

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 14 September 2011

**Public Authority:** British Library  
**Address:** 96 Euston Road  
London  
NW1 2DB

### Decision

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1. The complainant made a freedom of information request to the British Library for a full copy of the contract it entered into with the company BrightSolid for the digitisation of its Newspaper Archive. In response the British Library disclosed a redacted version of the contract with information withheld under the section 43 exemption (Commercial interests). The Commissioner has investigated the complaint and found that the British Library has correctly applied FOIA section 43 to the complainant's request and that the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

### Request and response

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2. On 18 June 2010, the complainant wrote to the British Library to request a copy of the full contract entered into between the Library and a company, BrightSolid, for the digitisation of the Library's newspaper archive.
3. The British Library responded on 16 July 2010 and provided the complainant with a redacted version of the contract. Certain clauses and schedules contained within the contract were withheld on the basis that they were exempt from disclosure under section 43(2) of the Act (Commercial interests exemption) and the public interest in maintaining the exemption outweighed the public interest in disclosure.
4. The British Library subsequently carried out an internal review and presented its findings on 4 October 2010. It now said that the commercial interests exemption had been wrongly applied to some of

the information in the contract or else it now considered that the public interest in disclosure of some of the information outweighed the public interest in maintaining the exemption. As a result the British Library disclosed some further information to the complainant that had previously been redacted. For the rest of the information the British Library upheld its application of the commercial interests exemption. In addition, the British Library said that it now considered that some of the redacted information was also exempt under section 41 (Information provided in confidence) and section 43(1) (Trade secrets).

## **Scope of the case**

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5. On 23 November 2010 the complainant contacted the Commissioner to complain about the British Library's decision to redact some of the information contained within the requested contract.
6. During the course of the Commissioner's investigation the British Library disclosed some further, previously redacted information to the complainant. Therefore the Commissioner has only considered whether the remaining redacted information should have been disclosed to the complainant.

## **Reasons for decision**

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7. Section 43(2) provides that information is exempt if disclosure would prejudice the commercial interests of any person including the public authority holding it. The Commissioner has considered the application of this exemption first because it has been applied to all of the redacted information.
8. In this case the requested information is a detailed commercial contract between the British Library and BrightSolid Online Technology Ltd for the digitisation of the Library's newspaper archive and the creation of a paid for online access service. According to the British Library the ten year agreement will deliver 'the most significant mass digitisation of historic newspapers ever carried out in the UK and will make an estimated 40 million pages of historical resource available to the public'. As well as the digitisation of out-of-copyright material the agreement also seeks to digitise a range of material that is still in copyright, after suitable negotiation with the relevant rights holders which is to be carried out by BrightSolid.
9. The British Library has applied the commercial interests exemption on the basis that disclosure would be likely to prejudice its own

commercial interests, the commercial interests of BrightSolid or both. The contract is very detailed and runs to in excess of 270 pages. Naturally there are various reasons as to why the British Library considers each piece of redacted information to be exempt. Due to the size of the contract the British Library grouped the redacted information under the following headings when explaining why it believed the information was exempt. The Commissioner has followed this approach and has considered whether the redacted information falling under each heading is exempt from disclosure, taking into account the nature of the prejudice and the likelihood of that prejudice occurring. Where possible the Commissioner has tried to describe as fully as possible the reasons why the exemption has been applied. However this has not always been possible as in some cases explaining the reasons why the information is believed to be exempt would risk disclosing the information itself. In such instances the Commissioner has provided additional comment in a confidential annex to be provided to the British Library only.

- Right of 1<sup>st</sup> refusal & non-compete provisions
- Role and Management of sub-contractors
- TUPE provisions
- Purchase of rights & licenses (plus draft publisher contract)
- Indemnity, Insurance and Liability
- Novation & Assignment
- Service description, implementation plans, project plans, Marketing plans & security plans
- Service standards and testing methodologies
- Calculation of revenue & price breakdowns

10. Right of First Refusal & Non Compete provisions

The British Library has said that certain parts of the contract set out BrightSolid's right of first refusal in relation to any proposed digitisation of newspaper material. The British Library argues that disclosure of this information would be likely to prejudice the commercial interests of BrightSolid by allowing its competitors to bypass BrightSolid's negotiated trading advantage by exploiting knowledge of the terms included.

11. The British Library explained that the contract allowed BrightSolid, at considerable expense, to digitise a large selection of the Library's newspaper collection. As a result BrightSolid was awarded the right to commercially exploit the scanned images and in return would provide the Library with a copy of the scanned image for its own digital collections as well as royalties. The Library went on to explain that as a matter of principle it was unwilling to offer a commercial company a monopoly on the right to exploit the contract but that it had to offer the winning bidder certain securities in the form of the right of first refusal and non-compete provisions which would protect their right to commercially exploit the contract. The Commissioner has discussed in more detail how disclosure of this information would be likely to prejudice the commercial interests of BrightSolid in the confidential annex.
12. The Commissioner has reviewed the withheld information and the British Library's arguments and accepts that disclosure would allow a competitor of BrightSolid to bypass its negotiated trading advantage which would reduce the profitability of the contract.

#### Role and Management of sub-contractors

13. The information in these parts of the contract relate to BrightSolid's management of sub-contractors. The British Library has said that disclosure of this information would be likely to prejudice the commercial interests of BrightSolid as it would compromise future negotiations with these parties. This is because the contract sets out what terms BrightSolid is required to obtain from any sub-contractor it employs during the course of the contract. It follows that disclosure of this information may harm BrightSolid's negotiating position because a sub-contractor would know where BrightSolid was unable to concede ground and could then 'leverage that fact' to obtain better terms than they would otherwise have been able to achieve. This could harm BrightSolid's ability to maximise its profits from the contract thereby prejudicing its commercial interests.

#### TUPE Provisions

14. The British Library has said that certain parts of the contract detail provisions for the transfer of staff under TUPE (Transfer of Undertakings [Protection of Employment] Regulations)<sup>1</sup> including the details of BrightSolid's specific obligations and liabilities. It argues that

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<sup>1</sup> UK law providing protection for employees rights in the event of a business transfer or takeover.

disclosure would be likely to prejudice the commercial interests of BrightSolid by compromising its negotiations with sub-contractors. The Commissioner has included further details on how disclosure would prejudice the commercial interests of BrightSolid in the confidential annex.

### Purchase of Rights & Licences

15. The British Library has said that as regards its own commercial interests the most sensitive parts of the contract relate to BrightSolid's responsibilities for the purchase of rights and licences. This type of information describes negotiations that BrightSolid is obliged to undertake on behalf of the British Library with the rights holder of in-copyright material on a 'best endeavour basis'. That is to say this is what BrightSolid should attempt to procure for the Library 'over and above the rights necessary for the immediate performance of the project'. Disclosure would reveal which parts of BrightSolid's negotiating position are fundamental to the deal and which are optional, being pursued at the behest of the British Library. Disclosure of this information would inhibit BrightSolid's negotiating position because a right's holder would know where it could afford not to concede ground during the negotiations but still reach an agreement with BrightSolid. This would prejudice the British Library's commercial interests as it would mean that it would not be able to fully exploit the contract. It has described these terms as the main benefit that it gets from the agreement with BrightSolid.

### Indemnity, Insurance and Liability

16. The British Library has explained that certain clauses within the contract set out in detail the specifics of the insurance and indemnity provisions provided to (and by) the Library and the specific liabilities of both parties. It argues that disclosure of this information would be likely to prejudice the commercial interests of BrightSolid by prematurely revealing their negotiating position in future discussions with rights holders in connection with this project or with other third parties in future business proposals.
17. As an example of how prejudice would be likely to arise the British Library explained that BrightSolid had indicated that it will wish to pass on some of its liability under the contract to rights holders, licensees and subcontractors. However, if the extent of BrightSolid's liability was revealed it would allow a rights holder or a subcontractor to see where BrightSolid was contractually unable to concede ground who could then use that knowledge to obtain better terms than would otherwise have been the case, to the detriment of BrightSolid's commercial interests.

18. In addition, disclosure would indicate how much liability BrightSolid would be willing to accept in order to gain business of this nature. This would compromise its opening negotiating position in future bids of this kind because the other party to the contract would be likely to use the information as justification for demanding a similar level of cover and will know just how much BrightSolid is willing to concede.

#### Novation & Assignment

19. Clauses 38.1 (a)-(c) detail specific provisions for the novation or assignment of the contract including details of BrightSolid's commercial relationships with companies that are not party to the contract. Disclosure of this information would be likely to prejudice BrightSolid's and the other companies' commercial relations by damaging their relationship with another organisation. The Commissioner has elaborated on this point in the confidential annex.

#### Service Standards and Testing methodologies

20. Some schedules within the contract have been redacted on the basis that they set out BrightSolid's service standards and testing methodologies in detail. The British Library has explained that this information is proprietary to BrightSolid and formed the basis of their tender. It went on to say that its service standards were "put together by BrightSolid using know-how and operational skills of BrightSolid personnel" and is over and above what was required by the Library in its contract specification. Disclosure of this information would be likely to prejudice the commercial interests of BrightSolid by allowing a competitor an unfair advantage when competing against BrightSolid in future tender opportunities. The information would reveal details of BrightSolid's successful bid which a competitor would be able to use to inform its own bid in any future tender exercise.

#### Service Description, Implementation Plans, Project Plans, Marketing Plans & Security Plans

21. The British Library explained that certain schedules appended to the contract set out the above plans in detail and contain BrightSolid's methodologies, operational details, technical capabilities, marketing plans, timelines to market and other strategic information. It argues that disclosure of this information would be likely to prejudice the commercial interests of BrightSolid because it would allow a competitor to gain knowledge of BrightSolid's successful tender which would have given them an unfair advantage in any future tender opportunity. For instance a competitor could use the information to offer a similar or identical service in a future tender of this kind.

22. Information that has been redacted under these headings also includes details of BrightSolid's personnel who are engaged in the project. The Commissioner has considered in more detail why disclosure of this information would be likely to prejudice BrightSolid's commercial interests in the confidential annex.

### Calculation of Revenue and Price Breakdowns

23. This type of information has been redacted from the contract because it details the calculation of revenue and price breakdown of the services provided by BrightSolid. Disclosure would be likely to prejudice the commercial interests of BrightSolid as its competitors would be able to use this information to undercut it in future tender opportunities.

### Conclusions

24. Where information has been redacted from the contract the Commissioner has reviewed the information and considered the arguments put forward by the British Library. In each case the Commissioner finds that the British Library has reached a reasonable view on the possible consequences of disclosure. The Commissioner considers that where information has been redacted a link can be drawn between disclosure of the information and the prejudice identified by the British Library and that the prejudice is real, actual and of substance. When considering the nature of the prejudice the Commissioner is mindful that the British Library consulted with BrightSolid both at the time of the request and as part of its submissions to the Commissioner. Where it is argued that disclosure would be likely to prejudice the commercial interests of BrightSolid the reasons given reflect BrightSolid's own concerns as opposed to being speculative arguments put forward by the British Library.
25. The Commissioner has also taken into account the fact that when deciding what information to redact from the contract the British Library followed the guidance produced by the Office of Government Commerce regarding the disclosure of information contained in public sector contracts.<sup>2</sup> This guidance has been endorsed by the Information Tribunal which described it as a useful guide for public authorities in dealing with a request involving the disclosure of contractual information.<sup>3</sup>

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<sup>2</sup>[http://www.ogc.gov.uk/documents/OGC\\_FOI\\_and\\_Civil\\_Procurement\\_guidance.pdf](http://www.ogc.gov.uk/documents/OGC_FOI_and_Civil_Procurement_guidance.pdf)

<sup>3</sup> Department of Health v Information Commissioner [EA/2008/0018]



26. The Commissioner has also considered the likelihood of the prejudice occurring. In doing so he has taken into account the fact that at the time of the request the contract was very recent, having been signed in March 2010 and therefore the information was likely to be more sensitive at that point. Furthermore, the British Library has confirmed that at the time of the request BrightSolid was still in negotiations or had yet to enter into negotiations with, rights holders, sub-contractors and other third parties and therefore disclosure would have been more likely to impact on negotiations at this point.
27. Other relevant factors include the small competitive nature of the market in which BrightSolid operates, the non-exclusivity of the contract, and the considerable value and controversial nature of the contract. In these circumstances it is reasonable to conclude that disclosure would influence any future bids by BrightSolid's competitors who may also use the information to disrupt or bypass its negotiated advantage in this agreement.
28. All of the above leads the Commissioner to conclude that disclosure would be likely to prejudice the commercial interests of BrightSolid and the British Library and that therefore the redacted information is exempt from disclosure under the commercial interests exemption. However, the commercial interests exemption is qualified which means that exempt information should only be withheld where the public interest in maintaining the exemption outweighs the public interest in disclosure.
29. The Commissioner accepts that there is a legitimate public interest in disclosure of information in this case. This would help to provide greater transparency and accountability for the spending of public money and would help the taxpayer to better understand whether the British Library was obtaining value for money for the tax payer in its contract with BrightSolid. For its part, the British Library has acknowledged that there is also a public interest in allowing for proper scrutiny of government actions in carrying out procurement in accordance with published policy, in an open and honest way and in demonstrating that there is proper management of the contract.
30. As regards the public interest in maintaining the exemption for the redacted information, the British Library has highlighted the following general factors which it says weigh the public interest in favour of the information remaining redacted:
  - There is a public interest in preventing harm to the commercial interests of parties involved in the supply of goods and services to government because this would make it harder for public bodies to procure goods and services resulting in less effective use of public



money.

- There is a public interest in ensuring that businesses feel able to engage in commerce with public bodies without risk of commercial data being compromised to the detriment of commercial interests.
  - There is a public interest in protecting the commercial interests of the private sector as this plays an important role in the health of the economy.
31. The British Library also highlighted specific public interest arguments in favour of maintaining the exemption for each redacted piece of information. These arguments essentially sought to demonstrate the public interest in protecting BrightSolid's and the Library's ability to successfully manage and commercially exploit the project which would otherwise be undermined by disclosure of the redacted information. The British Library also emphasised the public interest in preventing the commercial interests of BrightSolid from being prejudiced.
32. The Commissioner accepts that there is a public interest in disclosure and knowing more about the basis on which BrightSolid was awarded the contract. Given the controversial nature of the contract the Commissioner has given this factor particular weight. However, it should also be stressed that whilst creating a commercial opportunity for a private company the agreement between the British Library and BrightSolid will also help to significantly improve public access to the Library's newspaper's collection which had previously only been available in hard copy and on microfilm at the Library's premises. The British Library has an obligation under the British Library Act to preserve and make content accessible in perpetuity and therefore helping to achieve this aim can be said to be in the public interest. Furthermore, any commercial opportunity for the British Library is also ultimately to the benefit of the taxpayer. The public interest would not be served by the disclosure of information which would prevent the British Library from commercially exploiting the contract to the benefit of the taxpayer and the Commissioner's view is that taken together these are strong factors in maintaining the exemption.
33. There is also a public interest in protecting the commercial interests of BrightSolid in relation to this particular contract as disclosure would prevent the company from successfully implementing the project. In a wider sense the public interest also favours protecting the commercial interests of BrightSolid as disclosure would be likely to deter other contractors and providers of services from working with bodies in the public sector if they felt that their commercially sensitive information could be disclosed. This would not be in the public interest as it would mean that public sector bodies would be forced to rely on less

competitive and/or inferior products and services. Furthermore, the Commissioner considers that there is an inherent public interest in ensuring that competition is not distorted and that companies are able to compete fairly for public sector contracts. In the Commissioner's view, the commercial interests of a third party should not be unduly prejudiced in circumstances where it would not be warranted or proportionate. Given that much of the information in the contract has been disclosed the Commissioner finds that prejudicing BrightSolid's commercial interests to this extent would not be justified in the circumstances.

34. The Commissioner accepts that there is a public interest in disclosure. However, given the importance of the project to the British Library and considering the sensitive stage of the contractual negotiations at the time of the request, he has decided that in all the circumstances of the case the public interest in maintaining the commercial interests exemption outweighs the public interest in disclosure.
35. As noted above, the British Library had also submitted that some of information was additionally exempt under section 41 and section 43(1). The Commissioner has not considered whether these exemptions would apply as he is satisfied that all of the redacted information should be withheld under the commercial interests exemption.

## Right of appeal

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

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

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

37. 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.
38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Signed** .....

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