



Freedom of Information Act 2000 (Section 50)

Decision Notice Date 7 August 2006

Public Authority: Exeter City Council

Address: 3.18
Civic Centre
Paris Street
Exeter
Devon
EX1 1JN

Summary Decision and Action Required

The decision of the Information Commissioner (the "Commissioner") in this matter is that Exeter City Council, (the "Council") did not deal with a request for information made by the Complainant in accordance with Section 1 of The Freedom of Information Act 2000.

Action Required:

The Commissioner requires that the Council shall disclose the requested information to the Complainant within 30 days of the receipt of this notice.

1. Section 50(1) Application for a Decision
 - 1.1 The Information Commissioner (the 'Commissioner') has received an application for a decision whether, in any specified respect, the Complainant's request for information made to the Public Authority has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 (the 'Act').
2. The Complaint
 - 2.1 The Complainant made a request from Exeter City Council under section 1 of the Act on the 3 January 2005. His request was for the following information:

- a. the exact terms of the transfer of land, or the tenancy agreement, etc or any other conditions upon which, if the above application is to be approved, the fire service will be using the land.*
- b. The price that Exeter City Council is intending to be paid for the land, or the amount of rent that will be charged for the period of tenure by the Fire Service.*
- c. The exact basis of the evaluation of the land price or rent which relates to the purchase price for the Fire Service, or rent that the Fire Service will pay, and the category – i.e. If based on commercial rates land unsuitable for development, etc. “*
- d. The basis of the City Council’s view that the current Howell Road Fire Station is unsuitable for that area.*

The Council responded on the 7 January refusing the request under section 43 of the Act on the grounds that the information it holds is commercially sensitive and that disclosure would be prejudicial to its and the Fire Service’s commercial interests, particularly due to the fact that negotiations towards agreement on the land are still ongoing between parties.

The Complainant wrote back to the Council on the 21 January 2005 stating that he was not happy with its response. The Council reiterated its reasons for not disclosing the information, and provided the Complainant with details of its internal review procedure.

The Complainant invoked the internal complaints procedure on the 8 April, and the Council responded by again refusing the request for the same reasons on the 29 April 2005. In his letter the Complainant also brought up the possibility that the information should be released under the Environmental Information Regulations 2004, (the “EIR”). The Council however responded by stating that it did not believe that the Regulations were relevant to the considerations in this case, and that, in any event, the information would still be excepted from disclosure under the EIR.

3. The Complainant therefore alleges that the Council has failed to disclose the information requested to him as required by s.1 of the Act, and that it has incorrectly applied the exemption for commercial interests in section 43 of the Act.
4. The Duty of the Commissioner under section 50
- 4.1 Under section 50(2) of the Act, where a Complainant has made an application for a decision under section 50(1), unless:

- a Complainant has failed to exhaust an internal complaints procedure, or
- the complaint is frivolous or vexatious, or
- the complaint has been subject to undue delay, or
- the complaint has been withdrawn,

the Commissioner is under a duty to make a decision as to whether the Complainant's request has been dealt with in accordance with the requirements of Part I of the Act.

- 4.2 Under section 50(3) of the Act the Commissioner shall either notify the Complainant that he has not made a decision or shall serve a notice of his decision on both the Complainant and the public authority.

The Relevant Provisions

The Freedom of Information Act 2000

Commercial interests.

43. - (1) Information is exempt information if it constitutes a trade secret.
- (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
- (3) 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).

Local Government Act 1972

Disposal of Land by Principal Councils

123. - (1) *Subject to the following provisions of this section, a principal council may dispose of land held by them in any manner they wish.*
- (2) *Except with the consent of the Secretary of State, a council shall not dispose of land under this section, otherwise than by way of a short tenancy, for a consideration less than the best that can reasonably be obtained.*

5. Consideration of the case

5.1. The requested information relates to the disposal of land by the Council at Bonhay Road, Exeter. Nominal planning permission currently exists on the land

for the purpose of building of a fire station. Final planning permission has however not yet been granted by the Council. In the interim period negotiations have been taking place between the Council and the Fire Service to come to an agreement over the land.

The Complainant is seeking information about the terms of the disposal of the land and of the value at which this is proposed to take place. The Council has confirmed that it holds the information; however it has refused the Complainant access to it on the grounds that negotiations are currently still taking place and that disclosure at this time would damage the commercial environment in which the agreement is being negotiated. The Council also believes that disclosure of the requested information at this time would generally affect third parties' confidence in doing business with it.

5.2. Both the Council and the Fire Service agree that disclosure may affect their ability to renegotiate the contract at a later point in time. Given that both parties to the agreement are aware of its current terms, and of the fact that a renegotiation is possible, the Commissioner considers that the ability to renegotiate the agreement at a later point in time will not be significantly damaged by the disclosure of the information. Neither base negotiation terms, nor any future aspirational terms are included within the information. Hence no planned terms, held for the purposes of instigating a future renegotiation attempt, would be released by its disclosure. A disclosure of information known to both parties at this time will not therefore shift the commercial balance between the parties to one side or the other.

5.3. The Council further argues that as negotiation remains ongoing, a disclosure of the information at this point may affect the commercial environment in which negotiation is being carried out. Facts and figures regarding the proposed agreement may be published in the local press in spite of the fact that the agreement is "draft". The Council argues publishing the terms at this time could prevent further changes occurring to the working terms and figures currently in the agreement. The agreement may therefore effectively be sealed by this disclosure, or the entire agreement may collapse if any party finds that it is unable to renegotiate particular sections at a later point in the negotiations. The Commissioner does not consider that this is a strong argument given that it is open to both parties to clarify the fact that the terms held are still draft and open to renegotiation at any time; that they are subject to change.

5.4. The Council also argues that disclosure at this time may cause businesses to lose confidence in doing business with it. Given that both parties to this negotiation are public authorities subject to FOI, and that restrictions apply to the disposal and development of the site, the Commissioner does not consider that any general precedent could be inferred from a decision to disclose in this instance. It is also noted that businesses wishing to contract with authorities may, in general, benefit from the information access rights. Greater access rights to

agreements and tendering information may produce a better understanding of contract terms which have been successful in the past. This could benefit the Council, and ultimately tax payers, in that businesses may amend their practices or suggested terms in order to be more competitive given their knowledge of previous terms or tenders. The Commissioner does not therefore accept the argument that information should be withheld from disclosure solely on the basis that to do otherwise could damage business confidence in tendering or negotiating contracts with public authorities.

5.5. The Fire Service has argued that should the proposed agreement fall through, details of the draft agreement may prejudice any negotiation it undertakes with third parties for the same purposes. Terms and conditions it was willing to accept in the current agreement may not necessarily be appropriate for any subsequent negotiations. Should the Fire Service initiate negotiations with any other party the Commissioner's view is that the situation and circumstances surrounding such a negotiation are likely to be very different to the current situation. This is particularly so given the fact that the land is "open land", (and hence the opportunities for development restricted), and also given the fact that the other party in this negotiation is the Council.

The Commissioner does not therefore accept that the Council has demonstrated a likelihood of prejudice should this information be disclosed. The Commissioner therefore considers that section 43 is not applicable to the information requested.

5.6. Section 43 is a qualified exemption and requires that a public interest test is carried out in order to decide whether or not the information should be provided where the exemption is engaged. The test is whether the public interest in disclosing the information outweighs the public interest in maintaining the exemption. Although the Commissioner's decision in this case is that the exemption in section 43 is not engaged, he believes that the counter arguments are strong, and considers the arguments on both sides finely balanced. Because of this he has also considered the public interest test.

The Public Interest Test

5.7. The public interest arguments in this case revolve around whether the public accountability in the spending of public money, the proper disposal of open land, and the accountability of the Council in seeking to agree terms to develop open land should override any commercial prejudice which would be caused by the disclosure of the information.

There is a strong public interest in allowing a local authority to manage its assets effectively and to enter into agreements for the benefit of the local community. There is also a strong public interest in allowing the scrutiny of the authority in its actions, and in it being accountable for the actions it takes in pursuance of its functions. However it is also recognised that allowing scrutiny of an authority's

actions can in itself be detrimental to the management of those functions. These factors are discussed further below.

The public interest against the disclosure of the information in this case lies in the ability of public authorities to be able to negotiate commercial agreements free from intervention, where third party involvement could damage their ability to carry out business deals and negotiations effectively, contrary to the interests of the taxpayer and the local community.

5.8. Terms may become sealed.

The Council has suggested that a disclosure of the information at this stage may effectively seal the terms of the agreement as it currently stands and prevent further negotiations from continuing. This could prevent the Council from obtaining best value or the best terms available, thereby taking resources away from the Council which could otherwise be used to the benefit of the local community. It has not however provided further evidence or reasons for its arguments in this respect.

For the reasons provided above, the prejudice argument is not considered to be strong given that the parties would be able to refute any suggestion that the information was complete. The Commissioner does not therefore consider that this argument outweighs the public interest in accountability and allowing the scrutiny of its actions in this instance.

5.9. Intervention by third parties

The Commissioner recognises the possibility that disclosure of the terms of a draft agreement could on some occasions lead to third parties making counter offers to one or other party. Competitors could obtain details on the intended terms of an agreement and provide an offer of better terms to one or other party prior to the conclusion of the agreement. This could lead to negotiations between parties failing where one party takes up the alternative offer, thereby wasting public money if expenditure has already been incurred in pursuance of the agreement by the authority. These funds could otherwise be used to benefit the local community elsewhere.

However the Commissioner's view is that disclosure in this instance is based specifically upon the circumstances of this case. The additional considerations required on any decision to develop the land in question in this case mean that it is unlikely that any viable alternative offers to buy or lease the land in question would occur. A decision to order disclosure in this case does not therefore mean that disclosure would be ordered in all such cases.

There is also an argument that disclosing the information may encourage open competition and ensure value for money. Interested third parties will be aware of

the intended terms and have a better understanding as to whether they are able to offer more competitive terms to the parties. This would benefit the Council if they are able to obtain a better price, or better terms, for land in the future.

5.10. Business confidence

The Council also argues that a disclosure of the information whilst negotiations are still ongoing will reduce the business community's confidence in doing business with it. This could reduce the number of businesses willing to offer tenders or terms to the Council, and the reduced competition this would entail may affect the Council's ability to obtain best value. If the Council could not get the best value possible in its business negotiations the Council would have fewer funds to use for the benefit of the local community.

On the counter side, the Commissioner considers that business would recognise the uniqueness of the situation in this case and realise that an order for disclosure here would not suggest a greater likelihood of disclosure in cases where the circumstances are very different. The Commissioner also considers it unlikely that businesses would be hesitant in tendering for potentially lucrative contracts with public authorities simply on the basis that some, non sensitive commercial information may be disclosed as a result of an FOI request.

5.11. Accountability

On the side of disclosing the information is the fact that there is a strong public interest in open and accountable local government. It is in the public interest for authorities to be open and transparent as possible when carrying out their functions in order that the public may scrutinise the actions and decisions being taken by the Council. The Commissioner does not accept that a disclosure of the intended terms and conditions in this case would be likely to cause significant prejudice to the parties' commercial interests. On the counter side disclosure would enhance the public's ability to scrutinise the actions of the Council, and provide a clear understanding of the nature of the agreement being considered. In particular, it would allow it to assess whether the land in question is being disposed of properly.

The Local Government Act 1972 allows and encourages Local Authorities to dispose of land which is surplus to its requirements. It stipulates that a local authority may dispose of such land as it wishes, providing that in doing so it seeks to obtain best value. As the site has a designation of open land there are restrictions on the ability to dispose of, or allow development upon it. The Council is under a duty to consider the best interests of the community when making a decision to dispose of the land. It must advertise the fact that it intends to dispose of the land and take into consideration any objections it receives before making a final decision. This has been carried out in this case. However where a disposal is considered for less than best value further restrictions or requirements

are placed upon the Council in some circumstances. ODPM guidance Circular 06/03 provides further restrictions where the Council are seeking to dispose of land for less than best consideration. These include a requirement for the Council to have an independent valuation of the land concerned carried out, and in some cases the consent of a Minister may be required to dispose of the land for less than best value.

The Commissioner therefore notes the value of demonstrating to the community that the Council are seeking to dispose of the land on fair and equitable terms to the tax payer– that they have considered the value and the intended use of the property properly and are seeking a fair price and fair terms for the agreement. Disclosure will also allow interested parties to consider whether the Council has properly carried out any statutory steps or duties which may be required in order to dispose of the land at the value being considered. Allowing such scrutiny will increase public confidence in the Council’s decision making, and in its financial dealings.

5.12. Conclusion.

In this case, the Commissioner’s decision is that the objections submitted by the Council and the Fire Service have not been persuasive. Therefore, his decision is that the balance of the public interest lies in favour of disclosing the information.

6. The Commissioner’s Decision

6.1 The Commissioner’s decision in this matter is that the Public Authority has not dealt with the Complainant’s request in accordance with the following requirements of Part I of the Act:

[Section 1(1) – in that it failed

to communicate to the Complainant such of the information specified in his request which 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 authorize the Public Authority to refuse access.

6.2 Action Required

In view of the matters referred to above the Commissioner gives notice that in exercise of his powers under section 50 of the Act he requires Exeter City Council to disclose copies of all information falling within the scope of the Complainants request to him within 35 days of the receipt of this notice.

7. Right of Appeal

7.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "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

7.2 Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

Dated the 7th day of August 2006

Signed

Phil Boyd
Assistant Commissioner

Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Reference: FS50080412