

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 1 August 2011

**Public Authority:** Homes and Communities Agency  
**Address:** Maple House  
149 Tottenham Court Road  
London  
W1T 7BN

### Summary

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The complainant made two freedom of information requests to the Homes and Communities Agency for details of payments made to Pinsent Masons solicitors in relation to certain appeals heard before the Land Tribunal. The public authority disclosed the total sums paid but withheld the more detailed information under the exemptions in section 42 (Legal professional privilege), section 43(1) (Trade secrets) and section 43(2) (Commercial interests). During the course of the Commissioner's investigation the public authority disclosed further information but some information continued to be withheld. The Commissioner has investigated the complaint and has found that this remaining undisclosed information is exempt under section 43(2) and that the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

### 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.

### The Request

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2. On 21 June 2010 the complainant made a freedom of information request for details of payments made by the public authority to its

solicitors Pinsent Masons in relation to certain cases heard before the Lands Tribunal. The request read as follows:

*"We request the following information in accordance with the Freedom of Information Act 2000 from the Lands Tribunal references ACQ/320/209, ACQ/310/209, ACQ/311/209 and ACQ/323/209.*

*The information requested is full details of payments made by the Homes and Communities Agency or other amalgamated parties in respect of the above said properties, and disclosing specific rates of pay as charged and the amount of legal fees paid in respect of these lands and buildings, copy invoices are requested to substantiate this request."*

3. The public authority responded to the complainant on 16 July 2010 and advised that the qualified exemption in section 43 was being applied to the request. However it said that it needed further time to consider the public interest test and that, in accordance with the Act, it was extending the 20 working day deadline for response by another 10 working days. It said that it aimed to provide a final response by 2 August 2010.
4. On 30 July 2010 the public authority contacted the complainant to say that it had yet to reach a decision on where the public interest lay in relation to the request for information and that it estimated that it would need another 5 working days to respond. It informed the complainant that it aimed to provide a final response by 9 August 2010.
5. On 6 August 2010 the public authority contacted the complainant once more to say that it still had not completed its public interest determination and that it now aimed to respond by 16 August 2010.
6. The public authority responded substantively on 11 August 2010. It provided the complainant with details of the total amount which it had paid to Pinsent Masons in respect of the Land Tribunal references quoted by the complainant. However, it said that both the copy invoices and details of the rates of pay were being withheld under the exemptions in section 43(1) (Trade secrets), section 43(2) (Commercial interests) and section 42(1) (Legal professional privilege) of the Act. The public authority explained why each of the exemptions applied and the reasons why it had concluded that the public interest in maintaining each exemption outweighed the public interest in disclosure.

7. On 6 September 2010 the complainant contacted the public authority to ask it to carry out an internal review of its handling of his request. At this point the complainant also submitted a new request to the public authority. This request read as follows:

*"Ref – Properties at Pleasley and Warsop Vale*

*We request the following information in accordance with the Freedom of Information Act 2000 in respect of the properties at the above currently under the Lands Tribunal references ACQ/320/209, ACQ/310/209, ACQ311/209 and ACQ/323/209.*

*The information requested is for details of payments made by the Medan Valley Making Places or other amalgamated partners in respect of legal fees and payments to the solicitors Pinsent Masons, in respect of the above said properties, and disclosing specific rates of pay as charged and the amount of legal fees in respect of these lands and buildings, copy invoices are requested to substantiate this request.*

*We confirm that we will pay your reasonable costs in accordance with this request and shall be pleased to receive your reply at your earliest convenience.*

*We confirm that this information is in respect of services paid by your company prior to the Lands Tribunal application after which we understand fees are to be paid by the Homes and Communities Agency."*

8. The complainant had previously submitted this request to Medan Valley Making Places, a public sector company jointly owned by the public authority, East Midlands Development Agency, Bolsover District Council and Mansfield District Council. This organisation is not subject to the Act but nevertheless informed the complainant that it had not paid any legal fees. Rather, it explained that the legal fees had been met by the Homes and Communities Agency and therefore the complainant was advised to redirect his request to the public authority.
9. The public authority acknowledged the complainant's second request on 5 October 2010 but said that as a qualified exemption applied to the requested information it needed to extend the deadline for responding in order to consider the public interest test. It explained that the exemptions which applied were section 42 and section 43 and that it aimed to respond fully by 19 October 2010.
10. The public authority presented the findings of its internal review on the first request on 19 October 2010. It now informed the complainant that

it continued to believe that each of the exemptions applied to the requested information and that the public interest favoured non-disclosure. Therefore it said that it was upholding its initial response to the request.

11. The public authority responded to the complainant's second request on the same day as its internal review of the first request, 19 October 2010. It now disclosed the total cost it had paid in fees to Pinsent Masons in relation to the properties referred to in the request, prior to the creation of the Land Tribunal references quoted by the complainant. Fees incurred since the creation of the Land Tribunal references were the subject of the complainant's first request.
12. As in its response to the first request the public authority explained that the copy invoices and the rates of pay were being withheld. The public authority again relied on section 43(1), section 43(2) and section 42 to exempt this information. The public authority explained to the complainant why each exemption was being applied and its reasons for concluding that the public interest in maintaining each exemption outweighed the public interest in disclosure.

## **The Investigation**

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### **Scope of the case**

13. On 11 November 2010 the complainant contacted the Commissioner to complain about the way their request for information had been handled. The complainant specifically asked the Commissioner to consider the public authority's decision to refuse to disclose the information they requested.
14. The Commissioner would stress that whilst the complainant has in fact made two requests to the public authority the Commissioner has decided to consider the requests together as part of a single complaint. This is because the requests are both for very similar information and the public authority's reasons for refusing to disclose the information are identical in each case.
15. The Commissioner also notes that the public authority has not completed an internal review for the second request. However, the public authority has completed an internal review in respect of the first request and given the similarity in the requests the Commissioner has decided to exercise his discretion and consider the complaint in its

entirety even though the complainant has not exhausted the public authority's internal complaints procedure for both requests.

16. During the course of the Commissioner's investigation the public authority released redacted versions of the Pinsent Mason invoices. It also withdrew its reliance on the section 43(1) and section 42 exemptions. Therefore the Commissioner has only considered whether the public authority was correct to withhold this redacted information and has focused on the public authority's application of the section 43(2) exemption.

### **Chronology**

17. The Commissioner wrote to the public authority with details of the complaint on 31 March 2011. The Commissioner asked for copies of all information falling within the scope of the complainant's requests, marked to show where any exemption was being applied. The Commissioner also questioned and challenged the public authority's application of the various exemptions.
18. The public authority responded to the Commissioner on 11 May 2011. Having considered the points made by the Commissioner in his letter the public authority now said that it no longer wished to rely on the section 43(1) and section 42 exemptions and that it had taken the decision to release redacted copies of the invoices related to both requests. It explained that the remaining withheld information consisted of the hours and hourly rates charged by Pinsent Masons, along with summary information detailing the work attributed to these costs. The public authority provided the complainant with a detailed submission explaining why this remaining information was exempt under section 43(2).
19. The public authority wrote to the complainant on the same day with copies of the information it had now decided was suitable for disclosure. The complainant subsequently confirmed to the Commissioner that he had received redacted copies of the withheld information but that he wished to pursue his complaint in respect of the remaining withheld information.

### **Findings of fact**

20. The public authority is a non-departmental public body and is the national housing and regeneration agency for England. Its responsibilities include delivering affordable housing through the affordable Homes Programme, revitalising communities affected by decline through its Land and Regeneration projects, and improving the

quality of existing social housing through schemes such as the Decent Homes Programme.

## Analysis

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21. A full text of the relevant provisions of the statutes referred to in this section is contained within the legal annex.

## Exemptions

### Section 43(2) – Commercial interests

22. The public authority has withheld from the complainant the hours and hourly rates charged by Pinsent Masons, along with summary information detailing the work attributed to these costs under the section 43(2) exemption. Section 43(2) provides that information is exempt if its disclosure would or would be likely to prejudice the commercial interests of any person including the public authority holding it.
23. When considering a prejudice based exemption the Commissioner's approach is to decide whether the exemption applies by way of a three part prejudice test. This was described by the Information Tribunal in *Hogan v Information Commissioner* as follows:

*"The application of the 'prejudice' test should be considered as involving a numbers 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."*<sup>1</sup>

### The applicable interest

24. Identifying the applicable interests involves considering the wording of the exemption and ensuring that the prejudice claimed is relevant to the interest stated. In this case the public authority said that it believed the exemption was engaged because disclosure would prejudice its own commercial interests as well as the commercial interests of Pinsent Masons Solicitors. The Commissioner finds that

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<sup>1</sup> *Hogan v Information Commissioner and Oxford City Council* [EA/2005/0026 & EA/2005/0030], para. 28 – 34.

only relevant factors have been identified and that therefore this element of the test is met.

### The nature of the prejudice

25. As regards the nature of the prejudice, the Tribunal in *Hogan* commented that for this element of the test to be met “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”.<sup>2</sup> In this case the public authority has argued that disclosure would be likely to prejudice the commercial interests of Pinsent Masons because it would reveal the rates charged by Pinsent Masons and which had been accepted by the public authority when the contract was put out to tender. Therefore its competitors would be able to use the withheld information to inform their own submissions in any future tendering exercise by the public authority or in negotiations with other clients. It also suggested that disclosure could affect Pinsent Masons’ relationship with other clients because disclosure of the rates charged to the public authority could potentially reveal an inconsistency with the rates charged to other clients.
26. The complainant had suggested that the rates charged by Pinsent Masons could not be considered commercially sensitive as such information would be readily available to any client upon the instruction of a solicitor. However, the public authority has explained that whilst this may be true in the case of a private client, the situation here is somewhat different. It explained to the Commissioner that it operates a retained panel of legal advisers who are appointed through a very competitive process wherein the competing firms’ submissions were considered against a number of different criteria which included the rates at which the firms are prepared to undertake work on behalf of the public authority. In explaining why this information is commercially sensitive the HCA has said that the rates submitted are carefully considered by the tendering firms to increase their chances of selection. Therefore the hourly rates will vary depending on the firm and the client and are not comparable to the hourly rates charged to private clients or non-retained firms.
27. The Commissioner considers that this element of the test is met in respect of the prejudice caused to Pinsent Masons as disclosure would clearly allow a rival firm to learn more about the pricing structure of Pinsent Masons which could then be used to inform its own

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<sup>2</sup> Hogan, para. 30.

submissions either in a future tendering exercise with the public authority or with other clients.

28. The public authority also argued that disclosure would be likely to prejudice its own commercial interests by adversely affecting its relationship with its own legal services providers. This is because, it suggests, providers of goods and services may be discouraged from engaging with the public authority or may not be willing to openly share information which in turn may force it into appointing less competitive or less experienced advisors to the detriment of its own commercial interests. Furthermore, the public authority suggested that disclosure could also lead to other bidders raising their bids in any future tender exercise. This would be likely to prejudice its own commercial interests by reducing its ability to negotiate a lower price in any future tendering exercise.
29. As regards the public authority's commercial interests the Commissioner accepts that a causal link can be drawn between the disclosure of rates charged by a solicitor and prejudice being caused to the relationship with the public authority commissioning their services because that firm would not want that information or would not expect that information to be released. In the same way that disclosure would be likely to prejudice Pinsent Masons' commercial interests, the Commissioner also accepts that a causal link can be drawn between disclosure and the public authority's commercial position being undermined because revealing the basis upon which it had accepted Pinsent Masons' bid would put it at a disadvantage in any future negotiations.

#### The likelihood of prejudice

30. The Commissioner has now gone on to consider the likelihood that disclosure would, or would be likely to, result in the prejudice identified by the public authority. First of all the Commissioner should say that the public authority has not said explicitly whether disclosure would OR would be likely to, prejudice the commercial interests of itself and/or Pinsent Masons, as both terms have been used interchangeably in its responses to the complainant and the Commissioner. Therefore, the Commissioner considers it appropriate to apply the lesser test, that is to say the exemption will be engaged where disclosure would be likely to prejudice their commercial interests. This approach has found support in the Information Tribunal when it stated:



*"We consider that...in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level."*<sup>3</sup>

31. When discussing the prejudice test the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk."<sup>4</sup> This in turn follows the judgement of Mr Justice Munby in *R (on the application of Lord) v Secretary of State for the Home Office*. In that case, the view was expressed that:

*"Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not."*

32. In light of this the Commissioner's view is that in order for the exemption to be engaged on a "would be likely to prejudice" basis the risk of prejudice need not be more likely than not, but must be substantially more than remote. As regards the prejudice to Pinsent Masons' commercial interests the Commissioner is mindful of the fact that the appointment of the public authority's retained legal panel is the result of a competitive exercise where, as noted above, the various tendering firms give a lot of thought to the rates they charge. Therefore, given the competitive nature of the market it is fair to assume that disclosure would be likely to influence future bids produced by other firms who may seek to undercut Pinsent Masons. Similarly, the information could be used to gain a greater understanding of their pricing structure more generally which could then be used to undercut them in future bids involving other potential clients. This would be likely to place Pinsent Masons at a disadvantage in the market place and hinder its ability to compete effectively in future.
33. Similarly the Commissioner accepts that disclosure would be likely to prejudice the commercial interests of the public authority itself. This is because whilst other bidders may still seek to undercut Pinsent Masons they would undercut to a lesser extent than may otherwise have been

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<sup>3</sup> *Ian Edward McIntyre v Information Commissioner and The Ministry of Defence* [EA/2007/0068], para. 45.

<sup>4</sup> *John Connor Press Associates Limited v The Information Commissioner* [EA/2005/005], para. 15.

the case were they not aware of the price that had been negotiated with Pinsent Masons.

34. There is also the additional prejudice caused to Pinsent Masons' relationship with other clients caused by any inconsistency with the fees it charged the public authority. The Commissioner accepts that disclosure would be likely to prejudice the commercial interests of Pinsent Masons in this way because disclosure would be likely to lead to an unfavourable reaction on the part of other clients if they felt that Pinsent Masons were charging rates which they themselves did not enjoy. Furthermore, disclosure would reveal a rate that they are willing to charge a customer which any potential client could use as part of its negotiating position. Without a level playing field it would be harder for Pinsent Masons to negotiate the best possible terms for themselves in any future contracts.
35. When reaching his decision the Commissioner has also taken into account the guidance produced by the Office of Government Commerce on the disclosure of contractual information. This guidance describes information such as pricing structures, detailed cost models and day rates as commercially sensitive information that should normally be withheld. The Commissioner highlights this point because the Information Tribunal in *Department of Health v Information Commissioner* indicated that this guidance was a useful starting point for all public authorities considering the disclosure of contractual information and in that case, which involved a request for details of the amounts paid by the Department of Health to a contractor, found that "pricing figures and structure" should be withheld as it could provide information that would allow competitors to undercut the contractor.<sup>5</sup>
36. The Commissioner also notes that when applying the exemption the public authority sought the views of Pinsent Masons who confirmed that that they considered disclosure to be prejudicial to their commercial interests for the reasons referred to by the public authority.
37. As regards the possible prejudice to the public authority's commercial interests, the Commissioner is prepared to accept that disclosure would not be welcomed by Pinsent Masons or other providers of services. However he is not satisfied that this would be likely to result in potential providers of legal services, or indeed other services, withdrawing from future tender opportunities or refusing to engage with the public authority as it has suggested. Public sector contracts

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<sup>5</sup> Department of Health v Information Commissioner [EA/2008/0018]

can be very lucrative as demonstrated by the significant amounts of money paid by the public authority in just this one case. Therefore, the Commissioner is of the view that in this particular case providers of legal services would not be easily deterred from working with public authorities as a result of disclosure even if they would not necessarily welcome such information being made public.

38. However, the Commissioner is satisfied that the information is exempt under section 43(2) on the basis that disclosure would be likely to prejudice the commercial interests of Pinsent Masons and would be likely to prejudice the commercial interests of the public authority by undermining its future negotiating position.

### **Public interest test**

39. Section 2(2)(b) provides that where a qualified exemption applies information shall only be withheld where the public interest in maintaining that exemption outweighs the public interest in disclosure.

### **Public interest arguments in favour of disclosing the requested information**

40. The complainant has referred to the public interest in transparency and accountability as disclosure would allow the public to fully understand how public money was being spent. The public authority has itself acknowledged that disclosure would enable individuals to scrutinise the services being provided to public authorities, and to assess whether the public authority is achieving maximum value for money for the public purse.

### **Public interest arguments in favour of maintaining the exemption**

41. The public authority has said that disclosure would serve to undermine Pinsent Masons' ability to maintain their competitive edge, their willingness to work alongside the public authority in the future, or their ability to increase their professional prestige. It argues that this would not be in the public interest, which is best served by ensuring that those organisations upon which it relies are able to continue to provide the most informed, relevant and up to date advice, and are not unduly prejudiced through their association with the public authority.
42. The Commissioner would also say that in his view disadvantaging private sector firms in the market place is not in the public interest. He considers that there is an inherent public interest in ensuring that competition is not distorted and that companies are able to compete

fairly and in ensuring that there is fair competition for public sector contracts.

43. As regards the prejudice caused to its own commercial interests the public authority argued that disclosure could lead to it having to consider less competitive submissions in the future which would impact upon its ability to secure maximum value for the public purse.

### **Balance of the public interest arguments**

44. The Commissioner accepts that disclosure would allow for greater transparency and accountability in the spending of public money. However, the Commissioner considers that this public interest has largely been satisfied by the public authority disclosing the total sums of money paid to Pinsent Masons. Whilst the Commissioner acknowledges that there will always be a public interest in releasing as much information as possible so as to provide a full picture of events, he has given the public interest in fuller transparency and accountability only limited weight in this case. In the Commissioner's view disclosure would be of more value to Pinsent Masons' competitors than to the public in general.
45. On the other hand the Commissioner is of the view that there is a clear public interest in avoiding prejudicing the commercial interests of companies who work with the public sector. This helps to maintain fairness in competition which in turn increases innovation, more effective services and value for money. The Commissioner considers that there is a public interest in ensuring that the commercial interests of a third party are not prejudiced in circumstances where it would not be warranted or proportionate. Given that the public authority has already disclosed the total sums paid to Pinsent Masons as well as the cost of each invoice, and that there would be only limited public interest in the remaining information, the Commissioner considers that disclosure would not justify the prejudice that would likely be caused to the commercial interests of Pinsent Masons. In reaching this view the Commissioner is also mindful that the most recent invoices which make up the withheld information date from March 2010 and so were still current at the time of the request and therefore would still be valuable to a competitor.
46. The public interest in maintaining the exemption is also strengthened by the harm that would be caused to the public authority's negotiating position. It is clearly in the public interest that public authorities are able to secure the most competitive deals for the taxpayer.

47. The Commissioner has also taken into account the potential damage to the public authority's relationship with Pinsent Masons. The Commissioner has already said that he is not persuaded that disclosure would actually lead to providers of services withdrawing from future tender exercises. However, he is prepared to accept that disclosure would make that relationship more difficult as it would not be welcomed by Pinsent Masons. The Commissioner considers that this would not be in the public interest which favours public authorities being able to maintain relationships of trust with those contractors on which it relies to provide services and that the effectiveness of these services or contracts is not undermined.
48. The Commissioner has decided that in all the circumstances of the case the public interest in maintaining the section 43(2) exemption outweighs the public interest in disclosure.

## **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 dealt with the request of 21 June 2010 in accordance with the Act by correctly withholding information under the section 43(2) exemption.
  - The public authority dealt with the request of 6 September 2010 in accordance with the Act by correctly withholding information under the section 43(2) exemption.

## **Steps Required**

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50. The Commissioner requires no steps to be taken.

## Right of Appeal

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51. 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: 0300 1234504

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)

52. 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.
53. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 1<sup>st</sup> day of August 2011**

**Signed .....**

**Alexander Ganotis  
Group Manager – Complaints Resolution  
Information Commissioner’s Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal annex

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### **Commercial interests.**

#### **Section 43(1) provides that –**

“Information is exempt information if it constitutes a trade secret.”

#### **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).”

#### **Section 43(3) provides that –**

“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).”