

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 3 March 2008

Public Authority: Wirral Metropolitan Borough Council
Address: Town Hall
Brighton Street
Wallasey
Wirral
CH44 8ED

Summary

The complainant made a request for information to Wirral Metropolitan Borough Council (the "Council") on 14 October 2005. The Council refused to provide the information requested on the grounds that it was exempt under section 43 of the Freedom of Information Act 2000 (the "Act"). This decision was communicated to the complainant on 11 September 2006. Owing to the decision to withhold the information being taken at a high level within the Council, the Commissioner did not require an internal review to be carried out. During the course of the investigation, the Council suggested that section 22 of the Act may be applicable. The Commissioner has concluded that the Council incorrectly applied section 43(2) of the Act to the requested information, and has determined that it may not be withheld under section 22. He therefore requires the Council to disclose the requested information. The Commissioner further finds that the Council failed to comply with section 17 when issuing a refusal notice in respect of this request.

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 I of the Act. This Notice sets out his decision.

The Request

2. The complainant wrote to the Council on 14 October 2005 and requested the following information regarding the possible use of funds from tolling to finance a tram scheme:

“...we would like to see whatever documents are in the possession of the Council which refer to the possible use of tolls for the trams.”

3. The Council acknowledged this request on 21 October 2005.
4. Having not received a response, the complainant emailed the Council on 1 December 2005 and asked why it had not yet provided any information in response to his request.
5. The Council responded on 22 December 2005 and apologised for the delay in responding to the request. It explained that the Council was seeking legal advice and would contact the complainant again once it had received and considered this advice. The Council emailed the complainant again with a similar update on 10 January 2006.
6. The complainant emailed the Council again on 20 April 2006 as he had not received anything further.
7. On 25 April 2006 the Council acknowledged this email and stated “the best way to expedite matters [was] for the Exemptions panel to sit under Freedom of Information and come to a decision on what information – if any – can be released to you and the reasons why any information is to be held back”. The Council explained that Exemptions Panels were convened when a requester challenged the withholding of information.
8. The complainant replied to the Council and queried why the Exemptions Panel would be convened in his case. He explained that he had not challenged the withholding of any information, as he had not been informed that any information would be withheld.
9. The Council failed to respond to the complainant’s query however emailed him on 26 April 2006 to explain that the case would be most swiftly resolved if an Exemptions Panel met to consider the issue.
10. On 21 June 2006 the Council contacted the complainant and stated that the Exemptions Panel had met, and that a definitive response would shortly be sent, explaining what information could be made available.
11. The Council contacted the complainant on 11 September 2006 and stated:

“...the information held by the Council in relation to the possible use of tolls for the funding of the tramway is contained in two Council reports that were presented to Cabinet at their meetings on 22 September 2005 and 20 October 2005. In considering your request, the Council has approached Merseytravel who had been sponsoring the project to introduce a tram system into Merseyside. Merseytravel have indicated that the financial information referred to in those two reports is still of a commercially sensitive nature which they do not want to release into the public domain.”

The Council confirmed that it believed section 43 of the Act applied to the requested information.

The Investigation

Scope of the case

12. On 30 September 2006 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 the Council's refusal to supply him with the information requested.

Chronology

13. The Commissioner wrote to the Council on 10 July 2007 to begin his investigation. He asked the Council to supply him with a copy of the information that had been withheld from the complainant and to explain why it believed the section 43 exemption to be applicable. In particular, the Commissioner asked the Council to respond to the following points:
 - i. whose commercial interests would be (or would be likely to be) prejudiced by disclosure of the requested information;
 - ii. what would be the prejudice caused;
 - iii. how likely is it that the prejudice would occur; and
 - iv. the public interest factors the Council has considered in favour of disclosure of the information and those against, explaining how the Council weighted the factors to reach the conclusion that the information requested should be withheld.

The Commissioner asked the Council to respond within twenty working days.

14. On 7 August 2007 the Council emailed the Commissioner and acknowledged receipt of his letter of 10 July 2007. The Council briefly outlined the steps it had taken upon receipt of the letter, and undertook to contact the Commissioner again shortly with a full response to his questions.
15. The Commissioner contacted the Council on 9 August 2007 and extended the deadline for a response until 23 August 2007. He explained that, if a response was not received by this date, an Information Notice may be served to compel the Council to respond in full.
16. The withheld information was provided to the Commissioner by email on 23 August 2007. This consisted of two reports to the Cabinet.
17. In a covering letter of the same date, the Council explained that it considered the reports to be exempt in their entirety and that the exemption that was applied at

the time of the refusal notice being issued (section 43), continued to be applicable. The Council explained that it believed Merseytravel's commercial interests may be damaged by the disclosure of the reports, however failed to respond to questions (ii) to (iv) as set out in paragraph 13 above.

18. The Council also suggested that, as a result of a District Audit investigation that was in the process of being completed, the information would shortly be made available to the public and that therefore section 22 of the Act would become "relevant".
19. On 29 August 2007 the Commissioner spoke with the Council on the telephone. He was particularly interested to understand how the involvement of the District Auditor could affect this case, and asked to be provided with the details of a contact at the Audit Commission with whom he could discuss the matter. The Council provided this information by email later the same day.
20. The Commissioner telephoned the Audit Commission on 30 August 2007 to discuss what information was likely to be made available. The representative provided the details of another individual who was likely to be better placed to advise the Commissioner on the matter.
21. Having left a message for the second Audit Commission officer on 31 August 2007, the Commissioner received a call back on 3 September 2007. The representative stated that it was very unlikely that the information requested by the complainant would be made available following the publication of the Audit Commission's report. Concern was expressed that due to various "political sensitivities", disclosure of the requested information could adversely impact upon the Audit Commission's investigation.
22. On 4 September 2007 the Commissioner wrote to the Council and updated it as to the discussions he had had with the Audit Commission. To further his investigation, the Commissioner asked the Council to provide some information concerning the possible application of the section 22 exemption. He reiterated his request for the Council to respond to questions (ii) to (iv), set out at paragraph 13 above, in order that he may establish whether the Council correctly withheld the requested information at the time of the request being processed.
23. Being aware of his responsibility not to order untimely disclosure of sensitive information, the Commissioner informed the Council that, should further exemptions be relevant to the disclosure of the information at the time of his letter, he would be happy to consider them. He asked the Council, if it decided to make use of further exemptions, to explain clearly why they were applicable and to outline any public interest arguments that had been applied, where appropriate.
24. The Council replied on 19 September 2007. It provided the necessary information concerning the section 22 exemption and confirmed that it did not wish to offer further exemptions in relation to the withheld information. The Council did not answer questions (ii) to (iv) as stated at paragraph 13, however it later transpired that this may have been due to a typographical error in the Commissioner's letter of 4 September 2007.

25. In order to discuss the Council's letter of 19 September 2007 before considering his next course of action, the Commissioner telephoned the Council on 28 September 2007. During this telephone conversation, the Council stated that, were it not for the ongoing investigation by the Audit Commission, it would most likely consider the requested information now suitable for release under the Act.
26. On 1 October 2007 the Commissioner wrote to the Council again and asked it to respond to questions (ii) to (iv) in paragraph 13. He asked the Council to reply by 16 October 2007.
27. The Council emailed the Commissioner on 18 October 2007 and apologised that a response had not yet been provided. It undertook to address the Commissioner's latest correspondence fully by the end of October 2007.
28. On 26 October 2007 the Council wrote to the Commissioner. It provided a response to questions (ii) to (iv) set out in paragraph 13 above.
29. The Commissioner considered the content of the Council's letter of 26 October 2007 and concluded that he could complete his investigation. He advised the Council of this in a letter dated 14 November 2007.

Analysis

Procedural matters

General Right of Access

30. The Commissioner has considered whether the Council has complied with section 1 of the Act.
31. 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.”
32. The complainant wrote to the Council on 14 October 2005 and requested information relating to the use of revenue from tolls to fund a tram project. On 11 September 2006 the Council confirmed that it held two reports which were relevant to the request, however explained that it believed the reports were exempt under section 43 of the Act. For reasons that shall be explained from paragraph 48 below, the Commissioner does not consider section 43 to be applicable in this case. The Council should have provided the complainant with the information requested and by refusing to do so breached section 1(1)(b) of the Act.

Refusal of Request

33. The Commissioner has considered the extent to which the Council has complied with section 17 of the Act.
34. 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.”
35. The complainant made his request for information on 14 October 2005. The Council issued a refusal notice on 11 September 2006. This was not within the time limit for complying with section 1(1) of the Act, which requires public authorities to respond to requests within twenty working days of receipt. The Council has therefore breached section 17(1) of the Act.
36. Section 17(3) provides that –
- “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.”
37. The refusal notice issued by the Council on 11 September 2006 states that the section 43 exemption is believed to be applicable, however does not detail any public interest arguments the Council has taken into account when deciding the exemption should be maintained. The Council has therefore failed to comply with section 17(3) of the Act.
38. 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.”

39. The refusal notice issued by the Council on 11 September 2006 did not detail the procedure by which the complainant could ask the Council to review its handling of the request, most likely as it believed it had already carried out such a review (this will be discussed in greater detail in the ‘other matters’ section of this notice, below). In its refusal notice, the Council also failed to make the complainant aware of his right to complain to the Commissioner. The Council has therefore breached section 17(7) of the Act in respect of this request.

Exemptions

Information intended for future publication

40. The Commissioner has considered whether the Council could withhold the requested information on the grounds that it was likely to be published in the future.

41. Section 22(1) provides that –

“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).”

42. The refusal notice, issued by the Council on 11 September 2006, did not refer to the section 22 exemption, however in its letter to the Commissioner dated 23 August 2007, the Council suggested this exemption may be relevant. The Commissioner has therefore considered whether the information requested may be withheld under section 22 of the Act.

43. The Council has explained that it believes the section 22 exemption may be applicable for the following reasons:

- it believes the Audit Commission will publish the requested information following the completion of an investigation it is carrying out; and

- it was aware of the complainant's interest in the exempted information and it would have proactively made the reports available to him (however not to the public at large, for example, in the authority's publication scheme) once they were no longer considered to be sensitive.
44. The Commissioner has confirmed with the Audit Commission, in a telephone conversation on 3 September 2007, that it is very unlikely that it will publish the withheld information following completion of its investigation.
45. The Commissioner does not consider that making information available to one group or individual constitutes "publication" for the purpose of section 22. An authority would, for example, have to make information available at a public inquiry, or on its website, or by other similar means, for the information to be considered to have been "published".
46. Further, the Council has stated that, at the time the request was received, it did not intend to publish the information (save for intending to review the information at a future date, when it was less likely to be considered sensitive).
47. For the reasons outlined in paragraphs 44, 45 and 46 above, the Commissioner does not consider that the section 22 exemption is engaged. He has not, therefore, gone on to consider the public interest test in relation to this exemption.

Commercial interests

48. The Commissioner has considered whether the Council has correctly applied section 43(2) to the requested information.
49. 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).”
50. In order to establish whether any person's commercial interests would be, or would be likely to be, prejudiced by disclosure of the withheld information, the Commissioner asked the Council to respond to the following questions:
- i. whose commercial interests would be (or would be likely to be) prejudiced by disclosure of the requested information?
 - ii. What would be the prejudice caused?
 - iii. How likely is it that the prejudice would occur?
51. The Council provided the following reply:
- i. Merseytravel's commercial interests would be, or would be likely to be, prejudiced by the disclosure of the information.

- ii. Merseytravel's commercial interests would most likely be affected in the following ways:
 - A. The Merseytram project is part funded by the Merseyside authorities and is a complex and politically sensitive multi million pound scheme.
 - B. The project remains live and has the potential to be so until 2010.
 - C. At the time of the request being made, Merseytravel was attempting to fill a gap in the funding for the project, and was negotiating with various parties. Therefore the release of the requested information would have prejudiced these negotiations.
 - D. The various parties involved in the project would have had to respond to questions from the public and press about the project before it had been finalised, and this would have distracted the parties from the business of completing the project.
 - iii. It was highly likely the prejudice would occur.
52. The Commissioner considers that the arguments raised by the Council at A and B in paragraph 51 above are simply factual statements and do not explain *how* Merseytravel's commercial interests would be prejudiced if the information requested were to be disclosed. Similarly, point C offers no explanation as to *why* the Council believes that the disclosure of the requested information would have a detrimental impact upon Merseytravel's commercial interests.
53. The Council has argued that answering queries raised following disclosure of the information would have "taken time away from the local authorities' negotiations" before the decisions relating to the project had been finalised. Again, the Council has failed to explain *how* this would adversely affect Merseytravel's commercial interests. The Commissioner appreciates that it may be inconvenient for the parties involved to have to respond to queries. However he believes that they should have adequate measures in place to handle press enquiries and to keep the public informed as to the progress of the project. The Commissioner does not therefore consider that point D is relevant to the Council's argument.
54. The Council has failed to describe what prejudice would be caused to Merseytravel's commercial interests by disclosing the requested information, despite three requests from the Commissioner to provide a full response to his enquiries. Therefore the Commissioner may reasonably conclude that Merseytravel's commercial interests would not be, or would be unlikely to be, prejudiced if the requested information were to be disclosed. He therefore finds that the section 43 exemption is not engaged and is not required to consider the public interest test in respect of this exemption.

The Decision

55. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

Steps Required

56. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

The public authority should provide the complainant with a copy of the requested information, namely the reports presented to Cabinet on 22 September 2005 and 20 October 2005.

57. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

58. 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

59. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

The complainant made his request for information on 14 October 2005 and did not receive a refusal notice until 11 September 2006, almost a year later. The Commissioner considers this to be a serious breach of the time period for complying with requests. During this time, the Council considered, mistakenly, that it had provided a response to the request for information under the Act. When the complainant made contact with the public authority, to enquire as to the Council's progress in answering his request, the Council incorrectly treated his correspondence as an application for internal review.

The Commissioner considers there was a breakdown of the Council's procedures during the processing of this request for information, or alternatively that those procedures are not fit for purpose. He would request the Council take this opportunity to review its request handling procedures and to satisfy itself that it

will be able to process future requests in compliance with both the Act and the codes of practice.

Right of Appeal

60. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
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 served.

Dated the 3rd day of March 2008

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

General Right of Access

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 1(2) provides that –

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
- (b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
- (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

Refusal of Request

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(2) states –

“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.”

Section 17(3) provides that –

“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.”

Section 17(4) provides that –

“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.

Section 17(5) provides that –

“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.”

Section 17(6) provides that –

“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.”

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.”

Information intended for future publication

Section 22(1) provides that –

“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).”

Section 22(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which falls within subsection (1).”

Commercial interests

Section 43(1) provides that –

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

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

Section 43(3) provides that –

“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).”