

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 7 July 2014

**Public Authority:** Rotherham Metropolitan Borough Council

**Address:** Riverside House  
Main Street  
Rotherham  
S60 1AE

#### **Decision (including any steps ordered)**

---

1. The complainant has requested business plans, financial information, reports and records of discussions held by Rotherham Metropolitan Borough Council ("the Council").
  2. The Commissioner's decision is that the Council has breached section 16 of the FOIA by failing to offer the complainant appropriate advice and assistance in respect of parts 1 and 2 of his request for information. The Commissioner has also decided that the Council was entitled to rely on section 22 of the FOIA in respect of the information sought by the complainant at parts 3 and 5 of his request.
  3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
    - The Council is required to revisit parts 1 and 2 of the complainant's request by offering the complainant advice and assistance in terms of the information he seeks.
  4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.
-

## Request and response

---

5. On 12 August 2013, the complainant wrote to Rotherham Metropolitan Borough Council and requested information in the following terms

"Please forward a copy of

- 1) Rotherham Borough Council's Housing Revenue Account 30 Year Business Plan 2012-2042 and all modelling data;
- 2) The 30 Year Financial (Draft or otherwise) Plan as referred to in the Report to Cabinet on the 28<sup>th</sup> March 2012
- 3) RMBC's Asset Management Strategy for the HRA Housing and Non-Housing assets referred to in the Report to Cabinet on the 28<sup>th</sup> March 2012
- 4) A copy of the further report as required by Recommendation 2
- 5) A copy of the estates needs analysis and investment planning as required by recommendation 3
- 6) The report of Pricewaterhouse Coopers in relation to exploring various funding vehicles to unlock the resources available later in the Business Plan
- 7) A record of the outcome of the discussions with CB Ellis. Relating to the asset management assumptions within the model and the opportunities that may be available relating to financial leverage"

6. The Council responded to the complainant's request on 11 September 2013 in the following way:

Items 1 and 2: "The Council has considered your above questions and deems the information requested to be exempt under Section 43 of the Freedom of Information Act where its disclosure under the Act would, or would be likely to prejudice the commercial interests of any person or organisation."

Item 3: "The Council will not be providing this document as it is exempt under Section 22 of the Freedom of Information Act (information due for future publication)."

The Asset Management Strategy referred to in the report was that previously written by the then Arm's Length Management Organisation, 2010 Rotherham Limited. That strategy has expired and a new strategy is in draft format."

Item 4: "This can be accessed from the Council's web-site at the following link – <http://modern.gov.rotherham.gov.uk/ieList...>

Please go to Agenda item 4 at the Agenda Reports Pack."

Item 5: "The cost of providing this information will exceed the maximum cost as detailed in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. The cost would be exceeded due to the amount of information associated with estate appraisal and the file format of that data."

Item 6: "No formal reports were procured from PcW."

Item 7: "An initial discussion took place with CB Ellis, but no work was procured from them."

7. The complainant wrote to the Council on 12 September and asked it to conduct an internal review of its response to items 1, 2, 3 and 5.
8. The Council concluded its internal review and wrote to the complainant on 20 September 2013. The Council's letter explained the outcome of its review as follows:

"Items 1 and 2: [the complainant's] original FOI request in respect of items 1 and 2 was assumed to be a request for the HRA Business Plan Model. The response citing an exemption under Section 43 of the Freedom of Information Act was based on this assumption. The response to item 4 of your original request directed you to the Audit Committee report of the 21<sup>st</sup> November 2012, which clearly sets out the assumptions, outcomes and risks associated with the Business Plan model. Appendix A of this report sets out the assumption in tabular form. It is my view that this report provides you with the information that you are now requesting.

Items 3 and 5: After making further enquiries I can confirm that both the 30 Year Business Plan and the Asset Management Strategy for the HRA Housing and Non-Housing assets are currently being refreshed; both require a range of stock condition information and comprehension of housing market factors. There is a clear intention to complete this work and subject to approval by Cabinet Members, the latter document will become publically available. This will be before the 31<sup>st</sup> March 2014.

I am therefore satisfied that section 22 of the Freedom of Information Act (information due for future publication) applies and I maintain the Council's decision conveyed to you on the 11<sup>th</sup> September 2013 to

refuse this information.”

## **Scope of the case**

---

9. The complainant contacted the Commissioner on 25 September 2013 to complain about the way his request for information had been handled. The complainant stated his belief that the Council did not have a settled intention to publish the information he had requested and he expressed his doubts as to whether the Council had any draft working document to base a settled decision on.
10. In consequence of the complainant limiting his request for review to parts 1, 2, 3 and 5, the Commissioner's investigation of this complaint was focussed solely on the Council's responses to those parts.

## **Reasons for decision**

---

### **Section 43 – Commercial interests**

#### Parts 1 and 2

11. The Council has confirmed to the Commissioner its application of the section 43 of the FOIA to the information sought by the complainant at parts 1 and 2 of his request.
12. Section 43 of FOIA states 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.”
13. The Council informed the Commissioner that the models for its Housing Revenue Account 30 Year Business Plan 2012-2042 and 30 Year Financial Plan are purchased as templates from the Chartered Institute of Housing and as such it is that organisation's intellectual property.
14. The Commissioner accepts that the model template is likely to be the Chartered Institute's intellectual property.
15. For the withheld information to engage the exemption provided by section 43(2) its disclosure would, or would be likely to, prejudice a

commercial interest of either the public authority concerned or that of a third party.

16. The Commissioner has examined a spreadsheet supplied by the Council entitled, 'HRA Business Plan and Self-Financing Basic Model' ("the Model") on the understanding that this spreadsheet constitutes the information sought by the complainant.
17. The Report carries a disclaimer and is clearly marked as being strictly confidential. The Commissioner considers that the information contained in the Model is commercial in nature.
18. Having read the Council's representations in respect of its application of section 43, the Commissioner has determined that the Council has failed to demonstrate that the disclosure of the information which populates the Model would, as the Council contends, prejudice a commercial interest.
19. Notwithstanding the above, the Council believes that it has satisfied the complainant's information request at items 1 and 2 by referring him to a report containing the 'outcome information'. It appears to be the Council's position that the complainant, in asking for an internal review, had modified his request in such a way as to only require the outcome information.
20. The Commissioner does not agree with the Council that the complainant has modified his request. It is clear to the Commissioner that the complainant was making a number of points to support his position that the information contained in the Report should be disclosed. In asking for an internal review, the complainant clearly stated that Council should be able to provide the outcomes without the exposure of the model and that his request was for the modelling data which the Council had collated to support those outcomes and decisions.
21. The Commissioner notes that the Council failed to address the points raised by the complainant in his request for an internal review. The points raised by the complainant appear to the Commissioner to be entirely reasonable.
22. In the Commissioner's opinion the Council has failed to properly appreciate the nature of the complainant's request: It chose to interpret the complainant's request unilaterally without seeking to clarify what information was actually being sought.
23. The Commissioner considers that, in making its assumption as to extent of the information required by the complainant and without having spoken or written to him, the Council has failed in its duty under section

16 of the FOIA to provide the complainant with appropriate advice and assistance.

24. In consequence of this failure, the Commissioner requires the Council to revisit parts 1 and 2 of the complainant's request and to advise and assist him in making a new information request.

## **Section 22 – Information intended for future publication**

### Parts 3 and 5

25. Section 22 states –

“(1)Information is exempt information if—

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

(b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).”

26. The Council has advised the Commissioner that, at the time the complainant made his request, the Council had a clear intention to publish the information sought in parts 3 and 5 of the request at the end of the financial year. It also advised the Commissioner that its Housing Services is responsible for this information and it is normal procedure to have documents such as these approved by Council Cabinet before their publication.
27. The Council assured the Commissioner that the requested information needed to be refreshed and stressed that both these documents required a range of stock condition information and a comprehension of housing market factors.
28. On the basis of the Council's stated position and in the absence of any evidence to the contrary, the Commissioner is persuaded that the Council did have an intention to publish the requested information at the time it received the complainant's request.
29. The Commissioner accepts that the Council cannot adopt or revise policies and strategies until they have first gained approval by the Council's Cabinet or by a Cabinet member. He also believes it is reasonable for the Council to delay publication of these documents until it is satisfied that they reflect up-to-date and accurate information. In

view of these considerations the Commissioner has determined that, at the time the request was made, the Council was entitled to rely on section 22 of the FOIA in respect of the information sought at parts 3 and 5.

30. The Commissioner has searched the Council's website for the information which was due to be published by the Council prior to 31 March 2014: The Commissioner was unable to find this information. Consequently the Commissioner made a further enquiry about the publication of the information sought by the complainant.
31. On 16 June 2014 the Council informed the Commissioner that the requested information is yet to be published. It is now due to be presented to the Council's Cabinet in September 2014 and publication will follow this date.
32. The Council explained that it could not meet its previous date of intended publication due to the impact of a number of national policies on its Investment Planning. The result of these national policies, including Welfare Reform, Rent Convergence and Carbon Reduction Grant Funding, was that the assumptions contained in the 30 Year Business Model required further amendments.
33. The Commissioner again accepts that it is reasonable for the Council to delay publication of these documents until it is satisfied that they reflect up-to-date and accurate information. He is however concerned that the Council has failed to assure him that it will meet its revised publication date.
34. The Commissioner accepts that the assumptions used in the Business Plan may have changed and he can conceive that they might change again in the future. This does not mean however that the Council can indefinitely go on pushing-back the publication date and relying on section 22 of the FOIA. In the Commissioner's opinion it is not reasonable for the Council to do this, particularly when that the Council has not given a guarantee that it will meet its new date for publication.

## Right of appeal

---

35. 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: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

36. 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.
37. 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 .....**

**Andrew White**  
**Group Manger**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**