

Freedom of Information Act 2000 (Section 50)

Decision Notice

8 December 2010

Public Authority: Liverpool City Council
Address: Municipal Buildings
Dale Street
Liverpool
L2 2DH

Summary

The complainant asked the Council to release a copy of the contract it signed in 2001 with BT relating to the establishment and duties of Liverpool Direct Limited. The Council responded releasing a redacted version of this contract to the complainant. It informed the complainant that the information it had redacted was being withheld under sections 41 and 43(2) of the Act. During the Commissioner's investigation the complainant agreed to limit the scope to certain sections of the contract. As a result of the Commissioner's involvement some of these sections were disclosed. However, the Council remained of the opinion that the information redacted from clause 43 of the Service Provision Agreement and schedule 21 in its entirety should be withheld under sections 41 and 43(2) of the Act. The Commissioner has considered the application of these exemptions to the remaining information. He has concluded that neither section 41 or 43(2) apply to this information. He has therefore ordered disclosure within 35 days of this Notice.

The Commissioner's Role

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.

Background

2. In 2001 a joint venture company called Liverpool Direct Ltd ('LDL') was set up between the Council (19.9%) and BT (80.1%) to manage all IT, tax and payroll services within the Council. A contract was signed between the Council and LDL in 2001 for this work and is due to run until 31 March 2017. The contract itself is the subject of this information request. LDL operates across both the public and private delivery services currently offering similar services to a number of organisations such as Stockport Council, Amateur Boxing Association of England, Mid-Suffolk District Council and various schools.

The Request

3. The complainant contacted the Council on 9 July 2008 to request the following information:

"May I have a copy of the contract(s) signed between Liverpool City Council and BT in 2001 relating to the establishment and duties of Liverpool Direct Limited please?"

4. The Council responded on 20 May 2009. It provided redacted versions of the following documents to the complainant:
 1. The Service Provision Agreement dated 13 July 2001; and
 2. The Joint Venture Shareholding Agreement dated 13 July 2001.

In respect of the redactions the Council had made, it informed the complainant that this information was being withheld under section 43 of the Act. It also advised that it felt section 41 of the Act applied to the withheld sections of the above documents.

5. The complainant requested an internal review on 22 June 2009.
6. The Council completed its internal review and informed the complainant of its findings on 3 September 2009. It confirmed that it remained of the opinion that sections 41 and 43(2) of the Act applied in this case.

The Investigation

Scope of the case

7. On 9 October 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the Council had acted appropriately by withholding the remaining sections of the two documents described in paragraph 4 above under sections 41 and 43(2) of the Act.
8. At the outset of the Commissioner's investigation it was agreed with the complainant that the investigation would focus on the withheld information from the following sections of the two documents listed in paragraph 4 above:
 - clause 15 of the Joint Venture Shareholding Agreement;
 - clauses 39 to 43 of the Service Provision Agreement;
 - schedule 21 of the Service Provision Agreement; and
 - schedule 3 and 4 of the Service Provision Agreement.
9. During the Commissioner's investigation the following information was released:
 - clause 15 of the Joint Venture Shareholding Agreement;
 - the information previously redacted from clauses 39 to 42; and
 - schedule 3 and 4 of the Service Provision Agreement.

The remainder of this Notice will therefore focus on the remaining withheld information and the Council's application of sections 41 and 43(2) of the Act. For clarity, the remaining information is:

- the information redacted from clause 43 of the Service Provision Agreement; and
- schedule 21 of the Service Provision Agreement which has been withheld in its entirety.

Chronology

10. The Commissioner wrote to the Council on 4 November 2009 to inform it that he had received a complaint from the complainant and to request a copy of the withheld information.
11. The Council responded on 26 November 2009 providing a copy of the withheld information.

12. The Commissioner wrote to the Council on 7 December 2009 to request a further more detailed analysis of the exemptions cited.
13. The Council responded by telephone on 14 January 2010 providing some additional information and background to the case.
14. On 26 January 2010 the Commissioner wrote to the Council to request that it provides copies of its correspondence with BT which details why BT is of the view that section 43(2) of the Act applies to the remaining information.
15. The Council responded on 16 February 2010. It provided a table of the withheld information together with a summary of BT's arguments against disclosure.
16. On 17 February 2010 the Council wrote to the Commissioner to provide copies of all correspondence with BT relating to this request.
17. The Commissioner wrote to the Council on 12 May 2010 to confirm that the scope of his investigation was now limited to the withheld information described in paragraph 8 above and to request that it provide detailed arguments to support its application of sections 41 and 43(2) of the Act to each of these sections of the contract.
18. The Council responded on 11 June 2010 providing some additional information.
19. As the Council had not provided specific arguments for each of the four sections of the withheld information described in paragraph 8, the Commissioner wrote to the Council again on 23 June 2010 to request that this level of detail is provided.
20. The Council responded on 6 July 2010 providing the additional information requested.
21. The Commissioner wrote to the Council on 28 July 2010 to outline his preliminary view based on the arguments supplied so far and to request further more detailed arguments to demonstrate that sections 41 and 43(2) of the Act are engaged.
22. The Council responded on 31 August 2010. It confirmed that it was now willing to release further information to the complainant. However, it remained of the view that the information listed in the second half of paragraph 9 above was exempt from disclosure under the exemptions

previously cited. As requested, it provided further arguments to support its position.

Analysis

Exemptions

Section 41 – information provided in confidence

23. The Commissioner will first consider the Council's application of section 41 of the Act to the remaining information (i.e. the information redacted from clause 43 of the Service Provision Agreement and schedule 21 which was withheld in its entirety).
24. Section 41(1) of the Act provides that information is exempt from disclosure if it was obtained by the Council from any other person and the disclosure would constitute an actionable breach of confidence. The exemption is absolute and therefore not qualified by the public interest test set out in section 2 of the Act.
25. The first step is for the Commissioner to consider whether the information was obtained by the Council from any other person.
26. In the Information Tribunal hearing of *Derry City Council v Information Commissioner (EA/2006/0014)* the Tribunal stated that a written agreement between two parties did not constitute information provided by one of them to another and therefore a concluded contract between a public authority and a third party does not fall within section 41(1) of the Act.
27. During this hearing the Tribunal stated that:

"we are aware that the effect of our conclusion is that the whole of any contract with a public authority may be available to the public, no matter how confidential the content or how clearly expressed the confidentiality provisions incorporated in it, unless another exemption applies."

It therefore went on to say that it accepted certain information may fall within section 41(1) of the Act. It clarified that the following information may, depending on the circumstances on the case, count as confidential information obtained from a third party:

- information regarding a pre-contractual negotiating position; and

- technical information either contained within the body of a contract or provided as a separate schedule.
28. The Commissioner has considered the remaining withheld information. He notes that clause 43 and schedule 21 of the contract between the Council and LDL detail agreed terms between the two parties. Clause 43 details the limits of liability and schedule 21 discusses the termination payments due should either party terminate the contract in part or in full. Neither of these sections contains information regarding a pre-contractual negotiating position or technical information and the Council has not supplied any evidence or additional arguments to the Commissioner to suggest otherwise.
29. As these sections are quite clearly specific terms agreed between the two parties, the remaining withheld information does not constitute information obtained by the Council from another person. As the first element of this exemption is not met in this case, there is no need for the Commissioner to go on to consider whether disclosure would result in an actionable breach of confidence.
30. For the reasons explained above, the Commissioner is satisfied that section 41(1) of the Act is not engaged in this case.
31. He will now go on to consider whether section 43(2) of the Act applies to the remaining information.

Section 43 – commercial interests

32. For the Commissioner to agree that section 43(2) of the Act is engaged, the Council must first demonstrate that prejudice would or would be likely to occur to the commercial interests of the Council and/or LDL/BT (BT being LDL's majority shareholder). In the Information Tribunal hearing of *Hogan v The Information Commissioner and Oxford City Council (EA/2005/0030)* ('Hogan') the Tribunal stated that:
- "The application of the 'prejudice test' should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption... Second, the nature of 'prejudice' being claimed must be considered... A third step for the decision-maker concerns the likelihood of occurrence of prejudice."
33. When considering the nature of the prejudice, the Tribunal stated in the hearing of Hogan that:

"An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thoroton has stated "real, actual or of substance" (Hansard HL (VOL. 162, April 20, 2000, col.827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected."

34. As stated in paragraph 32 above, the third step of the prejudice test is to consider the likelihood of occurrence of the prejudice claimed. The Commissioner notes that there are two limbs to this test; "would be likely to prejudice" and "would prejudice". The first limb of the test places a lesser evidential burden on the public authority to discharge. "Would be likely to prejudice" was considered in the Information Tribunal hearing of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*. The tribunal stated that:

"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk".

35. The second limb of the test "would prejudice" places a much stronger evidential burden on the public authority to discharge. Whilst it would not be possible to prove that prejudice would occur beyond any doubt whatsoever, it is the Commissioner's view that prejudice must be at least more probable than not.
36. Once the prejudice test is satisfied, the Council needs to apply the public interest test weighing up the arguments for and against disclosure.
37. The Commissioner will address the remaining sections of withheld information in turn, as detailed in the second half of paragraph 9 above. As the Council has not specified which limb of the prejudice test it has applied in this case and it not obvious from the submissions the Commissioner has received, he will go on to consider the lower threshold of "would be likely to". As explained above, this is the lower threshold of the prejudice test. It therefore follows that if this level of prejudice is not met neither is the higher threshold of "would".

Clause 43

38. As explained previously in this Notice, the information withheld from clause 43 of the Service Provision Agreement details the specific limits of liability under the contract for both the Council and the contractor; LDL, which is majority owned by BT. The Council has argued that

disclosure would be likely to prejudice its own commercial interests and the commercial interests of BT and LDL in its own right.

Likelihood of prejudice to the commercial interests of BT and LDL

39. The Council argued that the withheld information represents a bespoke risk position. If this information was disclosed, competitors and other local authorities would be aware of these figures and could use this information to materially influence other contracts, negotiations or bids held in the future. The Council stated that disclosure would expose the commercial position which BT adopts with regards to limitations on liability and such information could be of significant value to competitors in any future competitive tender placing BT and LDL at a disadvantage within the market place.
40. The Commissioner has been provided with copies of correspondence between the Council and BT relating to the potential disclosure of this information. In this correspondence BT also stated that limits of liability are agreed on a case by case basis and as such are agreed in commercial confidence with each client.
41. The Commissioner has considered the contents of the withheld information. It is his view that the withheld information represents the limits of liability agreed between the Council and BT/LDL in certain scenarios and that this type of information would be generally found in similar contracts of this nature. The fact that BT/LDL and/or the Council agreed such terms is not in itself commercially sensitive.
42. Turning to the specific financial figures themselves, BT stated itself that these represent "bespoke" terms agreed between BT and the Council and that limits of liability for any contract it enters into are agreed on a case by case basis with each client. The Commissioner notes that "bespoke" generally means custom-made. It is therefore his view that these specific terms are contract specific and were agreed to match the specific requirements of both parties. All contracts differ; even existing contracts that expire and come up for re-tender. Often requirements change. It is therefore difficult to see from reviewing the withheld information itself or from the arguments presented by the Council and BT exactly how this information would be likely to be beneficial to BT/LDL's competitors or how BT/LDL would be likely to be placed at a disadvantage in the future should disclosure be ordered.
43. The Commissioner has asked the Council on more than one occasion to explain in more detail exactly how disclosure of this information would be likely to have the effects claimed. Despite these opportunities to elaborate further, the Council has failed to do so. As it is not obvious

from the evidence available, the Commissioner does not agree that disclosure of this information would be likely to prejudice BT or LDL.

Likelihood of prejudice to the commercial interests of the Council

44. In respect of its own commercial interests, the Council argued that disclosure would be likely to prejudice its ability to negotiate further terms under the contract and would be likely to impinge on the working relationship currently in place with BT which has advised the Council of its unwillingness to release this information. The Council provided the Commissioner with further submissions to support this claim in confidence. These are addressed in the Confidential Annex attached to this Notice. As these arguments were provided in confidence, the Commissioner cannot comment on these any further in this Notice. He can, however, confirm that he does not agree these arguments are sufficient to engage section 43(2) of the Act.
45. In its submissions to the Commissioner, the Council also stated that BT's resistance to the disclosure of this information is based on BT's view that the information redacted from this clause is commercially sensitive and, if disclosed, could be used by a competitor resulting in disadvantage to itself and LDL. The Council confirmed that this level of resistance to disclosure raised the possibility of legal action being taken against the Council by BT should disclosure be ordered. It explained that there is a confidentiality clause within the contract, which BT may exercise or BT could take legal action against the Council for the loss of future contracts and revenue.
46. The Commissioner notes BT's unwillingness to agree to the disclosure of this information and BT's view that it feels it has strong reasons for this position. However, it is the Commissioner's view that such unwillingness is not enough in itself to warrant non disclosure. Such resistance must be supported by evidence or at least convincing arguments that demonstrate that the requested information is commercially sensitive and would be likely to prejudice BT's interests if it were disclosed.
47. Similarly, a confidentiality clause in the contract is not enough in itself to prevent disclosure. If it were it would be relatively straight forward for all public authorities bound by the Act to opt out of their obligations under the Act. Again, it is the Commissioner's view that the contents of the withheld information must be commercially sensitive for any argument regarding the likelihood of legal action being successful if disclosure were ordered to be accepted.

48. For the reasons explained above in paragraphs 39 to 43, the Commissioner does not accept that this information is commercially sensitive or that disclosure would be likely to be prejudicial to the commercial interests of BT or LDL in this case.

Conclusion

49. For the information redacted from clause 43 of the Service Provision Agreement, the Commissioner has concluded that section 43(2) of the Act is not engaged.
50. As the Commissioner has concluded that section 43(2) of the Act does not apply to this part of the remaining withheld information, there is no need for him to go on to consider the public interest test.

Schedule 21

51. The Council argued that the schedule has been withheld in its entirety because it covers the termination payments agreed between itself and BT and forms a detailed account of liabilities. It confirmed that the schedule describes the rationale of how payments are calculated, specific rates on specific services and the basis for that specific charge.
52. The Council stated that the disclosure of this information would be likely to prejudice its own commercial interests and the commercial interests of BT/LDL.

Likelihood of prejudice to the commercial interests of BT/LDL

53. The Council stated that the exit strategies agreed between BT/LDL and itself would be of commercial interest to BT/LDL's competitors and could be used by competitors to influence the market and/or negotiations. As the requested information could be used by competitors, disclosure would be likely to disadvantage BT/LDL in any future tendering exercise and bids of this nature.
54. The Council also confirmed that as the requested information is commercially sensitive BT/LDL could possibly take legal action against the Council for any loss it may suffer as a result in any future tender exercises. It also referred again to the confidentiality clause which is in place between the Council and BT.
55. Regarding the issue of potential legal action and the confidentiality clause within the contract, the Commissioner does not accept these arguments are sufficient to engage section 43(2) of the Act for the reasons he has already explained in paragraphs 46 and 47 above.

56. In respect of the possible consequences of disclosing exit strategies agreed between the Council and BT/LDL, it is the Commissioner's view that all contracts of this nature and size have specific terms in place with regards to the termination of the contract by either party in certain situations. He therefore does not accept that the fact that exit strategies are used in itself is commercially sensitive.
57. Turning now to the specific financial figures which were agreed with regards to the termination of the contract in various scenarios, the Council and BT/LDL have failed to explain in any detail exactly how these figures if disclosed could be advantageous to a competitor despite a number of opportunities to do so.
58. It is the Commissioner's view having reviewed the contents of this schedule himself, that these financial figures are contract specific relating to a unique set of circumstances and requirements. Generally when contracts come up for re-tender, requirements change particularly in the field of IT. New requirements will require fresh negotiations and fresh terms and conditions; including termination payments.
59. As it is not obvious from the contents of the information itself exactly how disclosure would be likely to prejudice the commercial interests of BT/LDL the Commissioner does not accept that these arguments are sufficient to engage section 43(2) of the Act.

Likelihood of prejudice to the commercial interests of the Council

60. The Council argued that disclosure would result in commercially sensitive information being released into the public domain which could then be used by competitors in the industry to their own advantage when tendering for future contracts. Disclosure would therefore be likely to hinder the Council's ability to negotiate better terms with future providers which would in turn be likely to hinder the Council's ability to secure the best price for the public purse.
61. As stated previously in paragraph 44 above, the Council also argued that disclosure would be likely to prejudice its ability to negotiate further terms under the contract and would be likely to impinge on the working relationship currently in place with BT which has advised the Council of its unwillingness to release this information. As explained previously, the Council provided the Commissioner with further submissions to support this claim in confidence. Again, these are addressed in the Confidential Annex attached to this Notice.

62. The Commissioner cannot go into any detail of his analysis of the issues raised by the Council in confidence in this Notice. However, he is able to confirm that he concluded that these specific arguments were insufficient to demonstrate that section 43(2) of the Act is engaged.
63. Turning now to the arguments presented in paragraph 61, the Council has again failed to explain in sufficient detail exactly how disclosure of the requested information would be likely to hinder its ability to achieve best price in the future when the services required come up for re-tender. As he has already explained in this Notice, it is the Commissioner's view that the termination conditions are unique and based on the requirements of the contract itself. It is the Commissioner's view that requirements will change over the remaining life time of this contract and therefore fresh negotiations will be required with BT/LDL or another provider resulting in revised terms and conditions.
64. In the Information Tribunal hearing of the *Department of Health v Information Commissioner (EA/2008/0018)* the Tribunal warned against 'cosy' relationships that can develop between public authorities and incumbent contractors in long running contracts. The Tribunal pointed out that whilst such relationship may allow the smooth running of a contract they can also reduce innovation and value for money.
65. It is the Commissioner's view that disclosure of this type of information increases healthy competition which generally results in more favourable and cost effective terms being achieved which in turn is better for the public purse.

Conclusion

66. For schedule 21 of the Service Provision Agreement, the Commissioner has concluded that section 43(2) of the Act is not engaged.
67. As the Commissioner has concluded that section 43(2) of the Act does not apply to this information, there is no need for him to go on to consider the public interest test.

Procedural Requirements

68. The Commissioner notes that the Council took over 10 months to respond to the complainant's information request. As the Council failed to issue a refusal notice within 20 working days, the Commissioner has found that the Council was in breach of section 17(1) of the Act in this case.

69. The Commissioner notes that the Council's refusal notice failed to inform the complainant of the details of its internal complaints procedure and of his right to approach the Commissioner under section 50 of the Act. The Commissioner has therefore found that the Council was in breach of section 17(7)(a) and 17(7)(b) in this case.

The Decision

70. The Commissioner's decision is that the Council did not deal with the following aspect of request for information in accordance with the Act:
- it incorrectly relied upon section 43(2) of the Act for the non disclosure of the remaining withheld information;
 - it breached section 1(1)(b) of the Act, as the Commissioner has found that the remaining withheld information should have been disclosed, and section 10(1) for not disclosing it within 20 working days;
 - it breached section 17(1) of the Act by failing to issue a refusal notice within 20 working days of the request;
 - it breached sections 17(7)(a) and 17(7)(b) of the Act by failing to inform the complainant of his right to request an internal review and of his right to refer the matter to the Commissioner under section 50 of the Act in the refusal notice it issued.

Steps Required

72. The Commissioner requires the Council to take the following steps to ensure compliance with the Act:
- The Council should release the information previously redacted from clause 43 and schedule 21 of the Service Provision Agreement in its entirety to the complainant.
73. The Council must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

74. 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.

Other matters

75. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. Concerning the complainant's request for an internal review, the Commissioner notes that the Council took over 10 weeks to respond. The complainant's request was made on 22 June 2009. However, the Council did not respond until 3 September 2009; some 10 weeks later.
76. There is no timescale laid down in the Act for a public authority to complete an internal review but the Commissioner has since issued guidance which recommends 20 working days from the date of request as a reasonable time for completing an internal review and (in exceptional circumstances) no later than 40 working days. Also, Part VI of the Code of Practice issued under section 45 of the Act states in this regard:
- "41. In all cases, complaints should be acknowledged promptly and the complainant should be informed of an authority's target date for determining the complaint. Where it is apparent that determination of the complaint will take longer than the target time (for example because of the complexity of the particular case), the authority should inform the complainant and explain the reason for the delay."*
77. The Commissioner notes that, in failing to advise the complainant of the estimated date for completion of the internal review and in failing to complete the internal review within a reasonable timescale the Council failed to conform to Part VI of the section 45 Code of Practice.

Right of Appeal

78. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 8th day of December 2010

Signed

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

Legal Annex

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 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 17(7)

Provides that –

"A notice under section (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 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(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).”