the exemption

80. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry (EA/2005/0023)*, the Information Tribunal described legal professional privilege as, "*a fundamental condition on which the administration of justice as a whole rests*".
81. The Commissioner accepts that disclosure of legal advice would undermine this important common law principle. He further accepts that disclosure would in turn undermine a lawyer's capacity to give full and frank legal advice and would discourage people from seeking legal advice.
82. The Commissioner considers that there will always be a strong argument in favour of maintaining legal professional privilege. It is a longstanding, well established and important common law principle. The Information Tribunal affirmed this in the *Bellamy* case when it stated:

"...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need

to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."

83. This does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect.
84. It is very important that public authorities are able to consult with their lawyers in confidence and be able to obtain confidential legal advice. Should legal advice be subject to routine or even occasional public disclosure without strong reasons, this could affect the free and frank nature of future legal exchanges and/or may deter the public authority from seeking legal advice in situations where it would be in the public interest for it to do so.
85. The Commissioner's published guidance on legal professional privilege states the following:
- "Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice."*
86. Where a public authority is faced with a legal challenge, or a potential legal challenge, it is important that the authority can defend its position properly and fairly, and that it acts on robust advice when making decisions. Should the public authority be required to disclose its legal advice, its opponent would potentially be put at an advantage by not having to disclose its own position or legal advice beforehand. This would unbalance the position in any litigation that followed.
87. The public interest in maintaining legal professional privilege is inherently strong. To outweigh this requires circumstances where there are substantial amounts of public money at stake, where the decision would significantly affect large numbers of people, or where there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate authority. None of these factors appear relevant within this case.

Balance of the public interest arguments

88. The Commissioner appreciates that there is a general public interest in public authorities being as accountable as possible for the decisions they make. However, having considered the content of the withheld

information in the wider context of this case, the Commissioner has decided that the public interest in favour withholding the information which is subject to privilege is greater than that which favours disclosure.

89. The Commissioner's decision is that the council has properly applied section 42 of the FOIA to the information it has withheld.

Right of appeal

90. 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

91. 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.
92. 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

Andrew White
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