

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 June 2016

Public Authority: Liverpool City Council
Address: Municipal Buildings
Dale Street
Liverpool
L2 2DH

Decision (including any steps ordered)

1. The complainant requested a full copy of a 'due diligence' report created by accountants KPMG into the council's potential acquisition of Liverpool Direct Limited, a company which it jointly owned with British Telecom (BT). The council initially applied the exemption in section 36 of the Act (effective conduct of public affairs), section 43 (commercial interests) and section 41 (information provided in confidence). In the review it decided that neither section 43 nor section 41 were applicable, but maintained its position as regards the application of section 36 to withhold the information.
2. The Commissioner's decision is that the council was correct to apply section 36 to the information however the public interest in the disclosure of the information outweighs that in the exemption being maintained.
3. The Commissioner has also decided that the council did not comply with section 17 of the Act in its initial response, and its response which did meet the requirements of section 17 did not therefore comply with section 10(1) of the Act.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the information to the complainant
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 10 August 2015 the complainant wrote to the council and requested information in the following terms:

"Please provide a copy of the full due diligence report produced by KPMG in fulfillment of its engagement to provide "Financial and tax due diligence in relation to the proposed acquisition of Liverpool Direct Limited" as set out in the Schedule on pages 29-32 of the Engagement Letter you released today after being ordered to do so by the Information Commission in its Decision Notice FS50571721 on Information Request 351819.

According to KPMG's own correspondence, this report appears to have been dated 10 October 2014, but since there appears to have been some confusion about the date of the report in question, may I make clear that the actual date is secondary at this stage. However, to be clear, I am not referring to the extract dated 13 October 2014, previously disclosed by the Council. KPMG itself, in the published extract, states that "This extract forms part of a fuller Report.." So for the avoidance of doubt, please be clear that the document I am seeking is this fuller Report, produced in early October 2014."

7. The council responded on 8 September 2015 however the response simply informed the complainant of the process which had been gone through and described the information held by the council. This meets the requirement in section 1(1)(a) of the Act, however the council neither provided the information nor applied an exemption to withhold it. The council did not therefore meet the requirement for section 1(1)(b) (to communicate the information to the applicant). The complainant therefore wrote back to the council on 13 September 2015 asking it to respond as required by the Act.
8. Following further chasing letters from the complainant the council then provided its response on 19 October 2015. It withheld the information under sections 36(2)(b) (effective conduct of public affairs), 43 (commercial interests) and 41 (information provided under a duty of confidentiality).
9. Following an internal review the council wrote to the complainant on 7 March 2016. It stated that after reconsideration it had decided that neither section 41 nor 43 should be upheld. However it maintained the

application of the exemption in section 36(2)(b)(i) and (ii) and withheld the information.

Scope of the case

10. The complainant contacted the Commissioner on 26 October 2015 to complain about the way her request for information had been handled. Initially her complaint was that the council had refused the request and had not responded to the internal review request. After the council provided its response to this however the complainant asked the Commissioner to consider whether the application of section 36 was correct.
11. The Commissioner considers that that the complaint is whether the information should have been disclosed or whether the council applied the exemption appropriately.
12. The complaint also relates to the time which the council took to respond to the request and to carry out the internal review of the decision.

Is any further information held falling within the scope of the request

13. One point raised by the complainant as regards the response of the council was that she believes that a fuller single report exists which has not been provided to her. She therefore asked the council to ensure that the information it was reconsidering for disclosure was the correct information. She went on to describe the information as:

"The Council received a 'pack' of documents from KPMG on 9th October comprising that working draft 'Final report', the 'Draft red flag' paper from the first phase and the original version of the 'Issues update' document. Subsequent drafts of the 'Final report' contained some further changes as KPMG finalised their review together this set of three documents served as a full record of the work conducted by KPMG to that date and form the 'fuller report' referred to by them.

This is precisely what I am seeking, as I spelled out in my initial request, which stated: "KPMG, in the published extract, states that "This extract forms part of a fuller Report.". So for the avoidance of doubt, please be clear that the document I am seeking is this fuller Report, produced in early October 2014."

14. The Commissioner therefore asked the council to respond to this. The council confirmed that there is no 'fuller' report per se, but that KPMG is referring to initial drafts of the report and further issues reports which

were sent to the council during the course of it completing its contract, together with the initial 'red flag' report. It says that these, together form the 'fuller' report which KPMG is referring to.

15. The information which has been provided to the Commissioner and considered within this notice matches this description as well as that described by the complainant in her request. The Commissioner is therefore satisfied that the information which has been provided to him and which he considers within the notice is the information requested by the complainant.

Reasons for decision

16. Section 36(2)(b) states that information is exempt if, in the reasonable opinion of the qualified person, its disclosure would be likely to inhibit –

- (i) the free and frank provision of advice, or
- (ii) the free and frank exchange of views for the purposes of deliberation.

17. Section 36 is unique in that its application depends on the opinion of the qualified person that the inhibition envisaged would, or would be likely to occur. In determining whether the exemption was correctly engaged by the Council, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:

- Ascertain who the qualified person is,
- Establish that they gave an opinion,
- Ascertain when the opinion was given, and
- Consider whether the opinion was reasonable.

18. The council informed the Commissioner that the "qualified person" in this case the City Solicitor and Monitoring Officer to the Council. The Commissioner is satisfied that she is the appropriate qualified person for the purposes of section 36 of FOIA.

Is the opinion reasonable

19. In order for the Commissioner to determine whether the exemption at section 36(2)(b)(i) and (ii) are engaged, the Commissioner must determine whether the qualified person's opinion is a reasonable one. In doing so, he has considered all of the relevant factors including:

- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection, the opinion is unlikely to be reasonable.
 - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
 - The qualified person's knowledge of, or involvement in, the issue.
20. In determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
21. The Commissioner's guidance on section 36 (which is available at https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf) explains that information may be exempt under section 36(2)(b)(i) or (ii) if its disclosure would, or would be likely to, inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. The guidance says that the rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the public authority. The exemptions are therefore about the processes that may be inhibited rather than what is necessarily in the information itself.
22. The Council informed the Commissioner that the complainant's request was given to the qualified person to consider. It confirmed that the qualified person had access to all of the relevant information and that she gave her opinion on the 19 October 2015 after the initial request had been provided to her on 8 September 2015.
23. In her role as City Solicitor the qualified person would have had an in-depth overview of the information caught within the scope of the

request as it related to negotiations for the council to exit a multimillion pound joint venture agreement by purchasing the other parties share in the company. The aim was to successfully exit the agreement amicably via discussions and negotiations, without either party resorting to litigation.

24. The Commissioner notes that at the date of the request the 10 August 2015. The final report was dated 14 October 2014. Liverpool Direct Limited services were taken over fully by the council in 2014, with the purpose of a transitional period before bringing all services in-house by October 2015. The Commissioner also notes reports that the council issued pre tenders to cover telecoms services which would previously have been provided by BT in December 2014. The Commissioner therefore considers that the majority of issues surrounding the financial aspects of the company at the time that BT was a part owner were not therefore still 'live' at the time of the request, although some residual matters may have still been ongoing.
25. The qualified person considered the requested information and the potential effects of its disclosure. She considered that council officers need to be able to have free and frank discussions with KPMG regarding the reports that KPMG were providing to the Council. She considered that if the discussions and deliberations were made public it would have a direct impact upon the honest provision of advice on the part of council officers if they felt that this could be made public. She therefore considered that the exemption in section 36(2)(b)(i) was engaged.
26. She further considered that decision making is an important part of the function of the city council and its officers must feel free to discuss and explore difficult matters either internally or externally. She considered that any loss or freedom of this would inhibit free and frank discussions in the future.
27. She considered that the documents evidence differences between the parties to the negotiation which required free and frank exchanges in order to arrive at a resolution. She considered that if there was a full disclosure of the information it would inhibit the pragmatism which is essential in negotiations at this level in matters of such complexity. She therefore considered section 36(2)(b)(ii) was applicable.
28. The withheld information itself is not discussions per se. The report is a 'due diligence' report. It is sets of figures reporting and outlining various aspects of the financial position of Liverpool Direct Limited, together with other information which the council would need in order to properly judge whether its intention to purchase BT's share of the company and bring the company's services 'in-house' was appropriate or not. As such it provides a detailed account of the financial position of the company at

the time. The qualified person highlighted that the information was used to inform advice which offices of the council would give to decision makers about the basis of the agreement between the parties. The discussions therefore were derived from the information contained within the reports.

29. The Commissioner must take the opinion of the qualified person to be correct unless he is able to establish failings in his or her consideration of the withheld information. In this case he has established no reason to doubt that the qualified person's opinion was not reasonable. The withheld information relates to a multimillion pound contract and there had been sensitive discussions between the parties to seek to resolve issues without the need to resort to litigation. The qualified person highlighted that given the size and complexity of the situation there were many issues which needed to be addressed and resolved. Whilst these had been completed by the time of the request, the information contained within the documents sets out in great detail the financial situation of the company at the time of the report.
30. The Commissioner, having taken into account the issues considered by the qualified person, has concluded that the qualified person's opinion is reasonable in all the circumstances. He therefore considers that sections 36(2)(b)(i) and (ii) are engaged in relation to the withheld information.

Public interest test

31. As the Commissioner has decided that the exemption under section 36(2)(b) is engaged, he has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information as required by section 2 of the Act.
32. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's decision in the case of *Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC* (EA/2006/0011 and 0013).
33. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur.

34. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would, or would be likely to inhibit the free and frank provision of advice.

The public interest in maintaining the exemption

35. The central public interest in the exemption being maintained are those outlined in the arguments for the exemption being applied in the first instance, as outlined above.
36. Effectively the council argues that its officers needed to be able to have full and frank discussions with KPMG on matters surrounding the plan to take over BT's share of the contract. There is a public interest in allowing that to occur outside of the public eye in order that the arguments for and against particular actions can be considered in a full and frank manner. The Commissioner agrees with this argument, particularly where matters were still 'live' and negotiations between the parties ongoing. Additionally there is a public interest in the council being able to receive full and frank advice from KPMG (particularly in terms of the due diligence report).
37. If there is a potential for that information to be disclosed then officers (and KPMG) may be more reticent in putting some information into reports or correspondence which may subsequently become public, both from concerns that that information will be detrimental to the financial or commercial interests of the parties to the contracts, or as the council argues in this case, it would provide details on how KPMG approaches issues which it might consider to be commercially sensitive.
38. If relevant officers have these concerns, and not all of the information is subsequently included within the reports (or within correspondence) there is a risk that parties will be less informed when making important decisions which can affect the decisions they need to take.
39. The central point behind due diligence reports is to recognise and categorise the facts surrounding a decision to invest or purchase a company, with a view identifying the risks and potential outcomes from the actions open to the authority if they choose to purchase or invest.
40. The need for a full and frank report in such circumstances is therefore clearly of tantamount importance to the ultimate decision to purchase the company or not. If reports are not full and frank then due diligence will not be achieved and the potential for risks or errors in decision making becomes much greater.

41. Ultimately a less informed decision can lead the council to making ill-advised decisions which might ultimately cost taxpayers. In cases such as this that cost could be extremely high.

The public interest in the information being disclosed

42. The first point which the Commissioner notes is that there is no longer any outside involvement in the functions of Liverpool Direct Limited now that BT's share was bought from it by the council. It is now an 'in-house' service. It is worth noting however that the council entered into other agreements with other providers to provide technical services associated with the functions.
43. As stated, negotiations between the parties had been completed and the decision taken to bring the functions within the council by the time of the request. The process of moving the services back in house had begun, and may have finished by the time that the request was made (although some transitional moves may still have been in process). The financial details laid out by the reports refer to the company at the time it was part owned by BT, and prospective costs etc. once the council took over the services. The reports effectively provide a 'snapshot' of the financial situation at the time that the reports were produced in July - October 2014. This snapshot will have effectively been overtaken, and the service would be likely to look very different by the time that the request was received by the council.
44. The Commissioner also notes that there was public concern over the contract, and at various points within its history it has been reported that the council was not transparent over the details of the contract with BT and that the contract was too expensive.
45. Reports at the time of the acquisition detailed how not even the Cabinet of the council had seen the full report. The mayor described to a committee that it had to remain confidential due to the contract in place between the author's and the council, (see for instance: <http://www.liverpoolecho.co.uk/news/liverpool-news/liverpool-councils-decision-scrap-joint-8019705>). Despite this claim, no exemption relevant to this claim has been called upon to withhold the document at this time. The council withdrew its reliance upon section 41 at the review stage (as outlined above).
46. The Commissioner notes that a disclosure of the information would provide the public with a much greater understanding of the details of the project, what risks, or projected benefits the council took on when taking the decision to acquire BT's interest. This, in turn, is entirely in line with the council's clearly stated desire to be as transparent as possible about the circumstances around this particularly contentious

project. There is a public interest in this as the funds used to take over the interest (and any losses which might occur as a result of the acquisition) would directly impact upon the costs of the council and therefore resources available for frontline services.

47. Given the history, the public in Liverpool would have heightened concerns over issues surrounding Liverpool Direct, and particularly how the acquisition of BT's share in the company might affect the limited funds available to the council for its other frontline services and functions. The council declared the reason for the acquisition was to save money over the remaining period of the contract's life (which was meant to run until 2017). It argued that in taking the services in-house it would achieve savings of 10 million pounds plus over 3 years.
48. The public are not aware of the actual costs, the forecasted benefits/saving or any risks associated with the agreement other than through the council's statements over this. A disclosure of this document would provide much clearer transparency on some of these issues.

Conclusions

49. The Commissioner notes that the council arguments relate to matters from July 2014 until the service was taken over in 2015. Effectively the snapshot of data provided in the KPMG reports would no longer be current insofar as the situation had moved by the time of the request.
50. The withheld reports do not provide any details of the discussions which took place over the BT contract or the purchase of its interests'. The reports are merely a financial snapshot and forecasts as outlined above. A disclosure of the documents would not therefore provide details of the thinking which led to the purchase, or any deliberations which occurred between the parties.
51. Given that the reports date from 2014 and circumstances surrounding the provision of the service to the public has now changed the Commissioner considers any commercial sensitivity of the information would be reduced. In any event the Commissioner notes that the council did not continue to rely upon any arguments surrounding the application of sections 43 or 41 and so cannot consider these relevant to the application of section 36.
52. The Commissioner notes that the format of the information is generally financial figures – he considers that it would be difficult to exclude such details from a report and still provide 'due diligence'. Although some sections such as any highlighting 'potential risks' might be downplayed it is unlikely that such information would be excluded from reports such as this in any event; KPMG or the equivalent contractors who are providing

professional 'due diligence' advice would be producing work which, if deficient, would risk their commercial reputations. The Commissioner therefore considers the likelihood of a purposeful reduction of potentially sensitive information in the reports would be unlikely to occur in the future based upon a disclosure of this information at this time. In effect, in such reports the requirement to be full and frank in the advice provided is tied in to the very purpose behind producing a due diligence report.

53. The Commissioner therefore considers that the public interest in a disclosure of the information outweighs that in maintaining the exemption in section 36 of the Act in this case.

Section 17

54. Section 17 of the Act states that when refusing a request the authority must:

"(1) 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."

55. The Commissioner has decided that the council first response did not comply with the requirements of section 17 of the Act as it failed to specify the exemption it was relying upon or why the exemption applied.

Section 10(1)

56. Section 10 (1) provides that;

"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."

57. The complainant made her request for information to the council on 10 August 2015. The council's initial response described the information held but did not provide the information, nor did it provide any reasons for withholding the information. It did not therefore comply with the requirements of section 1(1) of the Act which states that:

"(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."

58. The council's second response was provided on 19 October 2015. This provided details of the exemptions applied by the council to withhold the information from disclosure.

59. This second request met the requirements of section 1 in that it provided details of the exemption which the council was relying upon to withhold the information. However the date on this was provided falls outside of the 20 working day period required by section 10(1) of the Act. The Commissioner has therefore decided that the council has breached section 10(1) in its response to the complainant.

Other Matters

60. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. The Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. In this case the Commissioner notes that there appeared to be no exceptional circumstances, but that the public authority failed to respond with the outcome of the review within twenty working days. Neither did the public authority respond with the outcome of the review within forty working days. The public authority should ensure that internal reviews are carried out promptly in future.

Right of appeal

61. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

62. 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.
63. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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