

Freedom of Information Act 2000 (Section 50)

Decision Notice

Dated 17 August 2006

Public Authority: South Shropshire District Council

Address: Stone House
Corve Street
Ludlow
Shropshire
ST8 1DG

Summary Decision

1. The Commissioner's decision in this matter is that the Public Authority has not dealt with the complainant's request in accordance with Part I of the Act in that it has failed to comply with its obligations under section 1(1).

In view of the matters referred to below the Commissioner hereby gives notice that in exercise of his powers under section 50 of the Act he requires that the Public Authority release the following information within 30 days of the date of this notice:-

The projected expenditures for the Ludlow Eco Business Park and the Craven Arms Gateway Projects on a "worse case scenario" as identified by the Public Authority in its letter to the Commissioner dated 1 August 2006. The Commissioner directs that if the Public Authority wishes to provide an explanation of the assumptions on which the information is based, it may do so.

The Commissioner's Role

2. The Commissioner's role is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

The Request

4. The complainant has advised that on 25th October 2005 the following information was requested from the Public Authority in accordance with section 1 of the Act:
5. "Please provide the following information regarding the Ludlow Eco Business Park and the Craven Arms Gateway Projects:-
 1. What are the budgeted council spends?
 2. How much has been spent to date against these budgets?
 3. What are the projected expenditures compared with these budgets?"
6. On the 3 November 2005 South Shropshire District Council ("SSDC") replied to the complainant advising him that the information requested was exempt under section 22 of the Act. SSDC referred the complainant to its Capital Programme Monitoring Report which provided details of budget and expenditure on the schemes and which was available on its website. SSDC's usual publication practice was to update the Capital Monitoring Report on a quarterly basis. The information requested by the complainant would not be disclosed until the report had been prepared for consideration by its Executive Committee.
7. Later on the 3 November 2005, the Complainant advised SSDC that he was not satisfied with the response and requested an internal review.
8. On 2 December 2005, SSDC advised the complainant of the outcome of its internal review. SSDC advised the complainant that:
 - "The issues surrounding the two major building schemes in which you are particularly interested were and continued to be the subject of considerable discussion and debate within the council including a confidential report considered by the Council's Executive Committee this week".
 - "The full minutes have not yet been processed however I have received a "potted" version from my staff which indicate that the Council cannot at this time identify the figures you seek as they are the subject of legal dispute.....I cannot divulge them as they are exempt by legal privilege under section 42."
 - "The Council's Members (from all political groups) are keen to know the outcome of the legal matters and as soon as this has been considered by Counsel and discussed with the third parties concerned the information you seek must be held in confidence."
 - "Disclosure of the facts as known would be likely to prejudice the commercial interests of the Council and third parties at this time"
 - "No precise figures are as yet available for disclosure and any speculative draft figures the subject of potential legal proceedings should be withheld in accordance with section 22(1)(c)."
9. SSDC was therefore relying on the following exemptions:
 - section 22 – Information intended for future publication
 - section 42 - Legal professional privilege
 - section 43 - Commercial interests

The exemptions are detailed in the Legal Annex attached to this Decision Notice.

10. The public interest test was applied and SSDC found that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
11. The complainant did not accept the explanation of SSDC. On the 4th December 2005, the complainant requested that the Commissioner investigate the validity of the public authorities decision to refuse him access to the information that he had requested.
12. Correspondence then passed between the Commissioner and the parties with the result that on the 6 February 2006, information was disclosed to the complainant. The disclosure left only the third question of his request outstanding, which the complainant agreed with the Commissioner in his email of the 15 February 2006.
13. It is therefore agreed that the only outstanding information is the projected expenditures compared to the budgets for both the Ludlow Eco Business Park and the Craven Arms Gateway Projects.

The Investigation

Scope of the case

14. On 4 December 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. After further information had been disclosed to the complainant as detailed at paragraph 12 above, the complainant specifically asked the Commissioner to consider SSDC's failure to supply him with the information detailed at paragraph 13 above ("the budgetary information").
15. The complainant advised the Commissioner that he does not accept the explanation of SSDC. He argues that the information is ongoing in nature and should be readily available on request. He also believes it is not confidential information as it is normal for any project to give expected costs to an accuracy of plus or minus 10%. He argues that to give a single figure would make it impossible to identify individual component parts and consequently, potential legal action should not in itself stop the overall projected costs for the projects being released.

Chronology of the case

16. In order to investigate whether SSDC had correctly applied the exemptions the Commissioner made various enquiries of them.
17. SSDC has provided the Commissioner with a number of explanations concerning the withholding of the information. The Commissioner was not satisfied with the

various responses of SSDC and therefore asked SSDC to confirm its views which it did on 2 June 2006.

18. The Commissioner summarises SSD's views at that time as follows:

- In respect of the Eco Park, budgeted figures remained as the original estimate. As the original estimate was publicly available, that information was in the public domain. Negotiations were ongoing and the final costs were not known therefore no other information existed at the time.
- In relation to the Auction Yard, any figures published would be misleading as SSDC could not assess certain costs as some of the amounts were disputed and there was some additional work still to be completed. SSDC felt that if, during their negotiations, they were to publish unfinalised figures it could cause adverse publicity and prejudice the council's chances of obtaining additional funding from external sources which in turn would put other schemes in jeopardy. That would be on the basis that any shortfall would need to be met from within the existing committed Capital Programme agreed by SSDC as part of the budget process. SSDC believed that if it was a private business, figures in dispute with contractors would not be released until negotiations had been concluded or at least considered by an arbitrator. It had not budgeted for any more at that stage than what had already been paid to contractors' pending the outcome of a committee meeting.
- The Commissioner notes that SSDC also provided to him a number of spreadsheets incorporating financial information. No explanation of the information within the spreadsheets was provided.

19. The Commissioner was not satisfied with that response as it was not clear

- what information SSDC held,
- whether there was information which closely matched the information the complainant requested,
- what exemptions SSDC were relying on to withhold the information,
- whether those exemptions were engaged and if so,
- whether the public interest test had been properly applied.

20. The Commissioner therefore contacted SSDC again in a letter dated 18 July 2006 which outlined his concerns and requested an explanation. SSDC provided its response on the 1 August 2006 and the Commissioner bases his findings upon that response and earlier advice provided.

Findings of the case

21. The Commissioner is now satisfied that SSDC holds information which resembles the complainants request and he identifies the information on projected expenditure as between a) the original budget and b) the worse case scenario figure for each project as known at the time of the request.

22. Whilst the Commissioner accepts that those figures may require an explanation and as speculative amounts should be treated with caution, there is nothing within the Act that prevents SSDC from providing such explanation - that is not a reason for finding that the information is not available for disclosure. The Commissioner also accepts SSDC's explanation that it does not hold budgetary information based on a realistic assessment of likely total payments.
23. The Commissioner notes that SSDC contends that it has been forced by him to "calculate a speculative best guess estimate at two worst case scenarios" in relation to the projects in question. The Commissioner does not accept those views. The Commissioner is seeking only to secure the release of the information actually held at the time of the request that relates to potential costs for the two projects. The Commissioner also refers SSDC to their duties under section 16 of the Act which requires a public authority to provide advice and assistance.

Analysis

24. Having satisfied himself that SSDC holds the requested information, the Commissioner must then consider whether the information is exempt from disclosure as claimed by SSDC. The Commissioner has therefore reviewed each exemption claimed to assess whether it is engaged and then if appropriate, whether the public interest test has been properly applied.

Exemptions

Section 22

25. The Commissioner considers that by withholding the information until it is finalised (ie contract prices agreed), SSDC is not displaying an intention to publish the requested information in the future - once negotiations have been completed and a price agreed, the information is no longer *projected* expenditure but *final* expenditure. In this particular situation, the Commissioner does not accept that it is reasonable to withhold information because it is being finalised.
26. Consequently, the Commissioner does not accept that SSDC has an intention to publish the information it currently holds in the future and thus the exemption is not engaged. There is no need to consider the public interest test.

Section 42

27. The Commissioner finds that whilst SSDC may be seeking legal advice concerning the information, the information itself is not subject to legal professional privilege. The information is not a communication between SSDC and its lawyers; it doesn't consist of confidential communications made for the purpose of obtaining or providing legal advice and in fact, existed before legal advice was sought. The information was not created in contemplation of litigation.

28. Consequently, the Commissioner finds that the exemption is not engaged. There is no need to consider the public interest test.

Section 43

29. The Commissioner notes that SSDC accepts that no individual agency/contractor would be able to assess the amount it is holding against each agency/contractor's particular claim for payment if budgetary information is disclosed in total cost terms. Adverse comment in the media about SSDC's ability to manage its finances is insufficient to establish that disclosing the information would be prejudicial to SSDC's commercial interests by adversely affecting its negotiating power. Consequently, the Commissioner is not satisfied that SSDC have demonstrated that prejudice will or will be likely to be caused to its or a third parties commercial interests. That potential prejudice can and has been avoided by providing a figure for the *total* projected expenditure rather than providing a series of figures for different elements of each project.
30. As the Commissioner is not satisfied that disclosure of the information would prejudice any parties' commercial interests, the exemption is not engaged and there is no need to consider the public interest test.

The Decision

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

Section 1(1) – in that it failed to communicate to the complainant such of the information specified in his request as did not fall within any of the absolute exemptions from the right of access nor within any of the qualified exemptions under which the consideration of the public interest in accordance with section 2 would authorise the Public Authority to refuse access

Section 16 – in that it failed to offer the complainant advice and assistance in accordance with its duty under this section by identifying the information it had most closely matching the complainants request and by extracting that information for him.

Steps Required

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

Disclose the following information to the complainant:-

The projected expenditures for the Ludlow Eco Business Park and the Craven Arms Gateway Projects on a "worse case scenario" as identified by the Public

Authority in its letter to the Commissioner dated 1 August 2006. The Commissioner directs that if the Public Authority wishes to provide an explanation of the assumptions on which the information is based, it may do so.

33. The public authority must take the steps required by this notice within 35 calendar days from the date of this notice.
34. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act, and may be dealt with as a contempt of court.

Right of Appeal

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

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

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

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 17th day of August 2006

Signed

**Phil Boyd
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 22(1) provides that –

“(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).”

Section 42(1) provides that –

“(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information”.

Section 43 provides that –

“(1) Information is exempt information if it constitutes a trade secret.

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