

## Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004

### Decision Notice

Date 27 May 2009

**Public Authority:** Bristol City Council  
**Address:** The Council House  
College Green  
Bristol  
BS1 5TR

### Summary

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The complainant requested information concerning the council's agreement to build new secondary schools under the government's Building Schools for the Future programme (BSF). He initially requested information concerning the procurement of information technology services (ICT) for the schools but details of the costs were withheld by the council via section 41(1) (information provided in confidence) and section 43(2) (commercial interests) of the Act.

Because the council maintained that it was bound by a confidentiality agreement with the contractor to withhold details of the ICT costs, the complainant requested evidence of the council's consideration to accept confidentiality requirements in the contract. The council refused that request via section 12(1) (appropriate limit) of the Act.

The council later submitted that it did not have an agreement with the contractor but that it had one with the local education partnership (LEP) instead. The complainant therefore asked for a copy of that agreement. This request was also refused via section 41(1) and section 43(2) of the Act. The Commissioner decided that the council's agreement with the LEP to manage the delivery of the BSF programme was environmental information. Consequently, the council withheld details of the agreement via the Environmental Information Regulations, namely, regulations 12(5)(e) (commercial confidentiality) and 12(5)(f) (information provided in confidence).

In relation to the initial request the Commissioner ascertained that the council did hold the information concerning the ICT procurement costs for its schools and that it incorrectly applied the exemption at section 41(1) of the Act. He decided that the exemption at section 43(2) applied in relation to some of the information but that the public interest favours disclosure. In relation to the request for evidence of the council's acceptance of a confidentiality agreement with the contractor, the Commissioner decided that the council incorrectly applied the exemption at section 12(1).

In relation to the request for a copy of the council's agreement with the LEP, the Commissioner decided that the council incorrectly applied the exceptions at regulations 12(5)(e) and 12(5)(f).

## 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 Environment Information Regulations (the Regulations) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2004/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the Commissioner). In effect, the enforcement provisions of Part 4 of the Act are imported into the Regulations.

## The Request

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2. On 1 November 2006 the complainant requested a copy of a service order *'that Bristol City County has entered into with Northgate Information Systems PLC sometime around 4 July 2006 for the procurement of ICT Infrastructure Services in accordance with the framework agreement organised by Becta'*. (Becta is the government's lead agency for information and communications technology (ICT) in education). The complainant described the service order as being *'the contract that details the products and services required, the dates of delivery and the charges.'*
3. In a refusal notice of 1 December 2006 the council informed the complainant that it had entered into a contract on 3 July 2006 for the provision of ICT services for new schools being built in the Bristol area. The council stated that the contract was agreed with the local authority's chosen developer of the schools, Skanska Education Partnership who subcontracted the ICT work to Northgate plc.
4. The complainant was provided with the opening dates of four new schools that were planned under the government's Building Schools for the Future (BSF) programme. He was told that the ICT products and services for each school would not be known until six to eight months before each school opened. He was also informed that the delivery dates would be the dates on which each school opened to receive its pupils.
5. The council refused to disclose information about the charges for the provision of ICT products and services maintaining that the information was exempt via s41 and s43(2) of the Act. It declared that disclosure of the information would be a breach of confidence by the council which could be actionable by Skanska Education Partnership. It also stated that disclosure would, or would be likely to, prejudice the commercial interests of the parties.
6. On 3 December 2006 the complainant wrote to the council disputing the validity of the s41 and s43 exemptions. He referred to the Access Code of Practice pursuant to s45 of the Act which states that,

*'When entering into contracts with non-public authority contractors, public authorities may be asked to accept confidentiality clauses... public authorities should carefully consider the compatibility of such terms with their obligations under the Act.'*

7. On the basis that the council should have considered the compatibility of a confidentiality agreement with its obligations under the Act the complainant requested the following information:

*'all relevant details relating to the council's consideration to accept ... confidentiality requirements in the contract it signed with Northgate as well as parts of that contract which are not considered to be commercially sensitive'.*

8. The council responded on 2 January 2007 with a statement that the ICT contract between the council and Northgate reflected appropriate obligations under the Act. It stated that the contract clearly set out the information that was felt appropriate to be disclosed and that which would harm the commercial interests of the parties were it to be disclosed. The council said it would endeavour to send the complainant details of the contract which were not deemed to be commercially sensitive.
9. The complainant pointed out to the council that his request was for *evidence* of the council's consideration of FOI issues when it accepted confidentiality requirements in the ICT contract with Northgate. He explained that he had expected this evidence to be in the form of emails, minutes of meetings or other written communication or record. He submitted that Northgate had already agreed in a contract with another public body – the British Educational Communications Technology Agency (Becta) – that such information was not confidential.
10. On 24 January 2007 the complainant had cause to contact the council again because it had not responded to his request for evidence that FOI issues had been considered when the council accepted confidentiality requirements in its ICT contract. He also reminded the council that it had not yet forwarded the 'non-commercial' parts of the contract.
11. On the same date the council replied to the complainant's earlier email of 2 January 2007 informing him that:
  - (a) The request for evidence that FOI issues had been considered when it accepted confidentiality requirements in its ICT contract with Northgate was refused under s12(1) of the Act. It was refused because the council estimated that it would take officers of the authority longer than 18 hours to locate the files and notes of meetings relating to the contract in order to compile a response.
  - (b) The council stated that details of the charges contractually agreed between the council and Northgate for ICT services to its schools were not disclosable because they were provided in confidence and were commercially sensitive.

- (c) The council said that the contract between Northgate and Becta was a separate matter and that it had nothing to do with the contract between the council and Northgate. It said that if the complainant required details of the contract between Northgate and Becta then he should direct his request to those bodies. The complainant was also informed that as he was aware that the information was available and accessible to him from a different source, the council would rely on s21(1) of the Act regarding his request. Section 21(1) of the Act provides that information which is accessible by other means is exempt from disclosure. However, the council did not explain this to the complainant neither did it properly explain its assumption that s21(1) was relevant in this instance.
12. On 6 March 2007 the council responded to the complainant's letter of 24 January 2007 by enclosing a copy of an email dated 7 February 2007 that had been sent but apparently not received by the complainant. The email said it appeared that some confusion needed to be addressed by the council:
- (a) There was no ICT contract between the council and Northgate. Instead the contract was between the council and the Local Education Partnership (LEP). The LEP had subcontracted to Skanska and in turn Skanska had subcontracted to Northgate. The council said that as a result it would appear that the details sought by the complainant were of the sub contract between Skanska and Northgate.
- (b) The council maintained that the s41 and s43 exemptions which it had previously applied to the (non existent) contract with Northgate now applied instead to its contract with the LEP. The council informed the complainant that the s41 exemption was engaged because it had entered into a contract with the LEP confirming that this particular information would not be disclosed and if it were to be released it could be an actionable breach. The council maintained that the s43 exemption was engaged on the grounds that disclosure would prejudice the commercial interests of the parties involved.
- (c) The council maintained that it had not forwarded the 'non commercial' details of the contract to the complainant because his request for those details related to a non existent agreement. The council added that it could of course send him the 'non commercial' details of its contract with the LEP if requested.
- (d) The council informed the complainant that it did not hold any contract between Becta and Northgate and therefore the s21 exemption which it had applied earlier in respect of that information was unnecessary. The council suggested that the complainant could approach Becta or Northgate for a copy instead.
- (f) The council informed the complainant that issues of confidentiality and freedom of information had been addressed in drafting the contract between the council and the LEP. However, it was unable to provide written documentation of this as any documents relating to this specific point were contained within many un-indexed boxes and it was estimated that to locate and provide this information would exceed the appropriate limit of 18 hours.
- (g) The council suggested that the complainant should direct his request for

- information towards Skanska or Northgate for details of the contract between those organisations.
13. In view of the council's reply the complainant wrote again on 20 March 2007 requesting:
- (i) a copy of the contract between the council and the LEP*
  - (ii) the list of people on the LEP's governing body, evidence of legal representation of the council if there is any and any available accounts so far and an explanation of what it means for it to have a 'commercial interest'.*
  - (iii) all relevant details of the statutory duties of the Local Education Partnership in relation to the Freedom of Information Act.*
14. With regard to item (i) the council informed the complainant in a refusal notice of 12 April 2007 that the contract was a standard document populated by contractual details which were commercially sensitive. It stated that the exemptions at s41 and s43(2) of the Act were engaged. It informed the complainant that a copy of the standard document was available on the 'Partnerships for Schools' and 'BSF' websites. The complainant was advised to contact the LEP directly for answers to his queries at (ii) and (iii).
15. The complainant accepted the council's advice regarding his queries at (ii) and (iii) but he appealed on 20 April 2007 against the council's decision to withhold the details of its agreement with the LEP. On 25 May 2007 the council's internal review upheld its decision to withhold the information.

## The Investigation

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### Scope and chronology of the case

16. The complainant wrote to the Commissioner on 29 May 2007 to complain about the council's refusal to disclose the information that he had requested.
17. On 3 April 2008 the Commissioner asked the council for a copy of its contract with the LEP and asked it to indicate the parts of the agreement it considered to be exempt under s41 and s43 of the Act. He also sought the following information:
- (i) An explanation of why the council had apparently entered into a contract with the LEP (as stated in its email of 7 February 2007 to the complainant) agreeing terms which restricted disclosure of information beyond that permitted by the Act.
  - (ii) An explanation of the factors taken into account by the council in reaching its view that the public interest in disclosure would not outweigh the need for confidentiality.

- (iii) An explanation of how disclosure of the requested information would, or would be likely to, prejudice the commercial interests of the parties involved.
  - (iv) An outline and explanation of the public interest arguments that were required to be balanced by the council in reaching its conclusion that the public interest in withholding the information under s43(2) outweighed that of disclosure.
  - (v) The number of un-indexed boxes that required searching by the council in order to locate the information as detailed by the council in paragraph 12(f) together with an estimate of the volume involved.
  - (vi) Whether the council has a formal records management policy and if so what the policy stated about the storage, filing and location of such documentation.
  - (vii) The reason why a search for the information was not undertaken up to the appropriate limit.
  - (viii) Why none of the requested information was electronically recorded despite the recent drafting of the agreement.
  - (ix) Why an email archive search was not undertaken in response to the complainant's request for copies of relevant emails.
18. On 17 April 2008 the council responded to the Commissioner's queries as follows:
- (i) With regard to his query at 17(i), the council reiterated its earlier assertion to the complainant that issues of confidentiality and freedom of information had been addressed in drafting the contract. It referred the Commissioner to the standard clause contained in BSF contracts which requires recognition by local education partnerships of the obligations of local authorities under the Act. However, the council omitted to explain to the Commissioner why it had advised the complainant that it had entered into a separate agreement with the LEP confirming that the requested information would not be disclosed.
  - (ii) In response to the Commissioner's query at 17(ii), the council maintained that the public interest in disclosure was low and that in its view this was confirmed because the standard form of the contract was in the public domain. It maintained that disclosure would not serve the public interest as it would lead to a breach of confidence actionable by the LEP, undermine confidence in the BSF programme and damage the council's relationship with the LEP.
  - (iii) In response to the Commissioner's request at 17(iii) for an explanation of how disclosure would prejudice the commercial interests of the parties involved, the council replied that disclosure would affect the supply chain linked to the ongoing BSF project. It maintained that contractors would be unable to competitively negotiate new contracts with other authorities, that disclosure would prevent them from getting a better return elsewhere and allow competitors to gain a commercial advantage.

- (iv) In response to 17(iv) the council maintained that disclosure would lead to contractors being unwilling to work with the council in the future and prejudice the commercial interests of the parties involved. It repeated the response that it gave to the Commissioner's query at 17(ii) saying that the public interest for disclosure was low and that in the council's view this was confirmed because the standard form of the contract was in the public domain and because the prejudice to the commercial interests of the parties was high.
- (v) The council informed the Commissioner that there were 123 un-indexed boxes together with a large number of files yet to be boxed. The council did not indicate the size of the boxes or provide an estimate of the volume as requested by the Commissioner.
- (vi) The council stated that it did not have a formal records management policy. It stated that it had a document retention schedule and that it uses a modern records information system database.
- (vii) The council's response to 17 (vii) was that there was no guarantee that the information would be found if it spent 18 hours searching for the information.
- (viii) The council stated that none of the records or minutes of meetings were available electronically. It said that when officers attended meetings they took written notes. The officers then updated the contract based on the notes and logged the amendments on the council's electronic case management system. The electronic case management system did not include actual copies of written meeting notes. These were apparently placed in a box for archiving.
- (ix) In response to 17(ix) the council maintained that the evidence requested would have been in the form of meeting notes and not emails. In the council's view an email search would not have revealed any information.
19. With its response of 17 April 2008 the council supplied a copy of the agreement between the council and the LEP, however, it failed to indicate the parts that were withheld as requested by the Commissioner. Consequently on 18 April 2008 the Commissioner wrote again to the council asking it to indicate the parts that it considered were exempt by virtue of s41 and s43 of the Act.
20. On 28 April 2008 the council provided the Commissioner with its indication of the parts of the agreement that it considered were exempt via s41 and s43.
21. The Commissioner asked the council to outline the consideration it had given to providing information within the related ICT services contract. He asked whether this information had been withheld and if so by what criteria.
22. His letter of 13 May 2008 also asked the council for clarification of the responses it had provided on 17 April 2008 and requested that it assist his understanding by illustrating each clarification with an example related to the information in question. He asked for the following information:

- (i) An explanation of the council's statement that its contract with the LEP should be withheld because disclosure would affect the supply chain.
  - (ii) Amplification of the council's argument that contractors would be unable to competitively negotiate new contracts with other authorities if the information was disclosed. The Commissioner asked the council to explain how the argument could apply when contractors could partner the public sector within different LEPs in the future and could potentially be involved with different sets of key performance indicators and continuous improvement plans.
  - (iii) The council's reasoning for its argument that disclosure would prevent contractors from being able to obtain better returns elsewhere and allow competitors to gain commercial advantage.
  - (iv) An explanation of why the disclosure of agreed objectives, key performance indicators, periods of measurement and continuous improvement plans would lead to contractors being unwilling to work for the council.
  - (v) Because the council's response in 18(i) had failed to properly engage the Commissioner's earlier question at 17(i), he asked it to state directly whether it had or had not contracted with the LEP not to disclose the requested information. If it had entered such a contract the Commissioner asked that it provide him with the detail of this.
23. He also advised the council in his letter of 13 May 2008 that in his view the council's contract with the LEP was environmental information. This was because the contract related to plans and developments which would have a direct impact on the land use and landscape of the areas concerned. He asked the council to reconsider the request under the Regulations and asked that it provide the necessary arguments for withholding the information should it still consider the information to be exempt from disclosure.
24. The council responded to the Commissioner's letter on 2 June 2008. It maintained that the ICT contract had not been withheld because a request for its disclosure had never been made. The council stated that this contract, along with 130 others arising from the BSF project, were sub contracted by the LEP and that the council was not a party to any of them. In the council's view it had simply specified the output that was required.
25. The council's response to the Commissioner's requests for clarification was as follows:
- (i) In answer to his request at 22(i) for an explanation of how disclosure of the information would affect the supply chain, the council replied only that supply chain costs affect profit levels. Its answer did not explain how disclosure would affect the supply chain which was the question asked.
  - (ii) In response to his query at 22 (ii) the council maintained that as the BSF process sought to standardise the process, key performance indicators and continuous improvement plans would not vary significantly from one authority to



another. Consequently, disclosure would be likely to prejudice new contracts as in the council's view the basis of the performance data would have been disclosed.

(iii) In response to the Commissioner's request at 22(iii) for an explanation as to how disclosure would prevent contractors obtaining a better return elsewhere and allow competitors a commercial advantage, the council stated only that disclosure of supply chain costs would lead to disclosure of commercially sensitive information.

(iv) In response to the Commissioner's query at 22(iv) the council stated that it relied on good working relationships with the private sector. It said that quality manuals and performance measures were competitively negotiated. It said the ICT contract was different to the main 25 year BSF contract as the ICT contract was for a five year period. After 5 years the ICT contract would again be competitively tendered with terms and conditions subject to renegotiation. It maintained that disclosure of the current terms would adversely affect the council's ability to negotiate with contractors and the pool of contractors willing to work with the council would be reduced. This in turn would affect the council's ability to obtain value for money. The council did not supply specific examples to support its case.

(v) In response to the Commissioner's question at 22(v) the council stated its denial that a separate confidentiality agreement had been entered into in relation to its contract with the LEP. However, it still did not explain why the council had informed the complainant that it had entered into such an agreement.

26. The council's letter of 2 June 2008 provided its reassessment under the Regulations of the request for a copy of its agreement with the LEP. The council submitted that the information was subject to the exception at regulation 12(5)(e) relating to commercial confidentiality and that at 12(5)(f) relating to information provided in confidence.
27. Because the council's response outlined at 25(i) had again failed to provide an adequate explanation of its submission that disclosure would affect the supply chain, the Commissioner requested further amplification.
28. An email from the council dated 18 June 2008 failed to answer this request. It referred instead to disclosure of the information as being likely to distort the market when the ICT contract was re tendered after 5 years. It maintained that this would affect the council's ability to gain best value and adversely affect contractor relationships. The council did not explain how this might occur.
29. On 12 June 2008 the Commissioner asked the council whether details of the ICT products and services that had been provided to recently completed schools would now be disclosed. The council had previously advised the complainant that this information would be finally determined 6 to 8 months before each school opened.

30. The council replied on 19 June that it was able to provide details of the ICT products and services concerning three schools that had been opened since the BSF contracts were entered into.
31. In his letter of 12 June the Commissioner referred to the council's assertion that it was not a party to the ICT contract. He considered it unlikely that the council did not hold any information concerning the ICT costs that had been agreed for its own schools particularly in view of its position as the major LEP partner and in view of the high costs involved. He therefore asked the council to clearly confirm whether or not it held any information concerning the charges that had been agreed for ICT products and services that had been designed or would be designed for each school that had been opened or was due to be opened as a result of the BSF programme in Bristol.
32. The council replied on 19 June 2008 that it did now have this information but that it had taken over 18 hours to locate it.
33. On 20 June the Commissioner asked the council to:
  - (a) confirm that it would supply the complainant with the information on the ICT products and services that had been put into the schools that had been opened
  - (b) provide the Commissioner with a copy of the information on the charges agreed for the procurement of ICT products and services to its schools indicating which parts were considered exempt under s41 and s43.
34. On 27 June 2008 the council finally provided the Commissioner with a copy of the information containing the ICT charges. The council also confirmed that it would supply the complainant with details of the ICT products and services for the schools that had been opened.
35. On 23 July 2008 the Commissioner asked once more for the council's clarification of its argument that disclosure would affect the supply chain. He also asked whether its submission that disclosure of the ICT charges would adversely affect the contractor had originated from the contractor and if so to supply a copy of the contractor's submission.
36. The council responded on 5 August 2008. It stated that the supply chain related to the terms of the BSF contract which was reliant on savings being made through successive re-tendering during the 25 year period of the contract. The council also said that it had discussed the matter of disclosure and adverse effect with the contractor but that there was no written record of this discussion. It said it could obtain the contractor's views if the Commissioner so wished. The Commissioner asked the council to obtain the contractor's views and the council supplied these on 20 August 2008.
37. The information on ICT costs that the council had supplied to the Commissioner comprised a number of financial spreadsheets some of which contained revised specification and costs that the Commissioner considered would not have been held at the time of the request. The Commissioner therefore calculated the

information that he believed would have been held at the time and asked the council to confirm his assessment which it did.

## Background information

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38. BSF is the largest single schools capital investment programme for over fifty years. The aim is to rebuild or renew every secondary school in England. The first wave of the programme started in March 2004.
39. Significant capital allocations are provided by government to local authorities in order to carry out the programme. It will take fifteen years at a cost of £45 billion to complete. £2.1 billion has been assigned for the provision of information and communication technology services (ICT) alone.
40. The BSF programme is managed centrally by a government body, 'Partnership for Schools' but it is delivered locally by public / private partnerships known as LEPs (local education partnerships). Under BSF the ownership and responsibility for all aspects of local education, including capital investment, remains with the local council. Local education partnerships create the means of delivery through which capital investment made available from the government can be deployed by local authorities into their school estates.
41. Bristol's LEP comprises Bristol City Council, Partnership for Schools and Skanska UK plc. Skanska UK plc is part of the Skanska group, the world's third largest construction company. Skanska's ICT partner in the Bristol project is Northgate Information Solutions Ltd.
42. Becoming a BSF contractor is a long-term and potentially lucrative commitment. Skanska's place in the Bristol LEP has secured the company an initial ten year exclusive partnership to deliver education projects for Bristol Council valued at more than £500 million. There is then an option to continue for a further five years without the requirement to re-tender. Northgate's initial five year contract to supply ICT services to Bristol's new schools has been valued at £8.9 million. The strategic partnering agreement between the council and the LEP was made on 3 July 2006.
43. The lifetime of the PFI contract (Private Finance Initiative) itself is 25 years.

## Analysis

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### Information held at time of request

44. The council's refusal notice of 1 December 2006 stated that the ICT products and services designed for each school would not be known until 6 – 8 months before each school opened. This was because the contract had been designed to be

flexible so that the new schools could be in line with technological developments and advancements when they opened. On first reading the notice appears to suggest that the requested information concerning ICT products and services was not held at the time of the request. However, it goes on to state that the council had identified information on ICT charges in the contract as being exempt from disclosure. As it was unlikely for such substantial costs to be agreed by a public authority without any regard to the actual items being purchased it appeared axiomatic in the Commissioner's view that information on the charges would have been held by the council at the time of the request. This was subsequently confirmed during the Commissioner's investigation. In his view, a more accurately worded statement in the refusal notice to the effect that, 'any *revised* specification that may be required will not be decided until 6 – 8 months before the opening of each school', might have been a better reflection of the position.

### **Procedural matters**

45. The council failed to adequately explain to the complainant why the exemption at s21(1) applied to the requested information. In failing to do so the council breached s17(1)(a) and s17(1)(c) of the Act. The council also breached s10(1) of the Act by applying the s21(1) exemption later than the twentieth working day following the date of receipt of the request.
46. The council failed to confirm to the complainant that it did not hold the information concerning a separate confidentiality agreement with the contractor. By failing to do so the council breached s1(1)(a) of the Act. It breached s10(1) of the Act by its failure to provide within 20 working days of the date of request the confirmation that it did not hold the information.
47. The council breached s10(1) of the Act by its failure to provide the ICT procurement information that it held within 20 working days of the date of request. It breached s17(3)(b) of the Act by failing to inform the complainant of the reasons why the public interest in maintaining the s43(2) exemption in relation to the ICT charges outweighed the public interest in disclosure.
48. The council failed to state to the complainant the reasons why the public interest in maintaining the s43(2) exemption in relation to the BSF partnering agreement with the LEP outweighed the public interest in disclosure. By failing to do so the council again breached s17(3)(b) of the Act.

### **Exemptions / Exceptions**

49. The complainant brought three different requests for information to the attention of the Commissioner. This decision notice considers each in turn and the exemptions under the Act and exceptions under the Regulations that were applied by the authority in order to withhold the requested information.

### **Request 1**

#### **The request for details of the ICT procurement costs**

50. The council relied on two exemptions under the Act in order to withhold the ICT procurement costs.

### Section 41

51. The council initially stated in its refusal notice of 1 December 2006 that disclosure of the ICT charges would be a breach of confidence actionable by Skanska. Later, in correspondence with the complainant the council proceeded on the basis that the exemption applied instead to a contract with Northgate. However, it then informed the complainant on 7 February 2007 that there was no contract with Northgate and that instead the s41 exemption applied to the council's contract with the LEP. During the course of the Commissioner's investigation the council maintained that it was not a party to the ICT contract after all because the matter was sub contracted by the LEP. The council also maintained that the ICT contract had not been withheld as a request for its disclosure had never been made.
52. The Commissioner considered it highly unlikely that the council would not hold information concerning the charges made for ICT products and services for its own schools especially in view of the authority's partnership responsibilities and the high costs involved. He therefore asked the council to clearly confirm whether or not it held any information concerning the charges. The council acceded that it did hold the requested information and supplied a copy to the Commissioner. The council contended that the details were commercially sensitive and had been provided in confidence.
53. The information comprised a breakdown of the agreed products and services to be supplied and installed by Northgate. Because it contained detailed information about the budget per student and school, ICT requirements for staff and the specific curriculum software applications required per key stage and subject, it was clear to the Commissioner that this information must have originated from the council. He was also clear that with regard to the nature of the particular services required, the council must have had a substantial input into how and where these were to be provided.
54. The authority's central role in the procurement of ICT products and services for its own schools is further indicated in its BSF agreement with the LEP. Schedule 3 to that document states that the council will work closely with the LEP to establish the ITC needs and best solutions for the schools. In the Commissioner's view this firmly suggests that any final agreement regarding the services to be provided by Northgate is the result of a process in which the council has always been engaged.
55. Section 41(1) of the Act provides that information is exempt information if it was obtained by the public authority from any other person and if disclosure constituted an actionable breach of confidence.
56. The information examined by the Commissioner records the scope and cost of an agreement and in his view does not constitute information provided in confidence. He is mindful of the Information Tribunal's decision in Derry City Council v ICO -

EA/2006/0014 – which upholds the view that an agreement concluded between two parties does not constitute information provided by one to the other. Although the council has argued that it does not have an agreement directly with Northgate it is clear from its BSF contract with the LEP that the authority's involvement in the content and performance of the ICT agreement is so inextricably linked that the effect is the same as if it did.

57. Whilst contracts may sometimes include confidential technical information that has been 'obtained' by one party from another, it is not the case in this instance. The Commissioner is satisfied that the charges for ICT products and services as detailed in this agreement do not fall within s41(1)(a) of the Act which requires that the information must be obtained from another. In light of his finding that s41(1) is not engaged he has not gone on to consider the questions of whether disclosure would result in an actionable breach of confidence or the public interest defence to disclosure.

### Section 43

58. The council's refusal notice of 1 December 2006 maintained that disclosure of the ICT procurement costs would or would be likely to prejudice the commercial interests of the parties. It also maintained that it would not be in the public interest to release the information at this time. No explanation was provided by the council as to why the exemption applied or why it considered that the public interest favoured withholding the information.
59. The council later informed the complainant that the s43 exemption did not apply to a contract between the council and Northgate. Instead, it maintained that the exemption applied to the council's agreement with the LEP. As a result of the Commissioner's investigation the council later acceded, as outlined in paragraph 51 of this decision notice, that it did hold details of an agreement with Northgate concerning the ICT costs. It is that agreement which the Commissioner now considers in relation to the council's engagement of the s43 exemption.
60. The council's internal review of 25 May 2007 upheld the s43 exemption of the information albeit with reference to its agreement with the LEP. Neither the refusal notice nor the internal review specified the relevant subsection of the exemption, however, it is apparent that the council intended to apply that at s43(2).
61. Section 43(2) of the Act exempts information if its disclosure *would, or would be likely to*, prejudice the commercial interests of any person including the public authority holding it. In the Commissioner's view, the term '*likely to prejudice*' means that the possibility of prejudice should be real and significant and certainly more than hypothetical or remote. The term '*would prejudice*' places a much stronger evidential burden on the public authority and must be at least more probable than not. Where the level of prejudice has not been specified by the public authority, unless there is clear evidence that the higher level should apply, the lower threshold of '*likely to prejudice*' should be used. In the absence of designation by the council as to which level of prejudice applied in this instance,

the Commissioner considers it to be the lower level threshold. He asked the council to confirm this which it did so.

62. In its argument to the Commissioner the council maintained that:

(a) the point of the private finance initiative was to drive down costs by going to the market and achieving economies of scale. Disclosure of the information would be likely to distort the market.

(b) disclosure would be likely to affect the council's ability to achieve best value when the ICT contract for its schools was re-tendered after 5 years.

(c) contractors may use the assumptions of previous contractors to submit bids for contracts which would lead to less innovative solutions being considered

(d) disclosure would be likely to adversely affect the council's relationship with current and future contractors.

(The Commissioner notes that the wording of '*adversely affect*' is that used by the council in this context. It is the terminology of the Regulations. The specific wording of the Act's s43 exemption is of course '*prejudice*').

(e) the ICT systems were specifically created to meet the council's specification - the systems are not unique but commercial sensitivity arises from the way these were approached and combined.

63. (a) The council did not explain how the achievement of economies of scale was relevant to its argument concerning the withholding of the ICT charges. The Commissioner does not accept that disclosure of the information would be likely to distort the market. Markets by their nature are dependent on competition. To describe market movement due to competition as a distortion misrepresents this basic economic principle. Although not stated directly by the authority, the implication of the council's argument appears to be that costs would be likely to rise as a result of information disclosure. However, the Commissioner notes the paradox of that argument, namely, that if disclosure were to enable less expensive provision from competitors because they might be in a position to undercut previously agreed prices then this would serve to benefit the council and the tax payer rather than the reverse. This public interest argument is referred to in paragraph 72(iii) of this notice.

(b) The Commissioner does not accept that disclosure of the ICT charges would be likely to affect the council's ability to achieve best value when the contract is re-tendered in five years time. As indicated above, if the argument that price change might accrue from disclosure was to be accepted, then the real outcome of disclosure would be beneficial rather than the reverse. Of perhaps more relevance however is the fact that due to rates of change in the ICT field, the products and technology of five years earlier, let alone their particular prices, would be likely to have little bearing on those that will be required when the contract is re-tendered in five years time.

(c) The Commissioner does not accept that other contractors would use the assumptions of the previous contractor in order to submit *less* innovative solutions. Even if the council's proposition that competitors might utilise the previous assumptions of others in their bids was to be accepted, this would more likely provide an opportunity for them to compete by submitting *more* innovative solutions in order to win the contract. In reality of course, as indicated in 62(b), the solutions of five years earlier would likely have minimal bearing on those that might be required at each re-tendering of the contract.

(d) The Commissioner is not persuaded that disclosure would be likely to adversely affect the council's relationship with contractors. The council did not indicate the nature of the adverse affect that it maintained would be likely to ensue as a result of disclosure. Consequently, in the absence of any amplification from the council that might support its argument, the Commissioner considered the worst case scenario that might be encompassed by the council's proposition. This is that contractors might be deterred from bidding for business with the authority if there was a prospect of information disclosure. With this in mind, the Commissioner holds the view that commercial organisations wishing to enter such contracts with the public sector already understand that as a result of the Act there will be a greater degree of public scrutiny of these contracts than those in the private sector. He believes that contractors are aware of the greater presumptions in favour of disclosure provided by the Act and that it contains provisions allowing the refusal of information which might prejudice the commercial interests of contractors. He recognises that projects placed for tender by public authorities are a lucrative business for commercial contractors and it is unlikely therefore that they would willingly exclude themselves from this source of revenue.

(e) The council did not explain what it meant by its statement that commercial sensitivity arises from the way the ICT systems were approached and combined. He is not persuaded that disclosure of the ICT charges would reveal any information regarding the contractor's expertise in the installation and assembly of these systems. Due to the rate of technological change he considers it unlikely in any case that identical or even similar combinations of products and tasks would be involved when the contract is due for re-tender in five years time. Also a re-tendered contract would in all likelihood relate to different sets of school projects and infrastructures. It would therefore entail different specifications and cost structures than those that are the subject of this request.

64. The Commissioner asked the council whether its argument that disclosure of the ICT costs would be likely to adversely affect the contractor had originated from the company itself. The council said it had discussed the matter with the contractor but that nothing had been recorded. The Commissioner therefore asked the council to obtain the company's view of the matter and relay this to the Commissioner. The subsequent submission that was obtained by the council from Northgate listed the sorts of information which in the company's opinion was exempt and should not be disclosed. The list included information about the company's business processes and methodologies, trade secrets, intellectual property rights and the unique elements of its technical arrangements and



systems. The Commissioner has carefully studied the company's submission in this respect and he is satisfied that none of these components would be revealed by disclosure of the ICT costs.

He also recognises that in order for competitors to be able to ascertain the prices that the contractor might submit in tenders for future contracts they would need to be able to identify the pricing model used. The Commissioner is satisfied that disclosure of the ICT costs themselves do not reveal the means of accurately identifying the pricing model used by Northgate and therefore competitors would be unable to predict the prices that Northgate may decide to submit in any potential bids for future contracts.

65. The Commissioner is mindful of the possibility that information concerning detailed prices in a contract could in some cases enable competitors to deduce discounts that may have been negotiated with sub-contractors or equipment suppliers. Arguably, the release of this type of information could be detrimental to the incumbent contractor. However, the Commissioner does not believe that this level of detail can be deduced in any meaningful way from the information that has been withheld in this instance.
66. Whilst disclosure may perhaps show that some prices are lower than the expected norm this observation alone cannot accurately determine the extent of discount that may have been obtained by the contractor. As it is not possible to extrapolate the original number of items that may have been purchased at any one time by the contractor, specific discounts that may have been involved cannot be calculated from the information. The contractor may have purchased items for inclusion in concurrent and/or future projects at the same time and he may sell these on at varying rates according to the individual requirements of separate agreements. Information on the contractor's costing mechanisms cannot be deduced from the price breakdown neither can his profit margins.
67. The Commissioner considers that with such disclosure, the contractor himself would benefit from the same transparency when competing for other contracts. In this way, the release of such information allows a level playing field and weakens the argument that competitors might gain unfair advantage from disclosure. By contrast, the Commissioner believes that the council's case for refusing disclosure is unfair to competitors. This would directly favour the incumbent contractor by denying to others the information that only he is privy to. In this regard the Commissioner is mindful of the decision in *Department of Health v ICO - EA/2008/0018* where the Information Tribunal warns against the 'cosy' relationships that can develop between public authorities and incumbent contractors in long running contracts. The Tribunal points out that whilst such relationships may allow smooth running of a contract they can also reduce innovation and value for money.
68. The Commissioner notes the standard duty in Canada for public bodies to fully disclose the sorts of information that the council is seeking to withhold. The Public Works and Government Services Canada (PWGSC), the body responsible for procuring goods and services for government departments, requires in every public/private contract, a statutory condition that:

*'The Offeror agrees to the disclosure of its standing offer unit prices or rates by Canada, and further agrees that it will have no right to claim against Canada, the Identified User, their employees, agents or servants, or any of them in relation to such disclosure'.*

69. The Commissioner believes that the existence in a comparable jurisdiction of an established requirement for comprehensive disclosure is strong evidence that contractors are not commercially disadvantaged by the disclosure of such information.
70. In the Commissioner's opinion the council's arguments fail to demonstrate that disclosure of the requested information would be likely to result in commercial prejudice to either party. However, the council based its case for withholding the information on the assumption that commercial sensitivity would be likely to arise at the point of re-tender. The Commissioner has gone on to consider whether the interval between the date of the agreement and the date of request would have a bearing on the matter. In his view the risk of commercial sensitivity resulting from disclosure would be likely to increase in inverse proportion to the narrowing of the interval between the date of contract and the date of request. The agreement for ICT products and services is a subcontract of the BSF agreement which was reached on 3 July 2006 and the date of request was 1 December 2006. The agreement had therefore been in existence for five months when the request was made. Whilst the Commissioner is satisfied that market conditions at the point of re-tender would be considerably different to those of five years earlier, changes in market conditions would not be so marked after a period of only five months.
71. In this instance, he considers that any likelihood of commercial prejudice resulting from disclosure of the information would be dependant on the conjunction of three conditions:
- (a) that products and prices remained current after five months
  - (b) that a similar tender for ICT products and services became available for competition elsewhere within the timeframe
  - (c) that the incumbent contractor was interested in competing for that other contract.
72. Whilst the Commissioner has taken into account the fact that disclosure of pricing information only provides an indication of the levels agreed between the council and contractor in one particular instance and that there is no immediate possibility of further competition for this contract as it has several years to run, in the event that all three conditions were to be met it could be argued that disclosure was likely to be commercially sensitive. This is because in those circumstances it could enable competitors to undercut the prices of the incumbent contractor. On this basis the Commissioner therefore considers that the exemption at s43(2) is engaged.

## Public interest test of the refusal to disclose the ICT charges

73. Section 43(2) is a qualified exemption and is therefore subject to the public interest test. In its refusal notice the council submitted the following public interest argument in support of maintaining its decision to withhold the ICT charges:

(i) disclosure would prejudice the commercial interests of the parties.

74. The council later informed the Commissioner of its adjustment that disclosure '*would be likely to*' rather than '*would*' result in prejudice. In any event, he notes that the council's submission is a standard statement regarding prejudice rather than a considered public interest argument.

75. In the course of the Commissioner's investigation the council added the following submissions:

(ii) disclosure would be likely to affect the council's ability to gain best value

(iii) disclosure would be likely to adversely affect contractor relationships with both current and prospective contractors.

The Commissioner has addressed the council's submission at (iii) in paragraph 62(d) of this decision notice. He has addressed the council's submission at (ii) in paragraph 62(b).

76. The Commissioner considers that the public interest arguments in favour of disclosure include the following:

(i) Disclosure allows proper accountability of the spending of public funds by local authorities. In this instance, the initial five year contract to supply ICT services to Bristol's new schools is valued at £8.9 million. In the national context, £2.1 billion has been assigned for the procurement of ICT services by local authorities.

(ii) Disclosure promotes honesty and transparency in the procurement decisions of local authorities. Disclosure encourages integrity and quality in the handling of such agreements which are matters of legitimate public interest.

(iii) Disclosure enables others to scrutinise the charges and work out how the products and services might be supplied more cost effectively and thereby increase value for money for the tax payer.

(iv) There is a strong public interest in understanding the circumstances in which public money is provided to private sector companies

77. The Commissioner has weighed the competing public interest arguments and has concluded that in all the circumstances of the case, the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

## Request 2

### The request for evidence of the council's consideration to accept confidentiality requirements in the ICT contract

#### Section 12

78. When the complainant requested details of the contract between the council and Northgate one of the grounds for refusal was that disclosure of the information would be a breach of confidence. The complainant requested details relating to the council's consideration to accept such confidentiality requirements in the contract. The council informed the complainant that it would take council officers more than 18 hours, the appropriate time limit, to locate the information and therefore his request was refused by virtue of s12(1) of the Act.
79. The council later informed the complainant that it did not have a contract with Northgate but instead it had entered into a contract with the LEP. The council stated that it had entered this contract confirming that the particular information would not be disclosed. The council maintained that issues of confidentiality and freedom of information had been addressed in its agreement with the LEP but that it was unable to locate any documentation relating to this point. Again, this was because the documents were contained in many un-indexed boxes. Again, it would take more than 18 hours to locate and would therefore exceed the appropriate limit. The council stated that it had already spent five hours dealing with the complainant's requests.
80. In further correspondence with the council the complainant quoted from the ICO's Guidance No 5: *'A public authority cannot attempt to contract out of its responsibilities under the Act and unless information is covered by an exemption it must be released if requested.'* He pointed to the council's submission that the reason why the information could not be released was because the council had signed a contract agreeing confidentiality terms whilst being unable to locate any materials that could explain why such terms had been agreed.
81. On investigating the matter the Commissioner referred the council to the s45 Access Code's statement that public authorities should refuse to include contractual terms which restrict disclosure of information held by the authority beyond the restrictions permitted by the Act. In light of this the Commissioner asked the council to explain why it had stated to the complainant that such contractual terms had been agreed in its contract with the LEP.
82. The council verified (at the second time of asking) that it had not agreed to such terms. However, it failed to explain why it had informed the complainant that such terms had been agreed in the first place.
83. In the Commissioner's opinion, the council's engagement of the exemption at s12(1) was inappropriate. The exemption is not engaged. There was never any separate confidentiality agreement either with Northgate or with the LEP. Therefore there could be no evidence of such a consideration by the council

which would warrant a search of more than 18 hours. The council's refusal to provide the information on grounds that it was difficult to locate from within 123 un-indexed boxes seems particularly incongruous when the issue was clearly set out for all to see in the standard BSF contract – the same document which the council advised the complainant to download from the internet in lieu of his request for a copy of the contract with the LEP.

### Request 3

#### The request for a copy of the council's BSF agreement with the LEP

84. The agreement requested by the complainant is entitled, 'Bristol City Council and Bristol LEP Ltd - Strategic Partnering Agreement' - dated 3 July 2006. The Commissioner considers the agreement to be environmental information as defined in regulation 2 of the Environmental Information Regulations. This is because it relates to plans and developments which have a direct impact on the use of land and landscape.
85. In considering whether or not environmental information should be released a public authority must apply a presumption in favour of disclosure. Regulation 12(2) weights the public interest in favour of release. Environmental information may only be refused where a specific exception applies and if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

#### Regulation 12(5)(e)

86. The council relied on the exception at regulation 12(5)(e) to withhold the details of its agreement with the LEP. The exception allows commercial or industrial information which is subject to the common law of confidentiality to remain confidential in order to protect a legitimate economic interest.
87. The Commissioner applied the following tests to regulation 12(5)(e):
- (i) Is the information commercial or industrial in nature?
  - (ii) Is the information subject to a duty of confidence provided by law?
  - (iii) Is confidentiality required to protect a legitimate economic interest?
  - (iii) Would that legitimate economic interest and thereby its confidentiality be adversely affected by disclosure?
88. With reference to the test at 86 (i) the Commissioner is satisfied that the agreement contains commercial information.
89. With reference to the test at 86 (ii), for a duty of confidence to be owed the information must:
- (a) have been imparted in circumstances which create an obligation of confidence and
  - (b) have the necessary quality of confidence.

90. The Commissioner is mindful that s41(1)(a) of the Act requires that information has to have been provided from one party to another for it to be considered confidential. In *Derry City Council v ICO – EA/2006/0014* – the Information Tribunal decided that information in a contract was the result of an agreement between parties rather than information provided by one to the other in confidence. However, this was a decision under the Act rather than the Regulations. The Act's s41(1)(a) requirement for information to have been provided by another is not a condition of the Regulations. The Commissioner therefore considers it possible that a duty of confidence may be owed by the council in relation to information shared with the other party (the LEP) or created jointly by both parties. Consequently, he considers it to be a possibility that information was imparted in circumstances which create an obligation of confidence.
91. The Commissioner considers that the information has the necessary quality of confidence as it is not trivial and its detail is unavailable from other sources.
92. With reference to the test at 86 (iii) the Commissioner does not believe there are legitimate economic interests in this instance which require the protection of confidentiality. He has not been provided with any evidence or reasoned argument to support that proposition. The Commissioner notes that the council's argument for withholding the information relates entirely to the contractor. In the Commissioner's view there is no evidence that the economic interests of the contractor or of any of the parties would be adversely affected by disclosure of the partnering agreement.
93. With reference to the test at 86 (iv), the Commissioner has considered the extent to which the council's argument supports the case that disclosure of the agreement would have an adverse effect. The Information Tribunal in *Archer v the ICO and Salisbury District Council – EA/2006/0037* – provides the approach that is required:
- '... it is not enough that disclosure should simply (have an effect) ... the effect must be "adverse". Second, refusal to disclose is only permitted to the extent of that adverse effect. Third, it is necessary to show that disclosure "would" have an adverse effect - not that it could or might have such effect. Fourth, even if there would be an adverse effect, the information must still be disclosed unless "in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information". All these issues must be assessed having regard to the overriding presumption in favour of disclosure. The result, in short, is that the threshold to justify non-disclosure is a high one.'*
94. The Commissioner asked the council to provide its arguments in support of the case to withhold the information under the Regulations. The council submitted that the exception at 12(5)(e) applied to the following categories:
- the annual values of the project agreement and its sub-contracts
  - the maximum LEP margin
  - the core costs payable annually to the LEP under the project's management services agreement
  - the rates payable to the design, construction, financial and other advisory staff

- the key performance indicators, their measurement periods and target levels
  - the continuous improvement plan, its measurement, target levels, monitoring intervals and assumptions.
95. The council submitted that disclosure would cause adverse affect in the following ways:
96. (a) disclosure of the agreement would affect the supply chain linked to the ongoing BSF project ie profit levels would be affected as these are reliant on achieving value for money supply contracts
- (b) the contractors involved in the project would be unable to competitively negotiate new contracts with other authorities and would prevent contractors from getting a better return elsewhere.
- (c) disclosure would lead to contractors being unwilling to work with the council in future
97. In view of the council's submission that disclosure of the agreement would adversely affect the contractor the Commissioner asked the council whether these arguments had originated from Skanska itself. The council replied that it had raised the matter with Skanska at the time when the Commissioner had queried whether Northgate had been consulted on withholding the ICT costs. The council supplied the Commissioner with a copy of a letter that it had written to Skanska at that time. The letter outlined the council's argument for non-disclosure and requested the company's views in relation to this.
98. The Commissioner has studied Skanska's response and in his view it does not relate to the arguments put forward by the council to withhold the agreement with the LEP. Instead, Skanska's response appears to refer only to the ICT contract together with a statement of Skanska's view that organisations bid for projects in the knowledge that there is limited access to competitive data. Consequently, in the Commissioner's view, the council failed to demonstrate that the arguments purporting adverse affect to the contractor by disclosure of the LEP agreement originated from the company itself. In the absence of any evidence on this point, the Commissioner is unable to conclude that the contractor's commercial interests would be adversely affected.
99. With reference to the council's argument at paragraph 95(a), in the course of his investigation the Commissioner had cause to ask the authority three times for an explanation of what it meant by its submission that disclosure would affect the supply chain. In response, the council replied simply that supply chain costs affect profit levels or that the supply chain relates to the term of the BSF contract. The latter response was combined with issues unrelated to the supply chain. The Commissioner is not convinced by these responses.
100. With reference to the council's argument at 95(b) the Commissioner asked the council to explain why disclosure would result in contractors being unable to competitively negotiate new contracts with other authorities. He asked it to include an explanation as to how this might occur if contractors partnered the

- public sector in a different LEP with a different set of key performance targets and improvement plans. The council submitted that because the BSF programme seeks to standardise the contractual process, continuous improvement plans and key performance indicators relating to such contracts would not vary significantly from one local authority to the next. Consequently, disclosure would prejudice new BSF contracts because the basis of the performance data would be revealed.
101. Whilst the Commissioner acknowledges that there will be similarities in school building projects he is unconvinced by the extent of contractual uniformity that has been suggested by the council. Notwithstanding the existence of a sector-specific delivery model he considers that modern projects frequently entail variations in design and build. If this were not the case it would be difficult to justify the high proportion of BSF budget allocated to the design element every time a local authority agreed a school building project. He further considers that if all school building contracts were as similar in detail as the council has suggested then contractors in the field would already be familiar with the information that the council maintains should not be disclosed. The Commissioner is not persuaded by the council's argument in this respect, not least because it also relies on withholding information from new bidders whilst allowing incumbent contractors to remain sole beneficiaries of the data.
102. The council's argument at 95(c) is similar to that employed by the authority in relation to the complainant's request for ICT charges and has been addressed by the Commissioner in paragraph 62 (d) of this notice. In that paragraph he concludes that the 'would be likely' test as required in that instance is not met. Accordingly, he reasons that the higher threshold of the 'would adversely affect' test which is required by the Regulations in respect of the argument at 95(c) is not met either.
103. With regard to the rates payable to the design, construction, financial and other advisory staff the Commissioner notes the reference in the Office of Government Commerce's (OGC) Civil Procurement guidance. Whilst the OGC guidance refers to the non disclosure of day rates if these should reveal information detrimental to the supplier it makes clear that this only applies in the context of general costing mechanisms that suppliers use and in cases where detailed costs of a particular contract are set out. The reference to day rates payable in the LEP agreement is an entirely different matter. Here they refer not to any specific and detailed cost that has been submitted by the contractor in respect of particular work done or work to be completed but rather to the maximum parameters of such costs that have been agreed could be paid out of the public purse. As such they do not provide any evidence of the contractor's own internal costing mechanisms and do not reveal any information that might adversely affect the contractor. Throughout the life of a 25 year PFI contract the accumulation of payments from within those parameters will substantially influence the total expended on the project.
104. In response to the Commissioner's request for an outline of how release of the objectives, key performance indicators, periods of measurement and continuous improvement plans would lead to contractors being unwilling to work for the council, the council replied only that disclosure would lead to a loss of confidence



as such matters were competitively negotiated. The council failed to show how disclosure would be likely to have this effect.

105. In the Commissioner's opinion the arguments deployed by the council fail to demonstrate that disclosure of the agreement would adversely affect the confidentiality of commercial or industrial information relating to any of the parties.
106. Because the exception at 12(5)(e) is not engaged the Commissioner is not required to consider the public interest test in respect of this.

### **Regulation 12(5)(f)**

107. The council relied on the exception at regulation 12(5)(f) in order to withhold the details of its agreement with the LEP.
108. Regulation 12(5)(f) applies to information where disclosure would have an adverse effect upon:
  - (a) the interests of a person who voluntarily provided the information to the public authority
  - (b) where that authority is not entitled to disclose that information apart from under the regulations and
  - (c) where the provider has not consented to the authority disclosing it.

The wording of the exception excludes the public authority's interests therefore only those of the contractor require consideration.

109. It is clear to the Commissioner that the information was provided voluntarily, that the authority is not expected to disclose it unless required to do so under the regulations and that the provider has not consented to disclosure. However, the exception at 12(5)(f) requires there to be an adverse affect to the interests of the information provider. Given the contractual relationship between the parties in this particular case, the Commissioner considers that the interests of the provider are necessarily commercial. The Commissioner has already considered whether disclosure of the same information would cause a commercial detriment in respect of 12(5)(e) and he has decided that it would not. Consequently, his conclusion is the same in respect of the information and its disclosure via 12(5)(f). The Commissioner has therefore decided that the exception at regulation 12(5)(f) is not engaged. He has not gone on to consider the public interest test in respect of this exception.

### **The Decision**

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110. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act in that it failed to comply with its obligations under section 1(1)(b).

The council incorrectly applied the exemptions at s12(1), s41(1) and s43(2) in order to withhold the ICT procurement costs.

The public authority did not deal with the request for information in accordance with the Regulations in that it failed to comply with its obligations under regulation 5(1).

The council incorrectly applied the exceptions at regulations 12(5)(e) and 12(5)(f) in order to withhold the details of its BSF agreement with the LEP.

## Steps Required

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111. The Commissioner requires that the council shall within 35 calendar days of the date of this decision notice disclose the information requested by the complainant, namely, the ICT procurement costs and the council's BSF partnering agreement with the LEP.
112. 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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113. 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 27<sup>th</sup> day of May 2009**

**Signed .....**

**Gerrard Tracey  
Assistant Commissioner**

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

## Legal Annex

### Freedom of Information Act 2000

**Section 1** provides that:

- (1) 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 12** provides that:

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.

(3) In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.

(4) The Secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority—

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.

(5) The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are to be estimated.

**Section 17** provides that:

(1) 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.

(2) Where—

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—

(i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

(6) Subsection (5) does not apply where—

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(7) A notice under subsection (1), (3) or (5) must—

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50.

**Section 21** provides that:

- (1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
- (2) For the purposes of subsection (1) -
  - (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
  - (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.
- (3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

**Section 41** provides 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.

**Section 43** provides that:

- (1) Information is exempt information if it constitutes a trade secret.
- (2) 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).
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).

**Section 45** provides that:

- 1) The Secretary of State shall issue, and may from time to time revise, a code of practice providing guidance to public authorities as to the practice which it would, in his opinion, be desirable for them to follow in connection with the discharge of the authorities' functions under Part I.
- (2) The code of practice must, in particular, include provision relating to—
  - (a) the provision of advice and assistance by public authorities to persons who propose to make, or have made, requests for information to them,
  - (b) the transfer of requests by one public authority to another public authority by which the information requested is or may be held,
  - (c) consultation with persons to whom the information requested relates or persons whose interests are likely to be affected by the disclosure of information,
  - (d) the inclusion in contracts entered into by public authorities of terms relating to the disclosure of information, and
  - (e) the provision by public authorities of procedures for dealing with complaints about the handling by them of requests for information.

## **Environmental Information Regulations 2004**

**Regulation 5** provides that:

**5.** - (1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

(5) Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to a standardised procedure used.

(6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

**Regulation 12** provides that:

(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if -

(a) an exception to disclosure applies under paragraphs (4) or (5);  
and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure.

(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that -

(a) it does not hold that information when an applicant's request is received;

(b) the request for information is manifestly unreasonable;

(c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or

(e) the request involves the disclosure of internal communications.

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect -

(a) international relations, defence, national security or public safety;

(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;

(c) intellectual property rights;



(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

(f) the interests of the person who provided the information where that person -

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure; or

(g) the protection of the environment to which the information relates.