

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

11 September 2006

**Public Authority:** The Welsh Development Agency  
(now part of the National Assembly for Wales)  
**Address:** Cathays Park  
Cardiff  
CF10 3NQ

### Summary Decision

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1. The complainant requested information relating to a proposed town centre redevelopment project. The public authority informed the complainant that the information requested was held, but refused to release it, citing the exemption at section 43(2) of the Act. The public authority argued that disclosure would prejudice the commercial interests of the private sector developers bringing forward the project and of the public authority itself, and that the public interest in maintaining the exemption outweighed the public interest in disclosure. The Commissioner reviewed the information withheld and has decided that the public authority applied the Act correctly in withholding the information in accordance with the section 43(2) exemption. However, the Commissioner finds that the public authority initially breached the requirements of section 17 of the Act.

### The Commissioner's Role

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

### The Request

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3. The complainant has advised that on 23 June 2005 he made the following request to the public authority:

*“Please may we have a copy of the application from Scarborough Dev. Group Plc to the WDA of December 2003, together with the detailed appraisal and evaluation of the application that you have undertaken.”*

4. The ‘application’ in question was for grant assistance (in the form of a Regeneration Investment Grant) to bring forward a proposed development, known as the Angharad Walk scheme (the ‘project’), to redevelop Pontypridd town centre. The public authority responded on 11 July 2005 by stating that the request was being considered under the terms of section 43 of the Act, and that it will take some additional time to evaluate this matter. In this letter the public authority stated that it hoped to respond fully by 5 August 2005.
5. The public authority responded substantively on 5 August 2005 by issuing the complainant with a refusal notice, confirming that the information requested was held by the authority. However, it was being withheld by virtue of the exemption at section 43(2) of the Act, because it was considered that disclosure would be likely to prejudice the commercial interests of the public authority itself and of Scarborough Development Group Plc (the ‘developers’).
6. The complainant wrote to the public authority on 11 August 2005, requesting an internal review of the decision to refuse his request. The public authority acknowledged the request on 18 August 2005 and responded substantively on 26 August 2005. The outcome of the review was to uphold the use of the exemption at section 43(2) of the Act. The complainant made his complaint to the Commissioner on 26 August 2005.

## The Investigation

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### Scope of the case

7. On 26 August 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - the failure by the public authority to provide the information requested (by applying the exemption at section 43 of the Act inappropriately);
  - the failure to respond within the statutory timescale (section 10);
  - the failure to explain why longer than twenty days was needed (section 17); and
  - the failure to provide advice and assistance when following up the request (section 16).
8. In taking forward the investigation of this complaint, the Commissioner has reviewed the information withheld and considered the procedural aspects of the request and the application of the section 43 exemption. He has also looked at whether the public authority issued a valid refusal notice under section 17 of the Act.

## Chronology of the case

9. The Commissioner's staff began investigating this complaint in December 2005. In the initial stages of the investigation the complainant indicated that he would be prepared to withdraw his complaint if the public authority confirmed a particular figure of grant assistance to be provided by the authority to the developers to bring forward the project. The complainant stated that a particular figure for grant assistance had been put into the public domain by a director of the developers.
10. The public authority refused to confirm or deny any figures relating to the grant application, stating that to do so would prejudice the commercial interests of both the authority and the developers. The public authority confirmed that negotiations were ongoing and therefore information was particularly commercially sensitive.
11. As this attempt to resolve the complaint informally had not been successful, the Commissioner requested copies of the information withheld, in order to determine whether the public authority had applied the Act correctly in withholding the information. This information was received on 16 March 2005, together with detailed information about the Regeneration Investment Grant scheme.
12. The public authority provided further detailed information to explain why particular information would prejudice commercial interests. The Commissioner did investigate the possibility of resolving this case informally by providing a redacted version of the information to the complainant. However, for the reasons set out below, he concluded that the section 43 exemption applies to the vast majority of the information requested, and that any such redacted version would therefore prove meaningless.

## Findings of the case

13. By viewing the information concerned, the Commissioner has established that it consists of information that is of a commercial nature – that is, information that relates to the developers' ability to participate in a commercial activity. Furthermore, the Commissioner believes that the information would be of interest to the developers' competitors because it reveals details of underlying assumptions and pricing structures.
14. The investigation also revealed that the public authority had written to the developers on 29 July 2005, in line with the requirements in Part IV of the code of practice issued by the Secretary of State under section 45 of the Act (the 'section 45 code'), to seek its views on the disclosure of the information requested. The developers responded on 3 August 2005 by stating that the information contained in its December 2003 application was provided to the public authority in confidence. Furthermore, the developers asserted that the information requested would be considered highly sensitive commercially.

## Analysis

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15. The Commissioner has considered the following aspects of the public authority's response to the complainant's request for information:

## **Procedural breaches**

### Section 10

16. Section 10(1) of the Act sets out a timescale of 'twenty working days following the date of receipt' for public authorities to respond to requests for information. However, section 10(3) allows the public authority to extend the time for responding to a request 'until such time as is reasonable', if the authority is seeking to rely on a 'qualified' exemption and needs more time to consider the public interest test.
17. In this case the request for information was made on 23 June 2005. The public authority responded on 11 July 2005, stating that it was considering using the section 43 exemption. Section 43 is a qualified exemption and is subject to a public interest test. Accordingly, the public authority did not breach the provisions of section 10. However, section 10(3) does not affect the time by which a public authority must issue a notice under section 17(1) of the Act. The Commissioner has therefore considered, below, whether the public authority's letter of 11 July 2005 constitutes a valid refusal notice.

### Section 16

18. Section 16 of the Act places a duty on public authorities to provide advice and assistance, 'so far as it would be reasonable to do so', to persons who propose to make or have already made requests for information. This duty is explained in more detail in Part II of the section 45 code. If the public authority has complied with the provisions of the section 45 code, then it will be taken to have complied with the section 16 duty.
19. The complainant alleges that the public authority should have provided more advice and assistance following the receipt of his request. However, he does not specify what further advice or assistance he required. The Commissioner notes that the public authority did not offer any specific advice and assistance to the complainant.
20. In this case the Commissioner considers the request to have been clear, with both the complainant and the public authority understanding fully what information was being sought. Accordingly, the Commissioner does not believe it would have been necessary for the public authority to seek clarification from the complainant before responding.

### Section 17

21. Section 17 of the Act explains the procedure a public authority must follow when refusing a request for information. For a refusal notice to be valid, in accordance with subsection (1), it must state the fact that the information is exempt, specify the exemption and state why the exemption applies (if that would not otherwise be apparent). Section 17(2) states that, when a public authority is seeking to rely on the time extension to consider the public interest test, the notice issued under section 17(1) must explain that no decision has yet been reached and must contain an estimate of the date by which the authority expects to make the decision.
22. The public authority's letter to the complainant of 11 July 2005 explains that it is considering the request under the terms of section 43 of the Act and provides a date of 5 August 2005 for reaching a decision on the use of that exemption. The Commissioner considers this letter to be a refusal notice under section 17.
23. The Commissioner finds that the letter of 11 July 2005 does not constitute a valid refusal notice under section 17(1) of the Act. This is because it does not state the fact that the information is exempt or state clearly why the exemption applies. In terms of the requirements of section 17(2) of the Act, the Commissioner notes that the letter does not specify that the extension is needed specifically to consider the public interest test. The Commissioner has raised this matter with the authority to ensure that the wording in such letters is made as clear as possible.
24. The Commissioner has also considered the public authority's refusal notice of 5 August 2005, and considers that it does meet the requirements of section 17 of the Act.

## **Exemptions**

### **Section 43**

25. Section 43(2) of the Act allows public authorities to exempt information if its disclosure 'would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)'. In this case the public authority has claimed that disclosure would prejudice the commercial interests of both the developers and the public authority itself.
26. The Commissioner has examined the information withheld in detail and has concluded that the exemption at section 43(2) of the Act is triggered in this case. This is because the Commissioner believes that there is a significant risk that disclosure of the information requested in this case would prejudice the commercial interests of the developers.
27. The Commissioner has reached this conclusion because of the nature of the information, which consists of an application for grant assistance and its detailed appraisal by a third party acting on behalf of the public authority. The information clearly relates to commercial activities and contains information which, if it were placed in the public domain, would be likely to prejudice the commercial interests

of the developers. This is because it has the potential to reveal underlying assumptions, pricing structures and margins employed by the developers.

28. The Commissioner notes that the information was created some time ago (the application is dated December 2003 and the appraisal October 2004). It could be argued that, as such, the information is perhaps less likely to cause prejudice than more recent information. However, the Commissioner is mindful that discussions regarding this particular project remain ongoing and therefore the information withheld is likely to remain commercially sensitive. The disclosure of this information would therefore be likely to prejudice the commercial interests of the developers.
29. The public authority has not offered any further evidence to support its assertion that its own commercial interests would, or would be likely to, be prejudiced by the disclosure of this information. Accordingly, the Commissioner has not considered this issue in any detail. For the exemption to hold, it is in any case sufficient to demonstrate that the disclosure of this information would be likely to prejudice the commercial interests of the developers.

### **Public Interest Test**

30. Section 43 is a 'qualified' exemption and thus subject to a public interest test. The complainant has stated that there is a strong public interest in the release of this information. This is because of the background to the project, which has had a long history and, the complainant argues, has actually prevented much needed redevelopment in Pontypridd. The complainant further states that there is a high level of public interest in the expenditure of large sums of public money, and that the project itself is not popular locally.
31. The public authority has accepted that there is a general public interest in openness and transparency. It also recognises that there is a public interest in ensuring that the public is aware of how much money is being spent and the benefits derived from that expenditure. However, the public authority believes that 'disclosure of information in a manner which fails to protect interests and relationships arising in a commercial context could have the effect of discouraging companies from dealing with the public sector because of fears that disclosure of information could damage them commercially'. This in turn could deter companies from seeking assistance from the public authority, or deter them from providing commercially sensitive information, and ultimately undermine the ability of the authority to pursue its function to bring forward development and assist in the economic regeneration of the area.
32. The Commissioner has looked at both of these arguments and notes that there are valid public interest arguments in favour of disclosure. In particular, he believes that private sector companies which engage in commercial activities with the public sector must expect some information about those activities to be disclosed. He also acknowledges that there will be a significant public interest in

- the possible expenditure of public money on redevelopment schemes that have the potential to impact upon a large number of individuals and communities.
33. However, the Commissioner has decided that, if the information were disclosed, there would be a significant risk of prejudice to the commercial interests of the developers and that the public interest in maintaining the exemption outweighs the public interest in disclosure, for the reasons set out below.
  34. The Commissioner believes that there is an inherent public interest in ensuring that companies are able to compete fairly and in ensuring that there is fair competition for public sector contracts. He has concluded that any prejudice to the developers in this case could distort competition and therefore not be in the public interest. Furthermore, it could damage the relationship between the authority and private sector companies, which could in turn prejudice the ability of the authority to bring forward future development projects.
  35. In addition, the Commissioner has considered the issue of timing in this case. He notes that, at the time of the request, the application was the subject of ongoing negotiations. He is particularly mindful that the project remains the subject of such negotiations, and believes that disclosure of the information requested at this stage would result in prejudice to the commercial interests of the developers. Any such prejudice could adversely affect the project itself and could prejudice future developments being brought forward by the public authority.

## **The Decision**

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36. The Commissioner's decision is that the public authority dealt with the request for information in accordance with section 1(1) of the Act, because it applied the exemption at section 43(2) of the Act appropriately. However, the Commissioner has decided that the public authority initially breached the requirements of section 17 of the Act.

## **Steps Required**

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37. The Commissioner requires no steps to be taken.

## **Right of Appeal**

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38. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 11<sup>th</sup> day of September 2006**

**Signed .....**

**Phil Boyd  
Assistant Commissioner**

**Information Commissioner's Office  
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