

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 2 February 2010**

**Public Authority:** Central Bedfordshire Council  
**Address:** Priory House  
Monks Walk  
Chicksands  
Shefford  
Bedfordshire  
SG17 5TQ

### Summary

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The complainant requested specific details relating to each contract awarded to planning consultants during a two year period. The public authority responded refusing to disclose the requested information under sections 40(2) and 43(2) of the Act. As the complainant remained dissatisfied, he approached the Commissioner. During the Commissioner's investigation all but one element of the complainant's request was either resolved informally or could not be considered as part of this formal Notice. The remaining element; the value of each contract or order and the public authority's application of section 43(2) of the Act to this information was considered by the Commissioner. He decided that the public authority was incorrect to withhold this information under section 43(2) of the Act and therefore requested the public authority to disclose this information within 35 days of this Notice.

### 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's information request was made to Mid Bedfordshire District Council, which ceased to exist from 31 March 2009. All functions were transferred to Central Bedfordshire Council, including the handling of this request. It is necessary to refer to the actions of both public authorities during this Notice, Mid

Bedfordshire District Council will be referred to as 'the Council' and Central Bedfordshire Council will be referred to as 'CBS'.

## The Request

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3. The complainant contacted the Council on 16 April 2008 to request the following information:

"I hereby request, under the Freedom of Information Act, details of contracts awarded to town planning consultants during the last two years. The information should include:

- FMIS [Financial Management Information System] Order reference
- Authorising officer
- Date official order raised
- Name of consultant
- Value of order
- Type of contract e.g. fixed price/variable priced
- Confirmation that the invoice has been matched to the official order."

4. The Council responded on 19 May 2008 providing the total spent on consultants for the three main areas of consultancy during 2006/2007 and 2007/2008 and the names of the authorising officers for each area. It explained that this expenditure includes a mix of fixed rate and hourly rate contracts and all invoices are matched against the contract or order as required by the financial management system in place. Concerning the specific details relating to each contractor and the value of each contract or order, the Council refused to disclose this information citing sections 40 and 43 of the Act respectively.
5. The complainant appealed against this decision on 2 June 2008. He stated that the information disclosed was not what he requested and was of little value. In addition, he explained that he disagreed that sections 40 and 43 of the Act applied.
6. The Council responded on 13 June 2008. In respect of section 40 of the Act, it explained in more detail why it was of the view that this exemption applied. Concerning the application of section 43, the Council confirmed that it was now in the process of consulting the companies concerned and would provide a further response in due course.
7. The Council issued a further response on 16 July 2008 explaining in more detail why section 43 of the Act applied in this case.

## The Investigation

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### Scope of the case

8. On 20 August 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He stated that the information provided by the Council on 19 May 2008 was not what he requested and he disagreed with its application of sections 40 and 43 of the Act.
9. During the course of the Commissioner's investigation the following information was disclosed to the complainant:
  - The name of each consultant
  - The authorising officer
  - Confirmation that the invoice has been matched to the order

As these elements of the complainant's request were informally resolved they will not form part of this Notice.

10. The Commissioner notes that the Council first claimed that the following elements of the request were exempt from disclosure under section 40 of the Act:
  - FMIS order reference
  - Date order was raised
  - Type of contract

Following the transition to CBS, this exemption was withdrawn and CBS confirmed that had it dealt with the request from the outset these details would have been disclosed. In these circumstances the Commissioner would normally order disclosure and conclude that these elements of the request had been informally resolved (similar to those elements of the request addressed in paragraph 9). However, the Commissioner has been informed that the recorded information which contained the above details was destroyed during the transition from the Council to CBS and during the Commissioner's investigation. As the information no longer exists and the Commissioner can request no steps in order to rectify this, these elements of the request will not form part of this Notice. The issue of records management will, however, be addressed in the 'Other matters' section towards the end of this Notice.

11. One element of the complainant's request remains; the value of each order. Both the Council and CBS claimed that this information was exempt from disclosure under section 43 of the Act. The remainder of this Notice will concentrate on the application of this exemption to this information.

### Chronology

12. The Commissioner wrote to the Council on 22 September 2008 to request a copy of the withheld information.

13. The Council responded on 2 October 2008. It provided print outs from its financial management system detailing the contracts awarded during the period specified. The print outs provided the following information for each contract:

- The name of each consultant
- The value of each order
- The authorising officer

The print outs did not provide the FMIS order reference, the date the order was raised or the type of contract (whether fixed rate or variable). The Council confirmed that it had not supplied this information, as it felt it was meaningless without the name and value of each contract, which is exempt from disclosure under sections 40 and 43 of the Act.

14. The Commissioner wrote to the Council on 7 August 2009 to request further more detailed arguments in support of its application of sections 40 and 43 of the Act.

15. It was at this point that it came to the Commissioner's attention that the Council had ceased to exist. The Commissioner recommended CBS to consider the information request afresh.

16. CBS replied on 1 October 2009 outlining in more detail how it would have responded to each element of the complainant's request. CBS confirmed that it would be willing to disclose some of the information requested.

17. The Commissioner wrote to the CBS on 14 October 2009. He requested CBS to release the information it was happy to disclose and provide arguments to support the non disclosure of the remaining elements of the complainant's request.

18. CBS replied on 30 October 2009. It disclosed the name of each consultant, the authorising officer and provided written confirmation that each invoice was matched appropriately to each consultant. In respect of the FMIS reference number, the date of the order and the type of contract, CBS confirmed that this information was no longer held, as it had been destroyed following the transition. Regarding the value of each order, CBS advised that it considered this information was exempt from disclosure under section 43 of the Act.

19. The Commissioner wrote to CBS on 13 November 2009 to request some additional information.

20. CBS responded on 7 and 11 December 2009.

## Analysis

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### Section 43 – commercial interests

21 For the Commissioner to agree that section 43(2) of the Act is engaged, CBS must first demonstrate that prejudice would or would be likely to occur to the commercial interests of the Council/CBS and/or the consultants concerned. In the Information Tribunal hearing of *Hogan v The Information Commissioner and Oxford City Council (EA/2005/0030)* ('Hogan') the tribunal stated that:

"The application of the 'prejudice test' should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption... Second, the nature of 'prejudice' being claimed must be considered... A third step for the decision-maker concerns the likelihood of occurrence of prejudice."

22. When considering the nature of the prejudice, the tribunal stated in the hearing of Hogan that:

"An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thoroton has stated "real, actual or of substance" (Hansard HL (VOL. 162, April 20, 2000, col.827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected."

23. As stated above in paragraph 21, the third step of the prejudice test is to consider the likelihood of occurrence of the prejudice claimed. The Commissioner notes that there are two limbs to this test; "would be likely to prejudice" and "would prejudice". The first limb of the test places a lesser evidential burden on the public authority to discharge. "Would be likely to prejudice" was considered in the Information Tribunal hearing of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*. The tribunal stated that:

"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk".

24. The second limb of the test "would prejudice" places a much stronger evidential burden on the public authority to discharge. Whilst it would not be possible to prove that prejudice would occur beyond any doubt whatsoever, it is the Commissioner's view that prejudice must be at least more probable than not.

25. Once the prejudice test is satisfied, the Council needs to apply the public interest weighing up the arguments for and against disclosure.

### The value of each order

26. As it has been explained previously, the Council responded to this request detailing its reasons for the application of section 43(2) of the Act prior to the

transition to CBS. CBS continued to rely on these arguments when it took over the handling of this complaint following the transition.

27. In its correspondence to the complainant, the Council confirmed that it undertook a consultation exercise with the planning consultants concerned to establish whether there would be any objection to the disclosure of this information. It advised that the majority of consultants objected on the grounds that disclosure would prejudice their commercial interests. The Council explained that the consultants were concerned that disclosure would enable their competitors to undercut them in future competitive exercises with this and other public authorities which would in turn distort the proper competition for contracts.
28. The Council stated that on balance the information regarding the value of each contract in respect of the services provided by each respective planning consultant is commercially sensitive, as the price of the service is an important factor when assessing tenders. It therefore felt that disclosure may prejudice the commercial interests of the consultants concerned if they were unable to compete fairly in what is a competitive environment. The Council also stated that its own interests may also be prejudiced if the number of planning consultants available to tender for contracts is reduced. It explained that there is already a limited number of consultants available to undertake the type of work required by the Council and there has been occasions where a contract has been put out to tender and there has been no response.
29. During his investigation the Commissioner asked CBS to expand on the above arguments and explain in more detail exactly how disclosure would or would be likely to prejudice the commercial interests of the Council/CBS and the consultants concerned. CBS responded that it could not provide any further in depth reasoning as to why section 43(2) of the Act had been applied by the Council prior to the transition. When requested by the Commissioner to consider afresh whether it felt section 43(2) of the Act applied, CBS reiterated the above arguments. In addition, CBS raised a fresh argument. It stated that it also felt disclosure could lead to legal action being taken against CBS for breach of contract or causing financial harm. Such action would cost CBS both time and resources, which would not benefit the public.
30. Despite being requested to explain which of the two limbs of prejudice CBS is claiming (as described in paragraphs 23 and 24 above), it has failed to do so. As it is difficult to establish from the responses received whether CBS is claiming that disclosure “would” or “would be likely to” prejudice the commercial interests of the Council/CBS and the consultants concerned, the Commissioner will consider the lower threshold; “would be likely to prejudice”. If this threshold is not met it follows that the higher threshold of “would prejudice” would not be met either.
31. Firstly, it is important to point out that whilst the majority of consultants may have objected to the disclosure of this information, this fact alone is not sufficient to engage this exemption. The Commissioner would expect the consultants to still demonstrate exactly how disclosure would be likely to prejudice their commercial interests.

32. The Commissioner notes that the requested information is the total value of each contract once it has been awarded. It is not a detailed breakdown of the pricing structure submitted by each consultant. It is the Commissioner's view that although some contracts may be similar in nature, they will not all be exactly the same and different factors will be taken into account when pricing and awarding future contracts. Pricing structures are also not static values; they fluctuate with market conditions and resources available. Even if contracts are re-tendered some time in the future it does not necessarily follow that the same value will be achieved. Requirements change and costs fluctuate. The Commissioner does not therefore accept that disclosure would be likely to prevent the contractors concerned being able to compete fairly in the future for other contracts. CBS has been given the opportunity to elaborate further on this argument but it has failed to do so.
33. The contractors that objected to disclosure also stated that they felt disclosure would be likely to enable their competitors to undercut them in future contracts. Again the Commissioner is not persuaded by this argument and CBS and/or the contractors concerned have failed to demonstrate exactly how and to what extent disclosure would be likely to have such an effect. As stated above, the requested information is the total value of the contract; it is not a detailed breakdown of the contractor's pricing structure. The requested information provides no indication of the profit margins to be realised by each consultant. Future contracts will invariably be different in nature requiring a fresh analysis of costs and the costs of materials and/or resources fluctuate with market conditions.
34. It is the Commissioner's view that external companies wishing to tender for public sector contracts should by now be aware that public authorities are subject to the Act, are open to public scrutiny and expect some types of information they submit in conjunction with these contracts to be disclosed to the general public, particularly where this information concerns the generation or utilisation of public funds. There is a strong public interest in how public money is spent and ensuring that public authorities are achieving the best price for work that is outsourced to external companies.
35. Concerning CBS's own commercial interests, the Commissioner does not agree that the disclosure of this information would be likely to lead to a reduction in the number of external companies wishing to tender for business. As stated above, the Commissioner does not accept that the requested information is commercially sensitive or that disclosure would be likely to prejudice a consultant's commercial interests. He also notes that public sector contracts are a lucrative and valuable source of revenue for external companies and for this reason external companies will continue to bid for future work.
36. CBS has stated that on one occasion it received no bids for one particular contract. The Commissioner has not been furnished with the details of this particular tender or been provided with any further details and so he is unable to comment on the reasons why no bids were submitted. It is likely that there a number of possible reasons why no bids were received and the Commissioner notes that CBS has not argued that it was due to the fear of disclosure.

37. CBS has argued that disclosure could possibly lead to legal action against it by the consultants concerned for breach of contract or causing financial harm. As the Commissioner does not agree that the requested information is commercially sensitive or that disclosure would be likely to be prejudicial, he does not accept that any claim could be brought against CBS for financial harm. Concerning the possible breaches of contract, the Commissioner notes that not all the consultants concerned have a formal contract with CBS. For those consultants that do, the Commissioner has not to date been furnished with any evidence that confidentiality clauses concerning this specific information exist. It is important to note that this fact alone would not automatically prevent disclosure. If it did, this would mean that public authorities could contract out of the requirements of the Act.
38. It is the Commissioner's view that CBS has not to date submitted any convincing arguments that demonstrate how disclosure in this case would be likely to prejudice the commercial interests of the consultants concerned or the public authority itself. For this reason, the Commissioner has concluded that section 43(2) of the Act is not engaged.
39. As he has concluded that section 43(2) of the Act is not engaged in this case, there is no need for the Commissioner to go on and consider the public interest test.

### **Procedural Requirements**

40. Although the Council stated the specific exemption it wished to rely on in the Refusal Notice it issued on 19 May 2008, it failed to outline which of the three subsections to this exemption was being applied. The Commissioner has therefore concluded that the Council was in breach of section 17(1)(b) of the Act.

### **The Decision**

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41. The Commissioner's decision is that the Council and CBS did not deal with the request for information in accordance with the Act for the following reasons:
- The Council failed to cite the relevant subsection of section 43 of the Act in its Refusal Notice and therefore breached section 17(1)(b) of the Act.
  - Both the Council and CBS incorrectly relied upon section 43(2) of the Act for the non disclosure of the requested information.

### **Steps Required**

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42. The Commissioner requires CBS to take the following steps to ensure compliance with the Act within 35 days of the receipt of this Notice:



- For each of the contracts awarded to town planning consultants between April 2006 and April 2008, CBS should release the value of that contract or order.

## Failure to comply

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43. 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

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44. Although it does not form part of this Decision Notice the Commissioner wishes to highlight the following concerns.
45. At the time the request was received, the November 2002 version of the section 46 Code of Practice (the "section 46 code") was in use. Part 9 of the section 46 code stipulates that records should be destroyed in line with clear policies. In particular, it recommends that public authorities delay the destruction of any information requested under the Act until the information is disclosed or until FOI appeals are exhausted. It is clear, in this case, that some of the information was destroyed prematurely and not in accordance with this code. Some of the information was destroyed whilst the Commissioner's investigation was on going and at a time when there was still a reasonable prospect that the information could be the subject of an appeal.
46. On 16 July 2009 the section 46 code was revised and reissued<sup>1</sup>. Section 12 of the reissued section 46 code provides recommendations regarding to the disposal of records. The Commissioner recommends that CBS refers to the section 46 code and reviews its current records management policy to ensure appropriate procedures are in place for the retention and disposal of records.

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<sup>1</sup> The reissued version of the section 46 code is available online here:  
<http://www.justice.gov.uk/guidance/docs/foi-section-46-code-of-practice.pdf>

## Right of Appeal

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47. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

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 2nd day of February 2010**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

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

## Legal Annex

### Freedom of Information Act

#### 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 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 40(2)

Provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

#### Section 40(3)

Provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or

- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

#### Section 40(4)

Provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

#### 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).”