

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 3 September 2009**

**Public Authority:** Wycombe District Council  
**Address:** Queen Victoria Road  
High Wycombe  
HP11 1BB

### Summary

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The complainant made a number of requests for information, about the decision making process at the public authority, in relation to the criteria it used in its assessment of accounts to rule out potential bidders from the tendering process in relation to a specific contract. The public authority provided some information and indicated that it believed that it held no further relevant recorded information. The Commissioner attempted an informal resolution and as a result of it, the complainant indicated that she wanted a formal decision in relation to two of the original requests. The Commissioner has determined that the public authority was correct on the balance of probabilities that it did not hold any recorded information for those two requests. It therefore complied with section 1(1)(b). He did however find breaches of section 1(1)(a) and 10(1) as the public authority failed to issue a notice denying that it held relevant recorded information in relation to the two specific requests that the Commissioner considered. The Commissioner requires no remedial steps to be taken in this case.

### The Commissioner's Role

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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

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2. The complainant represents a company who wanted to be invited to tender for the contract of management of the leisure facilities for Wycombe District.

3. The company failed to be selected for the Invitation To Tender (ITT) process by the public authority because it failed to progress through its initial Pre Qualification Questionnaire (PQQ) stage.
4. In the PQQ process a questionnaire is filled in by the Council in reference to each contractor to see if it is to be invited to tender. Part B of this form should contain financial information. This form specifies a number of the criteria that are expected in this area; however the Council did not use this part of the form in this instance. Instead it performed financial health checks on all organisations that expressed an interest in responding to an ITT (Invitation to Tender). This financial check is performed for 2 main reasons:
  1. To ensure that potential contractors are financially robust to perform the contract the Council is seeking to let for the full term of the contract.
  2. Where a contractor is not considered financially robust, to avoid unnecessary work and cost on their part in preparing a full tender bid which ultimately the Council will not be in a position to accept. This element of the evaluation is a 'Gate' which potential contractors must clear to continue in the tender process.
5. In the PQQ process that is relevant to this request the financial checks had two stages. The first stage was to send the relevant information to Equifax, a credit rating agency. If that report came back positive then the tenderer was allowed past the 'Gate' and invited to tender. Occasionally Equifax is unable to provide information. When this is the case the Council asks the relevant companies for their accounts and its financial department assesses them manually to see if it believes that the company is in robust enough shape to be allowed through the 'Gate'.
6. The Commissioner has looked at the Equifax report and can confirm that there is no relevant information on it in relation to the specified company in this case.
7. The information requests in this case came about because a company had their accounts assessed and the verdict was that the Council did not believe that it was robust enough to enter the tendering process. The complainant wants to be able to understand why this was so and does not believe that she has received all the recorded information held in this regard.
8. The complainant made ten separate requests for information between 26 August 2008 and 8 January 2009. The objective of all of these requests for information was to understand the rationale of the public authority's decision and to establish whether or not the company had been treated fairly.
9. Between 19 May 2009 and 12 August 2009, the Commissioner attempted to negotiate an informal resolution to the complaint. As a result of this attempted informal resolution the complainant withdrew eight of her original requests and asked for the Commissioner to make a formal decision in relation to one full request and one part of another. For the sake of clarity, the Commissioner has only included those requests on which he has made a decision in this Notice.

## The Request

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10. On 24 September 2008 the complainant requested amongst other things the following information [this will be referred to as 'Request 1' for the remainder of this notice]:

*'Regarding the financial check:*

*You did not include any specific criteria used to assess the set of accounts provided at your request especially the requirement/ criterion relating to pension liabilities.'*

11. On 6 October 2008 the complainant made the following request for information ['Request 2']:

*'Can I ask you though please to be clearer on the matter relating to criteria for assessing financial performance or status. You state in your email below that you had not provided such criteria because it is not contained in any recorded format. Please can you clarify what this means – does it mean you had the criteria at the time, but you no longer have them, or that they were not written down at the time. If the latter, presumably you would be able to reproduce the criteria and have them written down? If I have misunderstood and it means something else perhaps you could elaborate. It would be helpful to know exactly what is meant by your statement before we are able to decide whether to contact the complaints officer.'*

12. On 9 October 2008 the public authority responded to the request dated 6 October 2008 and stated:

*'Unfortunately we cannot answer you query and ask you to log this as a complaint if you wish to secure a response.'*

13. On 31 October 2008 the public authority provided a relevant explanation in response to another information request that has been replicated below:

*'1. Within the pre-qualification questionnaire, the Council seeks financial information from the prospective contractors in order that a financial assessment can be carried out. The purpose of such an assessment is to determine whether the company is a viable concern to carry out the contract. Whilst the Council does not have any proscribed score criteria, the financial assessment considers a range of parameters as set out in the documentation [this corresponds to the PQQ form and the information that gets sent to Equifax].*

*At the end of the PQQ, it states 'the information it contains will be... Used for the purpose of determining your suitability for meeting our generation requests for the provision [of] the services'*

...

*'2. No reference was made to specific criteria within the PQQ although the assessment included standard accounting processes to determine the viability of the company and included categories of relevant financial information as mentioned in 1 above.'*

14. On 19 November 2008 the public authority provided another partial explanation in response to another information request that has been replicated below:

*'Reviewing my email there is a difference of opinion as to the validity of our approach to the PQQ assessment. Your view is that it is only valid for a financial assessment to be pass/fail if there are a series of yes/no questions. Our view and approach is as identified in our previous letters, which is to take a view based on a review of the accounts as a whole.'*

*'This approach increases the likelihood of a company being included if there are unusual circumstances than if a strict yes/no approach is taken.'*

15. On 16 January 2009 the public authority confirmed to the complainant that it had provided all the recorded information that it held, which related to its decision to not include the company in the ITT process.

## The Investigation

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### Chronology

16. On 6 March 2009 the public authority informed the Commissioner that it was aware of the case and was locating the relevant documentation to send to the Commissioner. On 15 May 2009 the Commissioner called the public authority to ask it about its progress. It informed the Commissioner that it had collated all the correspondence and did not believe it was withholding any relevant information in this case. It informed the Commissioner that if an informal resolution could be negotiated then it would try to help.
17. On 19 May 2009 the Commissioner wrote to the complainant. In this email he presented a grid of all the requests that had been submitted to him and informed her of his understanding about how they have been responded to. He also identified three essential elements that embraced a numbers of the requests and he proposed to investigate whether information was held for these three elements as a potential informal resolution to this case.
18. On 2 June 2009 the complainant responded to the Commissioner's email. She informed the Commissioner that at this stage she was happy that the Commissioner investigated the three elements as a potential informal resolution. She also provided detailed comments about why she felt that the position of the public authority was not correct. She also provided the Commissioner with a copy of the PQQ framework and some information that she had received previously as a result of a separate complaint to the Local Government Ombudsman. This

information consisted of the submission that was sent to the Head of Finance about why the company would not be invited to tender in this instance.

19. On 8 June 2009 the Commissioner confirmed with the complainant that he would take the proposed informal resolution forward and that he would now write to the public authority. The complainant replied accepting these developments on the same day.
20. On 10 June 2009 the Commissioner wrote a detailed opening letter to the public authority. He explained that he was taking the informal resolution forward at this stage and that he would ask detailed questions about its position in order to establish whether there was further information held that was relevant to it. He also asked about the Equifax report and to be provided with a full copy of it.
21. On 14 July 2009 the Commissioner received a response to his detailed enquiries. On 16 July 2009 the Commissioner reported his findings to the complainant. He explained the questions he had asked and the responses he had received. He asked if given the investigation so far the complainant was satisfied with the expanded explanations.
22. On 11 August 2009 the complainant emailed the Commissioner. She informed the Commissioner that she was not happy with the response obtained with regard to two of the elements of the informal resolution and that she wished for the Commissioner to continue investigating the case.
23. On 13 August 2009 the Commissioner had a detailed telephone conversation with the complainant. He wanted to understand the differences between what she had said would accept as an informal resolution and what she had received. The result was that the complainant explained that her position that she believed there was further recorded information held about the manual assessment of accounts and she would inform the Commissioner of which of her original requests she would require him to take forward.
24. On 18 August 2009 the Commissioner received an email from the complainant explaining the two requests that she wanted to take forward and the reasons why she believed she had not received all the recorded information about the manual assessment of the accounts that was held. These reasons were based on her belief that there was no possibility of such an important decision being made without criteria. Later on the same day the Commissioner confirmed the scope of his investigation and how this case would progress.

### **Scope of the case**

25. On 27 February 2009 the complainant contacted the Commissioner to complain about the way her requests for information had been handled. The complainant explained the background of the requests and confirmed that she felt that there was recorded information outstanding that had not been provided to her.
26. As detailed above, as a result of attempted informal resolution the complainant withdrew eight of her original requests and asked for the Commissioner to make a

formal decision in relation to one full request and one part of another. For the sake of clarity, the Commissioner has only included those requests on which he has made a decision in this Notice.

27. The complainant informed the Commissioner that these requests were selected because she believes that in order to undertake a manual accounts review even of just one company, she finds it unbelievable that the people involved did not make any notes, or compile a spreadsheet or put pen to paper in any way. The Commissioner has therefore, in relation to request 2, investigated whether any recorded information is held in relation to considering the specific company's financial status in the second stage of the financial check process (the stage after the Equifax report failed to assist). He has also investigated whether any recorded information is held in relation to Request 1.
28. On 17 August 2009 the complainant agreed that the Commissioner should only focus this investigation on the information detailed in the paragraph above.

## Analysis

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### Substantive Procedural Matters

*Is further relevant recorded information held?*

29. An important initial point to make is that the Commissioner is limited to considering whether or not recorded information exists at the time of the requests for information. This is the only information that a public authority is obliged to provide. This is made clear in section 1(4) of the Act.
30. In investigating cases involving a disagreement as to whether or not information is in fact held by a public authority, the Commissioner has been guided by the approach adopted by the Information Tribunal in the case of *Linda Bromley & Others and Information Commissioner v Environment Agency (EA/2006/0072)*. In this case the Tribunal indicated that the test for establishing whether information was held by a public authority was not certainty, but rather whether on a balance of probabilities, the information is held.
31. The Commissioner made detailed enquiries of the public authority on 10 June 2009. These enquiries were focussed on the process that was undertaken by the public authority to make its decision in this case.
32. To ensure clarity, the Commissioner will consider each of the outstanding requests in turn:

#### *Request 1*

33. The first request was for '*any specific criteria used to assess the set of accounts provided at your request especially the requirement/ criterion relating to pension liabilities*' [in relation to the financial check].

34. In the finding of facts section above the Commissioner has determined that accounts are only provided at the public authority's request if the Equifax check comes back inconclusive. The information concerning the Equifax check itself is therefore not relevant recorded information held in relation to this request. It is important to understand that the response dated 31 October 2008 copied above is describing the Equifax check and not the look at the accounts themselves.
35. As explained on 19 November 2008 the public authority has informed the complainant that it did not have a set of criteria when assessing the accounts, instead a member of the Council's finance team took an overall pragmatic view to see if the accounts showed that the company was in adequate financial health to perform the contract.
36. The complainant's view is that this approach was not possible. She stated that it is extremely difficult for her to believe that such a complex determination could be done without any guidelines or something similar, as such an important analysis would require a good deal of consideration and need to be defensible.
37. The Commissioner has considered these arguments and has therefore asked a number of questions to go into more detail about the nature of the process.
38. On 10 June 2009 he asked the following:  
  
*'The complainant's main interest in this case is the financial criteria used to make the decision... Does the public authority hold procedures manuals, specifications of minimums that it is looking for or any other recorded information that helps it with this decision?'*
39. The public authority responded that it did not use procedures manuals or hold specifications of minimums that it is looking for. It explained that where Equifax is unavailable it undertakes a bespoke review of the company's accounts. It explained that it did not have strict criteria as it did not wish to prejudice a company's chances of taking part in the tendering process. Its aim was to try and rule companies in rather than rule them out.
40. The Commissioner is content on the basis of this information to determine that on the balance of probabilities no specific criteria were held by the Council in this case. He therefore finds that on the balance of probabilities that the Council holds no relevant recorded information that is relevant to Request 1.

### *Request 2*

41. On 6 October 2009 the complainant made a request for information about whether information was ever held regarding the criteria used when assessing financial performance or status and for the public authority to provide an explanation about its position in this regard.
42. As explained above the Act only applies to recorded information and there is never any obligation for the public authority to generate new information such as

an explanation where it has no recorded information about the issue. The only thing that the Commissioner can therefore look for is whether the public authority has on the balance of probabilities existing recorded information that would provide the explanation requested.

43. The Commissioner is content on the balance of probabilities from his reasoning for Request 1 that the public authority never held any recorded information in relation to the criteria that it used. This is because it did not use any.
44. Given that this is the case, the Commissioner has also concluded that on the balance of probabilities there is no relevant recorded information held that would provide the explanation sought by the complainant.
45. He therefore finds that on the balance of probabilities that the Council holds no recorded information that is relevant to Request 2.

### **Procedural Requirements**

46. From examining the correspondence the Commissioner could not identify a specific response to either Request 1 or 2.
47. In failing to deny specifically for either request that it held relevant recorded information the Commissioner therefore finds two breaches of section 1(1)(a).
48. In failing to specifically deny that it held relevant recorded information within the statutory timescales [twenty working days] the Commissioner also finds two breaches of section 10(1).

### **The Decision**

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49. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
  - *The public authority does not on the balance of probabilities hold relevant recorded information for the two requests that have been considered and is therefore not obliged to provide any further information under its obligations found in section 1(1)(b).*

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- *The public authority failed to deny that it held relevant recorded information in relation to the two requests for information that the Commissioner considered, before the Commissioner's involvement and therefore breached section 1(1)(a) twice.*



- *The public authority in failing to deny that it held relevant information in relation to the two request for information that the Commissioner considered in twenty working days breached section 10(1) twice.*

## Steps Required

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50. The Commissioner requires no steps to be taken. In particular, the nature of this Decision Notice means that there are no necessary remedial steps in relation to the procedural breaches that have been identified.

## Other Matters

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51. Although it does not form part of this Notice the Commissioner wishes to mention one area that is of concern. This is that the Commissioner could not find evidence of a specific internal review for the requests that he was considering, despite numerous expressions of dissatisfaction.
52. The Commissioner appreciates that given the volume of requests received on similar themes it is likely that the Council in this case believed that its response to other requests adequately answered these requests and the overlapping nature of correspondence negated the need for a specific internal review.
53. However, the Commissioner's view is that any expression of dissatisfaction should automatically be regarded as a request for an internal review of the decision. This is in line with paragraph 38 of the Section 45 Code of Practice. . The Commissioner hopes that the public authority will ensure that an internal review procedure is in place when dealing with future requests for information.
54. The Commissioner also considers that as part of such an internal review it would have been good practice, although not a requirement of the Act, to provide the complainant with the requested explanation of why it maintained that recorded information to answer a previous request was not held.

## Right of Appeal

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55. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://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 3<sup>rd</sup> day of September 2009**

**Signed .....**

**Lisa Adshead  
Senior FOI Policy Manager**

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

## Legal Annex

### The Freedom of Information Act 2000

#### Section 1 - General right of access to information held by public authorities

(1) 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.

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

(3) 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 10 - Time for compliance with request

(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

(2) Where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

(3) If, and to the extent that—

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

...