

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 June 2017

Public Authority: London Borough of Croydon
Address: Bernard Weatherill House
8 Mint Walk
Croydon
CR0 1EA

Decision (including any steps ordered)

1. The complainant requested information from the London Borough of Croydon (the council) relating to its review and decision to suspend work under a contract for provision of legal services by Baker Small solicitors.
2. The council refused the complainant's request, citing the exemptions under sections 36(2)(b)(i) (free and frank provision of advice), 36(2)(b)(ii) (free and frank provision of views for deliberation), 41 (information provided in confidence), 42 (legal professional privilege) and 43(2) (commercial interests) of the FOIA.
3. The Commissioner's decision is that the council has applied sections 36(2)(b)(i) and (ii) correctly in relation to all information to which these sections were applied, and to some, but not all, of the information to which sections 41 and 42 were applied. The council has applied section 43(2) correctly.
4. The Commissioner requires the council to take the following steps to ensure compliance with the legislation:
 - To disclose to the complainant the emails dated 1 July 2017 at 5:31pm and 21 June 2017 at 10:57am, previously withheld under section 42.
5. The council 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

6. On 16 July 2016 the complainant wrote to the council and requested information in the following terms:

"You will be aware that in June 2016 there was some media coverage of the work of law firm Baker Small for Local Authorities (see, for example, <https://www.theguardian.com/law/2016/jun/13/baker-small-law-firm-parents-tweets-children-special-educational-needs>). One such authority was Croydon Council.

At the time or shortly thereafter Council Leader [name redacted] announced a suspension of the contract pending a review. In making this request I request disclosure of all information held by the Legal, Contracts and Leader's Office departments concerning this review and the use of Baker Small by Croydon Council."

7. The council responded on 9 August 2016 in which it informed the complainant that it holds information relating to his request, however refused to disclose the information, citing sections 36(2)(b)(i) and (ii) of the FOIA.

8. On 30 August 2016 the complainant requested an internal review in which he stated:

"...request an internal review of all aspects of the Council's handling of my FOI request, including the application and evaluation of the PIT..."

9. Following an internal review the council wrote to the complainant upholding it's application of sections 36(2)(b)(i) and (ii) of the FOIA. The council also amended its response by applying further exemptions under sections 41 and 42 to some of the withheld information.

Scope of the case

10. The complainant contacted the Commissioner on 22 November 2016 to complain about the way his request for information had been handled and asked the Commissioner to encourage the council to respond to his request. He stated in support of his argument that the information should be disclosed:

"By way of public interest I also link two further media stories (in which Council officers in an official capacity discuss the matters which the legal dept refuse to disclose)

<http://www.croydonadvertiser.co.uk/croydon-council-suspends-use-legal-firm-baker/story-29403487-detail/story.html>

<https://insidecroydon.com/2016/08/01/council-returns-250000-pupil-premium-and-doesnt-know-why/> "

11. During the course of the Commissioner's investigation the council sought to apply a further exemption under section 43(2) to some of the withheld information.
12. The Commissioner considers that the scope of the case is whether the exemptions under sections 36, 41, 42 and 43 of the FOIA were applied correctly by the council.

Reasons for decision

Section 36 – effective conduct of public affairs

13. The Commissioner notes that the majority of the withheld information falls to be considered under sections 36(2)(b)(i) and (ii) of the FOIA.
14. Sections 36(2)(b)(i) and (ii) of FOIA state that:
 - 2) *Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –*
 - (b) *would, or would be likely to, inhibit-*
 - (i) *the free and frank provision of advice, or*
 - (ii) *the free and frank exchange of views for the purposes of deliberation.*
15. Sections 36(2)(b)(i) and (ii) can only be engaged if, in the reasonable opinion of the qualified person, disclosure would, or would be likely to result in any of the effects set out.
16. In the present case, the council's Acting Solicitor and Acting Monitoring Officer (Jaqueline Harris-Baker) provided the opinion. The Commissioner is satisfied that she is the qualified person for the purposes of section 36. The council's qualified person provided her opinion on 4 August 2016.
17. The council has informed the Commissioner that during the period when it was reviewing and making decisions regarding the council's use of the legal services of Baker Small, the qualified person was involved in

producing advice in her then role as Head of Social Care and Education Law. As such she had access to all the recorded information at that time and was also privy to conversations and related activities (which are not recorded information) in respect of this request. The council submits that she has intimate knowledge of the issues and concerns raised including considerations of both officers and members of the council's leadership team.

18. The council confirmed to the Commissioner that the qualified person has read and reviewed the withheld information and also discussed with a solicitor within the council's corporate legal team the issue of whether the relevant exemptions were engaged. The council has provided the Commissioner with a copy of the qualified person's opinion.

Engagement of section 36

19. When considering whether section 36 is engaged, the Commissioner must determine whether the qualified person's opinion is a reasonable one. When making her determination, the Commissioner considers that if the opinion is in accordance with reason and not irrational or absurd – that is, if it is an opinion that a reasonable person could hold – then it is reasonable.
20. However, this is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion will not be deemed unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It would only be deemed unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. Therefore, the qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
21. The Commissioner has considered the relevant factors including:
 - Whether the prejudice relates to the specific subsections of section 36(2) that are being claimed. If the prejudice or inhibition is not related to the specific subsections, the opinion is unlikely to be reasonable.
 - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
 - The qualified person's knowledge of, or involvement in, the issue.
22. The qualified person accepted the recommendation provided by the council that the exemptions at sections 36(2)(b)(i) and (ii) should be

relied upon. She also agreed with the reasoning provided to her by the council which explained that the disclosure of information regarding the decision to suspend the contract with Baker Small Solicitors would be likely to inhibit the ability of council employees and councillors of the council from expressing themselves openly, honestly and completely when giving their views as part of the process of deliberation as this may impair the quality of decision making by the council. The council and members of the council also need a "safe space" to make a very sensitive decision.

23. The qualified person concluded that council officers may find it difficult to have a full, free and frank provision of advice with each other and with members where there is no safe space for such advice to be provided without the protection necessary for such advice. She further concluded that council officers and members may find it difficult to have a free and frank exchange of views for the purposes of deliberations. She concurred that good public service depends on good decision making and this has to be based on the best advice available and a full consideration of the options. Without protecting the thinking space and the ability of senior council officers and members to receive free and frank advice, there is likely to be a damping effect on their ability to make sound and reasoned decisions and exchange views with necessary frankness and robustness that the situation demands. There is a risk that decision making will become uninformed and therefore ineffective.
24. The council has informed the Commissioner that the request was made at a time when the issue of the provision of legal services by Baker Small and the decision to suspend its contract was still live (and remains so at the present time). The qualified person also considered the nature of the issues it concerned, being the appropriateness of continuing to engage the services of a particular law firm in circumstances where there had been public debate together with endangerment of reputational damage.
25. The qualified person can only apply the exemption on the basis that the inhibition to the free and frank provision of advice and the exchange of views either 'would' occur or would only be 'likely' to occur. The term 'likely' to inhibit is interpreted as meaning that the chance of any inhibition should be more than a hypothetical possibility; there must be a real and significant risk. The alternative limb of 'would' inhibit is interpreted as meaning that the qualified person considers it is more likely than not that the inhibition would occur.
26. In the qualified person's opinion, she stated that disclosure 'would be likely to' inhibit the matters set out in sections 36(2)(b)(i) and (ii).

27. The Commissioner would emphasise that section 36 is concerned with the processes that may be inhibited by disclosure of information, rather than what is in the information itself. In this case, the issue is whether disclosure of the withheld information would be likely to inhibit the processes of providing advice or exchanging views.
28. Having reviewed the information withheld under this section of the FOIA the Commissioner is satisfied that it was reasonable for the qualified person to conclude that sections 36(2)(b)(i) and (ii) applied. This is because she considers that the council needs to provide advice and deliberate sensitive issues in a 'safe space' and away from the glare of publicity. She agrees that if each and every step of these processes is put into the public domain then council officials and members are likely to be inhibited from providing open and honest advice and exchanging free and frank views for the purposes of deliberation in the future. This in turn would affect the ability of the council to make effective and fully informed decisions in the future in relation to its core function of providing public services. Whilst the Commissioner is of the view that council officials should be sufficiently robust to make decisions without being deterred by concerns about advice and deliberations being publicly available, this view does not outweigh the need to deliberate and provide advice in a 'safe space' in relation to sensitive and contentious issues, as was involved in the particular facts and circumstances of this case.

Public interest test

29. As section 36 is a qualified exemption it is subject to the public interest test. Having accepted the opinion of the qualified person that inhibition would be likely to result from disclosure of the information, the Commissioner must then consider whether, in all the circumstances of the case, the public interest in maintaining either of the exemptions outweighs the public interest in disclosing the information.
30. When considering complaints about the application of section 36, where the Commissioner finds that the qualified person's opinion is reasonable, she will consider the weight of that opinion in applying the public interest test.

Public interest arguments in favour of disclosure of the information

31. The complainant, when initially contacting the Commissioner, made the point that the media has already reported on the issues at the heart of his request (as per paragraph 10 of this decision) and in those reports council officers in an official capacity had discussed the matters in relation to which the council has withheld information.

32. The council has stated that the public interest in favour of disclosure of the information relating to the use of Baker Small as solicitors to the council is about openness and transparency which may lead to increased trust, confidence and engagement between the public and the council. This is because it would provide the public with a greater understanding and reassurance of how the council came about the contentious decision to suspend the contract with Baker Small, and whether the council's actions are appropriate and fair.
33. The council accepts that such arguments in favour of releasing the requested information do carry significant weight and should not be dismissed out of hand; the core activity of public services being to provide services in which the public can have confidence, being provided for the benefit of the community, without bias and in the best interests of the community at large. This should also include the decision making processes of a public authority, when engaged in the provision of services.

Public interest arguments in favour of maintaining the exemption

34. The council argued that the public interest in maintaining the exemption is the prejudice that might arise as a result of allowing such issues and concerns to be discussed in the public arena. This might result in a restriction, even one that it is self-imposed by officers and members, should they consider that their ability to share and develop policy and decide upon matters would be significantly reduced if that process was unduly hindered by public scrutiny.
35. The council maintains that any disclosure would be likely to inhibit both officers and members in arriving at decisions and weighing issues that the public consider controversial. The council often needs to manage and decide upon such issues, away from the glare of publicity, to enable consideration of frank and strongly held opinions and also to offer and receive advice. Public authorities are dependent upon good decision making based on the best advice and exchange of views available, to enable consideration of a range of options; perhaps those that ultimately the public may consider to be unreasonable.
36. The council has issued a press statement via twitter regarding the suspension of the contract with Baker Small which provided the public with some information relating to the request. The statement issued was:

"We are suspending any work with Baker Small with immediate effect and are reviewing the matter following their highly inappropriate tweets"

37. The council concluded that the public interest arguments in favour of maintaining the exemption outweigh the public interest arguments in favour of disclosure.

Balance of the public interest arguments

38. When considering complaints about the application of section 36 in cases where the Commissioner finds that the qualified person's opinion is reasonable, she will also consider the weight of that opinion in applying the public interest test. She will consider the severity, extent and frequency of that inhibition in assessing whether the public interest test dictates disclosure.
39. When attributing weight to the 'chilling effect' arguments ie. that disclosure of information would inhibit free and frank provision of advice and discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making, the Commissioner recognises that civil servants are expected to be robust and impartial when providing advice.
40. The Commissioner considers that they should not be easily deterred from expressing their views by the possibility of any future disclosure. However, she also considers that chilling effect arguments cannot be dismissed out of hand. In this case, she accepts the council should be able to hold free and frank discussions which include the provision of advice and the exchange of views for the purpose of deliberation, in order to enable strategic decisions to be made.
41. With regard to the council's 'thinking space' argument, the Commissioner considers that there is need for any public authority to have a safe space in which to develop ideas or make decisions.
42. The Commissioner accepts the general principle that the disclosure of information can aid transparency and accountability, however, she considers that the publication of information via the tweet (as detailed in paragraph 34) is sufficient to achieve these ends. The Commissioner does not consider that the wider public interest would be better served by disclosure of the withheld information.
43. The Commissioner appreciates that the requester might have valid reasons for accessing the information which are founded on genuine concerns, but in her view these are more in the nature of a personal or private interest. In considering where the balance of the public interest lies the Commissioner does not take into account the motivation of requesters except where this reflects a broader public interest. In this instance, the Commissioner is aware that the council's consideration of a highly sensitive and contentious issue has taken place in circumstances

where there has been media and public interest. However the Commissioner's view is that the fact there has been media and public interest is not to be interpreted as meaning that there is a strong broader public interest. In this case she does not consider that the public interest in disclosure is an interest which would counteract the public interest in the council's ability to conduct its affairs effectively and away from the glare of publicity.

44. The Commissioner has weighed the public interest in avoiding the inhibition of the free and frank provision of advice and exchange of views for the purposes of deliberation against the public interest in openness and transparency of the council and the complainant's arguments regarding disclosure. In her deliberations she has paid particular attention to the timing of the request which occurred at a time when the issue was very much live. Her conclusion is that the public interest in avoiding this inhibition is a strong factor and considers that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Conclusion

45. Taking all of the above into account, the Commissioner is satisfied that sections 36(2)(i) and (ii) have been applied appropriately in this case and that the public interest in maintaining the exemptions outweighs the public interest in disclosure.

Section 41 – information provided in confidence

46. To the extent that the withheld information does not fall within the exemption provided by section 36 above the Commissioner has considered the council's application of section 41 of the FOIA.

47. Section 41 states that:

'(1) Information is exempt information if—

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.'

48. Therefore for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party *and* the disclosure of that information has to constitute an actionable breach of confidence.

49. With regard to whether disclosure would constitute an actionable breach of confidence the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:
- Whether the information had the necessary quality of confidence;
 - Whether the information was imparted in circumstances importing an obligation of confidence; and
 - Whether an unauthorised use of the information would result in detriment to the confider.
50. The council has argued that although the information withheld under section 41 is not highly sensitive, it cannot be considered trivial, in the context in which it was shared. In considering the circumstances in which it was shared with the council, whilst there was no explicit statement of confidence, the council considered it reasonable to infer it from the nature of the information and also from the context and circumstances in which it was shared. The information is considered by the council to be commercial in nature and as such disclosure may have a detrimental effect on the confider. The council felt that it could not reasonably expect to be able to rely upon a public interest defence should the information be disclosed to the complainant.
51. The Commissioner is satisfied that some of the withheld information was provided to the council by a third party. In respect of that information section 41(1)(a) is therefore met. However, in respect of the remainder of the withheld information, it is apparent that the information was not provided to the council by a third party confider, but was in fact information created by the council. In respect of this information the Commissioner finds that the requirement of section 41(1)(a) has not been met and therefore section 41 is not engaged.
52. In relation to the information in respect of which section 41(1)(a) has been met, the Commissioner is satisfied that the information was provided with the clear expectation that it would be treated confidentially and moreover that disclosure of the information would be detrimental to the confider. The Commissioner cannot explain at any greater length why she has concluded that this information engages the exemption contained at section 41(1) without referring directly to the content of the withheld information. However, in reaching this conclusion she wishes to emphasise that despite the passage of time she is satisfied that the disclosure would still constitute a breach of confidence. As such she considers that section 41(1)(b) is met.

53. Although section 41 is an absolute exemption, the law of confidence contains its own built in public interest test with one defence to an action being that disclosure is in the public interest. For the reasons discussed above, the Commissioner accepts that there is a public interest in ensuring that public authorities remain transparent, accountable and open to scrutiny, for example to enhance public understanding of decisions made by public authorities affecting their lives. However she agrees with the council's argument that that this must be balanced with the wider public interest in preserving confidentiality and the impact of disclosure on the interests of a confider. Any disclosure of confidential information will to some degree, undermine the principal of confidentiality and the relationship of trust between public authorities and confiders, and individuals and organisations may be discouraged from confiding, which of itself can be considered a positive aid to the decision making process, by enabling frank and honest exchanges of information, thereby assisting the provision of public services.
54. The Commissioner has noted that that the amount of information withheld on the basis of section 41(1) is small and the degree to which it would increase the public's knowledge of this subject is limited especially in comparison to the broader and wider nature of information withheld on the basis of section 36. Furthermore, in the Commissioner's view it is clear that disclosure of such information would clearly have detrimental consequences for the third party in question, but also it is likely that such parties would be unwilling to share similar information with the council as they may consider it likely that such information would be released. Such an outcome would be firmly against the public interest as it would impact on the council's ability to make informed decisions and thereby reduce the effectiveness of the services it provides to the public. The Commissioner has therefore concluded that the public interest in disclosing the information does not outweigh the public interest in maintaining the confidence.
55. Accordingly the Commissioner has concluded that section 41(1) is engaged in respect of some, but not all (as per paragraph 51), of the withheld information to which it has been applied.

Section 42 – legal professional privilege

56. The Council has advised the Commissioner that some of the withheld information is subject to legal advice privilege, including the information in relation to which the Commissioner has concluded that section 41 is not engaged. The legal advice is contained and summarised in emails from the council's solicitor, and summarised in a further communication between council officials, including the council's solicitor. The advice concerns the council's contract with Baker Small and related legal

issues. The council also argues that a letter from itself to Baker Small is also subject to legal advice privilege.

57. The council has informed the Commissioner that the advice is considered to be 'legal advice' because at the time no litigation was in progress nor contemplated.
58. The advice was provided by the council's professional legal advisor (it's solicitor), a role which she was employed by the council to perform, to the officers and members of the council (the client).
59. The Commissioner has examined the withheld information. She notes that the majority of the advice relates to the terms of the contract with Baker Small and the implications of various provisions within it. The advice also addresses the options the legal advisor was asked to consider pending its review of the provision of legal support.
60. The Commissioner notes that some of the withheld information under section 41 constitutes a letter written by the council to Baker Small. Whilst the Commissioner accepts that the contents of the letter is the likely culmination of advice sought by the council from it's legal advisor, she does not consider that the letter itself constitutes 'legal advice'. This is because the letter is a communication between the council's legal advisor and a third party; it is not communication between the legal advisor and her client (the council). Furthermore, the Commissioner notes that two of the email communications in respect of which the council relies on section 41, are also communications between the council's legal advisor and a third party. The Commissioner has viewed these emails as being of a general business nature and not sufficiently advisory in nature to constitute 'legal advice'. Again she does not consider these communications to constitute 'legal advice' being provided to her client (the council). As such, in respect of these pieces of information, the Commissioner finds that section 42 is not engaged.
61. In considering the remaining information withheld under section 42, the Commissioner notes that the tweet published by the council (paragraph 36) places into the public domain the fact that the council had suspended work with Baker Small and was reviewing its position.
62. She has also given consideration to her own guidance which states:

"If only part of the advice is disclosed outside litigation without restrictions it is possible for the remaining information to keep its LPP protection depending on how much the disclosed information revealed about it. If the disclosure did not reveal the content or substance of the remaining information then the remaining part will keep its quality of confidentiality. Therefore a brief reference to or summary of the legal

advice that does not reveal its substance will not lead to a loss of privilege."

63. The Commissioner's view is that whilst the council's decision to suspend the services of Baker Small pending review was placed into the public domain by the council, the reasoning or grounds for the advice has not been disclosed. Accordingly the Commissioner has decided that, with the exception of the information referred to in paragraph 60 of this decision, the exemption provided by section 42 is properly engaged.

Public interest test

64. As section 42 is a qualified exemption, the Commissioner is now required to consider whether the public interest favours the disclosure of the withheld information in relation to which section 42 is engaged, or whether it should continue to be withheld.

Public interest arguments in favour of disclosure of the information

65. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding the basis and how public authorities make their decisions.
66. Disclosure of publicly held information can help foster greater trust in public authorities and may allow greater public understanding and participation in the decision making process.
67. In this case, disclosure of the requested information would help the public to understand some of the issues considered by the council in respect of Baker Small. It would also allow the public to consider the quality of the legal advice which was provided to the council.

Public interest arguments in favour of maintaining the exemption

68. In her previous decisions the Commissioner has expressed the view that disclosure of information relating to legal advice would have an adverse effect on the course of justice through a weakening of the general principle behind the concept of legal professional privilege. This view has also been supported by the Information Tribunal.
69. It is very important that individuals and public authorities are able to consult with lawyers in confidence and be able to obtain confidential legal advice.
70. Should the legal advice be subject to routine or even occasional public disclosure without compelling 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.

71. 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."

72. The Commissioner considers that there will always be a strong argument in favour of maintaining legal professional privilege. It is a long-standing, 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..."

73. This does not mean that the counter arguments favour public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect.

Balance of the public interest arguments

74. The Commissioner appreciates that there is a general public interest in public authorities being as accountable as possible for the decisions they make.

75. In this case the council is responsible for making informed decisions in relation to a contractual relationship with Baker Small. The Commissioner agrees with the council's strongly held view that it is important that the council can speak freely and frankly with their legal advisor in order to obtain appropriate legal advice, and considers that given the nature of the information and the context in which it was created the public interest favours maintaining the exemption. The Council has also confirmed to the Commissioner that the issue was live at the time of the request and continues to be live. As the Council considers the information to still be relevant and would be relied upon in any future considerations of this issue, the Commissioner considers the privilege attached to the information has not been waived and is still relevant now.

Conclusion

76. It is the Commissioner's view that none of the arguments mentioned in favour of disclosure outweigh the inherent public interest in maintaining the exemption and withholding the information which is subject to legal professional privilege in this case. The Commissioner places particular weight on the inherent public interest in allowing decisions to be taken on a fully informed and robust legal basis in this case. She therefore concludes that (with the exception of the information referred to in paragraph 60) the Council correctly withheld the requested information under the exemption at section 42.

Section 43 – Commercial interests

77. During the course of the Commissioner's investigation the council sought to raise a further exemption in relation to a letter written by it to Baker Small (in relation to which it had previously sought to apply sections 41 and 42, and which the Commissioner has concluded are not engaged). The Commissioner has therefore gone on to consider whether section 43(2) has been applied correctly by the council to this information.

78. Section 43(2) 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)'. This exemption is a qualified exemption and therefore subject to a public interest test.

79. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered her awareness guidance on the application of section 43 which 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."

80. In this instance the council has applied section 43(2) to a communication written by itself to Baker Small relating to its contractual relationship with Baker Small. The Commissioner considers that the requested information does fall within the remit of section 43(2) FOIA as it relates to a contract for provision of legal services to the council.

80. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. 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.

81. In its submission to the Commissioner, the council said that commercial interests 'could be prejudiced' if the requested information is disclosed. The Commissioner considers that this is not sufficient to satisfy the higher threshold of 'would prejudice' and has therefore considered the lower threshold of 'would be likely to prejudice'.
81. The Commissioner has considered how any prejudice to commercial interests would be likely to be caused by the disclosure of the requested information. This includes consideration of whether the prejudice claimed is "real, actual or of substance" and whether there is a causal link between disclosure and the prejudice occurring.
82. The council said that disclosure of the information could prejudice the commercial interests of Baker Small. The council has received representations from Baker Small to the effect that it objected to disclosure of the letter on the basis that it would create an adverse impression of Baker Small and that such an impression will have a direct impact on their commercial interests.
83. The Council stated that its own commercial interests could be prejudiced as it must take into account the need to engage external services, and to this end the Council considers that to release the letter into the public domain could prejudice the Council's ability to employ contractors in the future as they would undoubtedly be concerned that communications of this nature might be subject to release.
84. The Council explained that taken on its own, the letter might be considered to carry a different level of prejudice than when considered as part of whole of the information concerned in this request. The Council considers that given the context of the situation from which the information in question arises, it is important that it is wherever possible to consider this information as being interrelated. Having considered the contents of the letter the Commissioner agrees that taken in isolation, the contents of the letter would appear more prejudicial than if considered within the context of the whole of the information concerned in this case.
85. The Commissioner is satisfied that the explanations given by the council sufficiently demonstrate a causal link between the disclosure of the withheld information and the prejudice to the commercial interests of both the council and Baker Small. She accepts that disclosure of the letter outside of the overall context of the situation in which the letter was created, and the other withheld information would give a misleading impression of Baker Small and would be likely place it at a commercial disadvantage when competing for the provision of legal services. Even coupled with the information which the

Commissioner has decided should be disclosed in this case, the Commissioner is satisfied that the effect on the commercial interests of Baker Small would not be negated in any way.

86. For the above reasons, the Commissioner is satisfied that section 43 of the FOIA is engaged. She therefore now needs to go on to consider the public interest test.

Public interest arguments in favour of disclosure of the information

87. The council states that providing the information would assist the understanding of decision making within local authorities and of this Council in respect of this particular matter.

Public interest arguments in favour of maintaining the exemption

88. The council's position is that there is a need to provide a measure of confidentiality in how both the council and contractors conduct their business. In considering the public interest issues, the council is of the view that it would not be in the public interest to disclose this letter as to do so could only prejudice Baker Small both commercially and perhaps more importantly cause them reputational harm.

Balance of the public interest arguments

89. The Commissioner accepts that there is a public interest in the need for transparency and an understanding of the decisions which councils make when negotiating with and making decisions in relation to its contractors. In this case the issue was the council's decision to suspend and review the council's contract with Baker Small.
90. She also accepts that there is a need for councils to be able to conduct their business with a measure of confidence and that disclosure of this information would be likely to undermine this confidence. This in turn would be likely to have the resultant effect of discouraging contractors from competing for contracts to provide goods and/or services to the council. The potential pool of competitors and the quality of goods and/or services could as a consequence be diluted which would counter the public interest in encouraging healthy competition and receiving good quality services.
91. The council has already placed some information into the public domain, ie. the fact that it had suspended its contract with Baker Small and was under review (as per paragraph 36 of this decision). The Commissioner is mindful that the request was made at a time when the issue was very much live, and as informed by the council, remains so at the present time, and so disclosure of this information would place Baker Small at a commercial disadvantage.

92. Having balanced the public interest arguments the Commissioner concludes that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Right of appeal

93. 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

94. 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.
95. 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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Information Commissioner's Office
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Water Lane
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SK9 5AF