

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 20th February 2008**

**Public Authority:** Chief Constable of Cumbria Constabulary  
**Address:** Police Headquarters  
Carleton Hall  
Penrith  
Cumbria  
CA10 2AU

### Summary

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The complainant requested information about a review of the policies of the public authority carried out by a consultancy firm and about the handling of an information request made by him previously. The public authority withheld the information, citing sections 40 (personal information), 41 (information provided in confidence), 42 (legal professional privilege) and 43 (commercial interests). The Commissioner finds that the information about the handling of the previous information request made by the complainant is personal data relating to the complainant and thus exempt under section 40(1). In relation to the information about the consultancy review, the Commissioner finds that the exemptions cited were applied incorrectly and the public authority is required to disclose the withheld information to the complainant. The Commissioner has also found the public authority in breach of the procedural requirements of the Act in that it initially failed to respond within 20 working days of receipt of the request and that the initial response failed to clarify what information was held by the public authority that fell within the scope of the request.

### The Commissioner's Role

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1. The Commissioner's duty 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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2. On 13 September 2005, the complainant made the following information request:  
*"1. A copy of the Specification and Contract related to the review undertaken and*

*the Consultants engaged.*

*2. All correspondence and material (e.g. e mail, memos, briefings, file notes handwritten and electronic) between 3 August and 30 August [concerning my earlier information request].”*

3. The public authority responded to this on 3 November 2005, outside the 20 working days time period. The public authority confirmed that it did hold information falling within the scope of the request. In response to the first part of the request, the public authority cited the following exemptions:

**Section 41 (information provided in confidence)**

4. The public authority cited this in relation to information provided to it by the Consultants referred to in the request. The public authority believed that this information had been supplied to it in confidence.

**Section 43 (commercial interests)**

5. The public authority believed that disclosure of the information withheld under this exemption would prejudice the commercial interests of the consultants. The consultants were retained to carry out a review of the public authority's policies and efforts to embed race and diversity. The public authority specified that disclosure would reveal the costs charged by the consultants and details of how they carry out their business activities.
6. The public authority further believed that disclosure would harm its own commercial interests as this would mean that commercial organisations would be reluctant to do business with it. This would lead to the public authority being charged more where it is necessary for it to retain the services of a commercial organisation. The public authority also believed that the public interest favoured the maintenance of this exemption.
7. In response to the second part of the request the public authority disclosed “...*file notes, memorandums, e mail messages etc...*”. Information was redacted from these documents, with the following exemptions cited:

**Sections 40(1) and (2) (personal data)**

8. The public authority cited subsection (1) in relation to personal data of which the complainant is data subject and subsection (2) in relation to personal data of employees of the public authority that had not been involved in dealing with the complainant's information request.

**Section 42 (legal professional privilege)**

9. The public authority cited this exemption in relation to information disclosing advice received from a member of its Legal Services Department. The public authority specified advice privilege and also confirmed that it believed that the public interest favoured the maintenance of this exemption.

10. The public authority also redacted information on the grounds that this would be exempt by virtue of sections 41 and 43. The public authority stated that the same arguments as given in response to the first part of the request applied here.
11. The complainant responded to the public authority on 20 December 2005 and requested an internal review of the handling of his request. The public authority responded with the outcome to its internal review on 9 March 2006. In response to the first part of the request, all the information initially withheld under section 43(1) and some of the information withheld under section 41 was disclosed to the complainant. The review upheld the initial refusal of the second part of the request.
12. When responding to the internal review, the public authority stated that no recorded information was held that consisted of the "*Specification and Contract related to the review undertaken*" that the complainant requested. The information that had been identified as within the scope of the first part of the complainant's request was considered by the public authority to be the information held by it that most closely conformed to its understanding of the complainant's request.

## The Investigation

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### Scope of the case

13. The complainant initially contacted the Commissioner solely in connection with the failure of the public authority to respond to his request within 20 working days of receipt. The complainant later also specified the refusal of the public authority to disclose certain of the requested information as the grounds for his complaint.

### Chronology

14. The Commissioner initially contacted the public authority on 31 May 2007. In this letter, the public authority was informed of the complaint and was asked to respond with further information about the exemptions cited. The public authority was asked to respond as follows:

#### **Section 41**

15. The public authority was asked to state from which individual or organisation the information withheld under this exemption had been provided and why the disclosure of this information would constitute an actionable breach of confidence.

#### **Section 42**

16. The public authority was asked to confirm that the individual who provided the legal advice in question was a qualified legal professional and that they were acting as legal advisor to the public authority when giving the advice. The public authority was also asked to advance any further arguments that they wished about the balance of the public interest in relation to this exemption.

### **Section 43**

17. In relation to this exemption, the public authority was asked firstly to confirm whether the commercial interest in question here was that of the public authority itself, or of another organisation. Secondly, the public authority was asked to confirm whether it considered that subsection (1) or (2) of this exemption applied here. The public authority was again also asked to advance any further arguments that it wished to about the balance of the public interest here.
18. The public authority responded by letter dated 28 June 2007. On each point, the public authority responded as follows:

### **Section 41**

19. The public authority clarified that this exemption was cited in relation to information provided to it by the consultancy firm referred to in the request and that the information withheld under this exemption disclosed the names of the consultant's proposed project team and an outline of the estimated costs.
20. The public authority stated that this information had been provided to it by the consultancy firm for the purpose of allowing the public authority to consider whether this proposal and the associated costs were acceptable. The public authority believed that to disclose this information would enable the consultancy firm to bring a civil action against it.
21. The public authority further stated that it believed that names of the proposed project team would be subject to section 40(2), although this exemption was not cited at the time that the request was refused.

### **Section 42**

22. The public authority stated that this exemption had been applied in relation to information recording legal advice taken in connection with an earlier information request made by the complainant. The public authority confirmed that this advice had been provided by a qualified solicitor who was employed by the public authority in order to provide legal advice to the Chief Constable. Whilst the withheld information did not consist of written advice provided directly by the legal advisor, it was a record of this advice as written by the employee of the public authority to whom the advice was given.
23. The public authority referred to the refusal notice of 3 November 2005 for its public interest arguments.

### **Section 43**

24. The public authority clarified that it believed that both subsections (1) and (2) applied. Firstly, it believed that information showing the methodology used by the consultants would constitute a trade secret and thus was exempt under subsection (1). Subsection (2) was considered to apply to information showing the estimate of costs made by the consultants. The public authority believed that

to disclose this would prejudice the commercial interest of the consultants because it would enable competitors of the consultancy firm to submit cost estimates that were lower than that made by the consultancy firm.

25. The public authority further believed that disclosure would have a prejudicial effect on its own commercial interests. The public authority explained that it believed that disclosure would lead to businesses being less willing to work with it.
26. The public authority also provided further explanation concerning sections 40(1) and (2). The public authority stated that it had removed the name of the complainant from the withheld information and also the names of staff members within the public authority that had not been closely involved in dealing with his earlier request. The names of senior staff within the public authority, as well as those who had been involved with the process of dealing with the complainant's earlier request, were not redacted.
27. The Commissioner contacted the public authority again on 1 August 2007. At this stage, the Commissioner expressed some reservations about the exemptions cited by the public authority. The comments in relation to each exemption were as follows:

#### **Section 40**

28. It was noted that the information withheld here under subsection (2) appeared to relate to individuals in a professional capacity. The public authority was advised that the Commissioner had previously taken a clear line that disclosure of such information would be unlikely to constitute a breach of the data protection principles.
29. The public authority was asked to respond stating whether it was correct that the information withheld related to individuals in a professional capacity.

#### **Section 41**

30. It was noted that the information withheld here related to work carried out by the consultancy firm on the behalf of the public authority and, therefore, it could be said that this information was, in effect, created by the public authority. The public authority was advised that, in this situation, it is arguable that this information has not been provided to it by a third party and so this exemption would not be engaged.
31. The public authority was asked to respond stating whether it was the case that the work carried out by the consultants was done on the behalf of the public authority.

#### **Section 43**

32. Firstly, it was noted that information showing the methodology used by the consultants and which the public authority believed to be a trade secret and thus

exempt under subsection (1), appeared to have been disclosed to the complainant following the internal review.

33. Secondly, in relation to subsection (2), which the public authority believed applied in relation to information showing the cost estimate of the consultants, the Commissioner advised that the argument advanced here was unconvincing. Whilst the public authority had argued that the competitors of the consultants would gain an advantage through knowledge of the estimate made by the consultants, the Commissioner noted that the consultants would be under pressure to submit a competitive bid in any situation.
34. The public authority was asked to respond confirming whether it was correct that information showing the methodology used by the consultants had been disclosed previously and to comment further on the issue of commercial interests, if it wished.
35. The public authority responded on 21 August 2007. It confirmed that section 40(2) had been cited in relation to individuals working in a professional capacity; employees of both the public authority and the consultancy firm. The public authority stated that it had attempted to be selective about the information withheld under this exemption in order to achieve a balance between fairness to the individuals identified in the withheld information and openness.
36. The public authority further confirmed that the work of the consultants was carried out on the behalf of the public authority and that details of the methodology employed by the consultants had been disclosed to the complainant in response to the internal review. The public authority also maintained that disclosure of the details of the cost estimate made by the consultancy firm would provide an unfair advantage to its competitors.
37. The Commissioner contacted the public authority further on 3 October 2007 in connection with its citing of section 41. The Commissioner noted that the documentation withheld from the complainant appeared to be pre contractual documentation, rather than a concluded contract. The public authority was asked to confirm if this documentation was pre contractual documentation, or whether this information constituted the written agreement between the public authority and the consultancy firm.
38. The public authority responded to this on 11 October 2007. In this response, the public authority confirmed that this documentation was not the final contract agreed between the public authority and the consultancy firm, but that this information was considered to fall within the scope of the request as there was no formal signed contract between the public authority and the consultancy firm.
39. The Commissioner contacted the public authority again on 16 October 2007. The public authority was asked to respond with the following further information and clarification:
  - Confirmation that no information constituting "*the specification and contract*" is held.



- Confirmation as to whether this information was not created in the first place and hence has not been held at any time, or whether this information was created previously but has since been destroyed.
  - If it is the case that no specification or contract relating to the review were created, an explanation as to the reasons for this.
40. The public authority responded to this on 26 October 2007. In this response, the public authority confirmed firstly that it did not hold information constituting the “specification and contract”. The information that was disclosed to the complainant was considered to be relevant to the request, although it did not fall directly within the scope of the request.
41. Secondly, the public authority stated that no “specification and contract” had been created previously and no such information had been held by the public authority at any time. As to the reasoning for this, the public authority stated that it wished for a review of its race and diversity policy to be carried out urgently. To this end, the agreement with the consultancy firm was verbal.

## Analysis

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### Procedural matters

#### Section 1

42. The position of the public authority is that it does not hold information falling directly within the scope of the first part of the request; that is it does not hold information constituting the specification and contract identified in the request. In considering whether the public authority is correct in this regard, the Commissioner has considered the likelihood that this information would be held by the public authority and whether it has undertaken appropriate steps to attempt to locate information falling within the scope of the request.
43. The Commissioner notes that the public authority has provided an explanation as to why no written contract between it and the consultancy firm exists; the agreement between the public authority and the consultancy firm was verbal due to the urgency with which the public authority wished the review to be carried out. The Commissioner also notes the steps taken by the public authority to locate and disclose information that, whilst not falling directly within the scope of the request, it was believed would be of assistance to the complainant.
44. The Commissioner concludes that the public authority is correct in stating that no information constituting that described in the first part of the complainant’s request is held by it. In forming this conclusion, the Commissioner has accepted the explanation provided by the public authority as to why there was no written agreement between it and the consultancy firm and has noted the action taken by the public authority in locating and disclosing information that it believed would be of assistance to the complainant.

## Section 10

45. The information request was made on 13 September 2005 and was responded to on 3 November 2005. The public authority failed, therefore, to respond to the request within 20 working days of receipt and, in so doing, failed to comply with the requirements of section 10(1).
46. As stated above at paragraph 12, the public authority clarified at the stage of responding with the outcome to the internal review that it did not hold information conforming to the specific wording of the first part of the request. In failing to provide this clarification at the time of the initial response, the public authority did not comply with the requirements of section 10(1).

## Section 17

47. The response of 3 November 2005 was, in part, a refusal notice. In failing to issue this refusal notice within 20 working days of receipt of the request, the public authority did not comply with section 17(1).

## Exemption

### Section 40(1)

48. The second part of the complainant's request is for information relating to the handling of his own earlier information request. Whilst the complainant specified the Act in his request and the public authority dealt with it as an information request made under the Act, the Commissioner has considered whether this was a request for the complainant's own personal data and should have more correctly been dealt with as a subject access request made under section 7 of the Data Protection Act 1998.
49. Whilst the focus of this information may be the previous information request rather than the complainant, this information does relate to the complainant in that it describes the steps taken by the public authority in response to the request made by him and decisions that therefore affect him. It is also clear that the complainant can be identified from this information. The Commissioner considers that this information can be accurately defined as personal data relating to the complainant and, therefore, finds that this information is exempt by virtue of section 40(1). Further, as the information is exempt under section 40(1) the public authority was not obliged to confirm or deny whether the information was in fact held by virtue of subsection (5) of section 40.
50. The Commissioner would refer here to his guidance note "*Determining what is personal data*". This is available at: [http://www.ico.gov.uk/upload/documents/library/data\\_protection/detailed\\_specialist\\_guides/personal\\_data\\_flowchart\\_v1\\_with\\_preface001.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf). The Commissioner comments further on the issues presented by section 40(1) in the 'Other matters' section of this notice.
51. As the Commissioner has concluded that section 40(1) applies to the information



withheld from the second part of the information request in its entirety, he has not considered or formed any conclusion about the other exemptions cited in response to the second part of the request. The remainder of this notice addresses the first part of the request.

## Section 40(2)

52. This exemption, and those covered later in this notice, were cited in connection with the first part of the request. As noted above, the information disclosed in response to the first part of the request did not fall directly within the scope of the request, but was disclosed as it was felt that this information would be of assistance to the complainant. As the public authority cited exemptions when disclosing this information and as the complainant included this within the scope of his complaint, the citing of these exemptions has been included within the scope of this case.
53. When considering whether this exemption applies, it is necessary firstly to consider whether the information in question constitutes personal data. In this case the information consists of the names of employees of the consultancy firm. It is clear that individuals could be identified from this information and, therefore, the Commissioner accepts that this information is personal data.
54. Secondly, it should be considered whether disclosure would breach any of the data protection principles. In this case, the Commissioner has focussed on whether disclosure would be fair and compliant with the first data protection principle, which requires that personal data be processed fairly and lawfully.
55. When reaching a view about whether disclosure of the requested information would be fair, the Commissioner has considered a number of factors, namely:
  - the nature of the information requested and the level of prejudice to the rights and freedoms of the data subjects (the consultants);
  - the reasonable expectations of the consultants in relation to disclosure;
  - whether the legitimate interests of the public having access to this information outweigh the prejudice to the rights and freedoms of the data subjects.
56. In the case of the *House of Commons vs the Information Commissioner and Norman Baker MP*, the Information Tribunal considered the exemption in section 40(2) and in particular the first data protection principle. In that case the Tribunal took the view that it is relevant when determining whether disclosure would be fair to consider whether the information relates to an individual's public or private life. It found that where information is requested which relates to a public official and processing arises through the performance of a public function the interests of the data subject are no longer first or paramount.
57. In this case the information that has been withheld is simply the names of individuals, the lead consultant and two associate consultants, who were

employed to carry out a particular project relating to equality and diversity for the police force. Therefore the Commissioner considers that any prejudice to the rights and freedoms of the consultants that may result from disclosure would be limited.

58. It should be acknowledged that the individuals to whom the personal data in question here relates are not employees of the public authority, but rather of the consultancy firm. However, the information in question relates to a situation in which they were working for the public authority. The Commissioner does not consider that the fact that the individuals to whom the personal data relates were not directly employed by the public authority is a valid argument against the disclosure of this information.
59. The Commissioner is not aware that the consultants have been given any undertaking by the public authority that their names would not be released in the event of a request. Neither does he consider that such an undertaking by the public authority would necessarily be reasonable, particularly since the Act was passed in 2000. In addition, he considers that it would be reasonable for individuals who contract with the public sector to expect that they will be subject to a higher level of scrutiny and transparency than in other sectors. Given that the individuals in this case are providing a consultancy service and that they are usually commissioned on the basis of their expertise, experience and reputation, the Commissioner also considers that it would be reasonable for them to expect that their names may be disclosed in the interests of transparency and accountability.
60. The Commissioner considers that, as the consultants were commissioned to carry out work for the public authority the argument that there is a legitimate interest in the public having access to the requested information has greater weight. Releasing the information would demonstrate that the public authority is transparent and accountable, particularly in terms of how it has chosen to spend public money and who has benefited from those funds. It is also noted that the individuals who have been commissioned to provide services in this case, have been employed to advise on a topic of considerable importance, namely where the police force stands in terms of embedding a race and diversity strategy. In determining that the legitimate interests of the public outweigh any prejudice to the data subjects, the Commissioner has been mindful that any such prejudice would be limited in this case.
61. In order to comply with the first data protection principle, personal data should not be processed unless one of the conditions set out in Schedule 2 of the DPA is satisfied. In reaching this conclusion the Commissioner is satisfied that condition 6(1) of schedule 2 of the DPA is also met.
62. The conclusion of the Commissioner is that disclosure would not be in breach of the first data protection principle and thus this information is not exempt by virtue of section 40(2).

## Section 41

63. There are two conditions that must be met for this exemption to be applied correctly. Firstly, the information in question must have been supplied to the public authority by a third party. Secondly, the disclosure of this information must constitute an actionable breach of confidence.
64. As stated above at paragraph 38, the public authority has stated that the documentation consisting of the information withheld from the complainant is pre contractual information. This was a document submitted to the public authority by the consultancy firm for the purposes of the public authority reviewing the proposed terms with a view to entering into an agreement with the consultancy firm. The public authority has also confirmed that in fact the final sums paid to the consultants differed from the figures given within the information withheld from the complainant.
65. In the case of *Derry City Council v The Information Commissioner*, the Tribunal upheld the decision of the Commissioner that a written agreement between two parties did not constitute information provided by one of them to the other and that, therefore, a concluded contract between a public authority and a third party does not fall within section 41(1)(a) of the Act. However, the Tribunal qualified this by identifying types of information that may, dependant on the circumstances, be subject to section 41. This included pre contractual documentation.
66. In contrast to the situation in the aforementioned Derry City Council case, the Commissioner understands that the parties did not work to the terms set out in the withheld information whilst the service was being provided. Therefore the Commissioner is satisfied that the withheld information constitutes pre-contractual information supplied by a third party, the consultancy. Therefore the first limb of the section 41 exemption is satisfied.
67. It is therefore necessary to consider the second limb of section 41, whether disclosure of this information would result in an actionable breach of confidence. When doing so it is necessary to consider the following questions:
- Was the information imparted in circumstances which give rise to an obligation of confidence?
  - Does the information have the necessary quality of confidence?
  - What detriment to the confider would arise if the information were disclosed?
68. Where each of the elements above are satisfied it is then necessary to consider whether the public authority would have a public interest defence against a claim for breach of confidence.
- Was the information imparted in circumstances which give rise to an obligation of confidence?

69. The Commissioner has considered the circumstances in which this information was provided to the public authority and whether any specific guarantee of confidentiality was given to the consultancy firm by the public authority, or whether there would have been a strong and legitimate expectation of confidentiality in relation to this information.
70. The public authority has given no indication that the consultants were given any specific guarantee of confidentiality in relation to this information. Neither is there any indication within the information itself that it was considered confidential, such as having been marked "*Private and Confidential*".
71. The documentation withheld here does carry a copyright marking. Whilst this has not been cited by the public authority as an argument in favour of the confidentiality of this information, the Commissioner considers that it is appropriate to comment on this.
72. The Ministry of Justice has provided guidance on copyright which can be accessed via the following link:  
<http://www.foi.gov.uk/guidance/proguide/chap08.htm>

*"Public authorities complying with their statutory duty under sections 1 and 11 of the Freedom of Information Act to release information to an applicant are not breaching the Copyright, Designs and Patents Act 1988. The FOIA specifically authorises release of the information to an applicant, even if it is in such a form as would otherwise breach the copyright interests of a third party."*

*"However, the Copyright Designs and Patents Act 1988 will continue to protect the rights of the copyright holder once the information is received by the applicant."*

That the information withheld in this case carries a copyright marking is not, therefore, an argument in favour of the confidentiality of this information.

73. Given that there does not appear to have been an explicit undertaking of confidentiality on the part of the public authority, the Commissioner has gone on to consider whether an implied duty exists. In particular he has considered whether the company would have a strong and legitimate expectation of confidentiality given the circumstances in which the information was imparted. In his view, it is generally accepted practice that tender information supplied to a potential customer by a bidder in the context of a procurement exercise will give rise to an expectation that a duty of confidence exists. He considers that such an expectation would be greater whilst the tender exercise is ongoing but that in some cases it may extend beyond the procurement period.
74. In this case the Commissioner notes that the tender exercise had been completed and the work carried out at the point that the request was received. Nevertheless he is satisfied that the consultant would have a legitimate expectation that tender information would be held in confidence by the public authority.
  - Does the information have the necessary quality of confidence?

75. Information will have the necessary quality of confidence, provided that it is not already in the public domain and that it is not trivial. In this case the Commissioner understands that the withheld information is not available in the public domain. He is further satisfied that details of the estimated costs associated with a piece of work to be carried out on behalf of the public authority does not constitute trivial information. It is a record of the way in which the consultants breakdown the overall cost of the work and an indication of the price that they have successfully quoted. The Commissioner is satisfied that the information is of value to the consultants and therefore that it has the necessary quality of confidence.
- What detriment to the confider would arise if the information were disclosed?
76. In the Commissioner's view, where section 41 is cited in relation to commercial information, it is necessary for the public authority to demonstrate that releasing the material would result in detriment to the confider in order for the disclosure to constitute an actionable breach of confidence and for the exemption to be applicable.
77. In this case the Commissioner has therefore considered the likely harm to the commercial interests of the consultants when determining whether or not section 41 has been appropriately applied by the public authority.
78. The public authority has argued that disclosure would harm the consultants' commercial interests because it would enable its competitors to submit lower bids. In this case the Commissioner is not satisfied that such detriment to the consultants is likely to arise as a result of disclosure. He is mindful that the consultants would be under pressure to submit a competitive bid to the public authority in any circumstance. The possibility of a competitor succeeding in submitting a better value bid would exist with or without disclosure. Further, he considers it fair to assume that commercial organisations competing in the same industry would, in order that they could remain competitive, have some indication of the rates that would be charged for a particular task.
79. In this particular case it is important to emphasise that the estimate of costs provided by the consultancy firm is not detailed and therefore it is unlikely to include sufficient information to enable a competitor, or any other party, to determine how the consultancy firm calculates its prices or profit margins.
80. The Commissioner is also mindful that the tender exercise was completed at the time that the request was made. Where tenders remain under active consideration the sensitivity of the information and the detriment to the confider is likely to be considerably higher than once the contract is awarded.
82. The Commissioner has also taken into account the fact that the consultants may tender for similar work with other public and private organisations. He recognises that the consultants may tender for similar work, given that this is probably one of their areas of expertise and that other bodies may have similar race and diversity obligations and therefore may require similar services. However, he has not been provided with evidence that the consultants were in the process of bidding for

similar work at the time that the request was received. Further, although the consultants may bid to deliver services on the same subject he is mindful that each organisation is likely to have different needs depending on their size and the specific work required.

82. In view of all of the factors above the Commissioner's conclusion is that the disclosure of the requested information would not detrimentally affect the commercial interests of the confider, in this case the consultants. Disclosure of the information would not constitute an actionable breach of confidence and the Commissioner has therefore decided that the exemption in section 41 has been incorrectly cited by the public authority. In view of this it has not been necessary to go on to consider whether the public authority would have a public interest defence.

### Section 43

83. This section provides for two circumstances in which information will be exempt. Firstly, where information constitutes a trade secret (subsection (1)) and, secondly, where disclosure would or would be likely to result in prejudice to commercial interests (subsection (2)). Initially, the public authority cited both subsections (1) and (2). However, the information that the public authority considered to constitute a trade secret was disclosed to the complainant following the internal review. Therefore, the Commissioner's considerations here focus solely on subsection (2). Section 43 provides a qualified exemption; meaning that if it is established that the exemption is engaged, it should be considered whether the public interest favours disclosure, or the maintenance of the exemption.
84. The information that the public authority believes to be subject to the exemption provided by section 43(2) consists of the estimated costs that would be charged to the public authority by the consultancy firm. The public authority has argued that disclosure would prejudice the commercial interests of the consultants as it would enable their competitors to submit a lower bid. The public authority has also argued that its own commercial interests would be prejudiced through disclosure as commercial organisations concerned about possible disclosure would be less willing to work with it. The public authority believes that this ultimately will result in it being charged more where it requires the services of a commercial organisation.
85. The Commissioner considers that the arguments relating to the prejudice to the consultants' commercial interests are largely the same as those considered in relation to detriment under section 41. Therefore he has not rehearsed them in detail in his analysis under section 43. On the basis of the analysis under section 41, he is not persuaded that the disclosure of the requested information would be likely to prejudice the consultants' commercial interests.
86. The only additional point that the Commissioner wishes to make in relation to the consultants' commercial interests and the application of section 43 is as follows. The arguments concerning prejudice to the commercial interests of the consultancy firm have been made by the public authority; the consultancy firm itself does not appear to have been consulted as to its position with regard to disclosure. In line with the decision of the Information Tribunal in the case of



*Derry City Council v The Information Commissioner*, speculative arguments made by a public authority as to the prejudice to the commercial interests of a third party organisation will not be a sufficient basis for the Commissioner to conclude that such prejudice to the third party organisation would result from disclosure. Where a public authority believes that information should not be disclosed due to the potential for prejudice to the commercial interests of a third party, that third party should normally be consulted and its views on disclosure taken into account.

87. As to the commercial interests of the public authority, the Commissioner notes that its argument that it would have to pay more to retain commercial organisations as a result of disclosure does not appear entirely compatible with its argument that disclosure would allow a competitor of the consultants to submit a lower bid. The Commissioner also considers it likely that the market imperative to which any commercial organisation is subject will ensure that the public authority is able to secure the services of commercial organisations, even if it is accepted that most commercial organisations would consider it preferable to avoid disclosure about their work.
88. When assessing the potential for prejudice to the commercial interests of the public authority, it is appropriate to consider whether the public authority would be prejudiced in any future commercial negotiation of a similar nature. In this case, that means considering whether the public authority is likely to again require the services of a consultancy firm to develop an equality and diversity policy within the near future. Whilst the Commissioner accepts that the public authority is likely to again retain consultants in the future, it appears fair to assume that the public authority would not require a new equality and diversity strategy in the near future. Any arguments advanced in this case about the likelihood of future prejudice to the commercial interests of the public authority would be of reduced relevance to a situation where the public authority retains consultants for a different purpose.
89. As the Commissioner is not convinced about the arguments here concerning prejudice to commercial interests, he finds that this exemption is not engaged. It is not necessary to continue to consideration of the balance of the public interest.

## The Decision

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90. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with section 10(1) and section 17(1) in that it failed to respond to the request within 20 working days of receipt and that it failed to state that it did not hold the information identified in the first part of the request. The Commissioner also finds that the public authority failed to comply with section 1(1)(b) of the Act in that it wrongly applied the exemptions provided by sections 40(2), 41 and 43.
91. The Commissioner further finds that the information requested in the second part of the information request is, in its entirety, personal data of which the

complainant is the subject and is thus exempt by virtue of section 40(1) and 40(5).

## Steps Required

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92. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
93. Disclose to the complainant the information withheld from the response to the first part of the information request under sections 40(2), 41 and 43.

## Other matters

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94. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
95. Section 7 of the DPA gives an individual the right to request copies of personal data held about them – this is referred to as the right of Subject Access. Therefore, the Commissioner will go on to make an assessment under section 42 of the DPA as to whether the information that constitutes personal data relating to the complainant in this case should be disclosed to the complainant under this access right. However, this assessment will be dealt with separately and will not form part of this Decision Notice, because an assessment under section 42 of the DPA is a separate legal process from the consideration of a complaint under section 50 of the FOI Act.
96. The Commissioner notes that some of the request should have been dealt with as a subject access request under section 7 of the DPA from the outset. He would encourage public authorities to consider requests under the correct access regime at first instance.

## Failure to comply

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97. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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98. 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@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk)

99. 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 20 day of February 2008**

**Signed .....**

**Anne Jones**  
**Assistant Commissioner**

**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**

## **Legal Annex**

### **Section 1**

Section 1(1) provides that –

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

### **Section 10**

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

### **Section 17**

Section 17(1) provides that –

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

### **Section 40**

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

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.”

## **Section 41**

Section 41(1) provides that –

“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.”

## **Section 43**

Section 43(1) provides that –

“Information is exempt information if it constitutes a trade secret.”

Section 43(2) provides 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).”