

## **Traffic CCTV Contract – Refusal Notice**

We are withholding some elements of the Contract as we consider that the following exemptions apply to it.

**Section 43 (Prejudicial to commercial interests) subsection (2)** - 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).

### **Section 44 – Prohibitions on Disclosure**

- Information is exempt if there is an existing statutory bar to the disclosure of information by a public authority

### **Section 40(2) – Personal data**

### **Section 43(2)**

- Schedule 6 – Price Schedule

In addressing the commercial interests and the prejudice that would or would be likely to occur the council has consulted with OpenView Security Systems Ltd, and has asked them to explain and justify what prejudice could be caused, how and how likely this would be. The council is relying upon the lower threshold of likelihood that disclosure 'would be likely' to have a prejudicial effect.

The party whose commercial interests would, or would be likely to be prejudiced if the withheld information was disclosed is OpenView.

The harm that would be likely to be caused to OpenView is that they would be likely to lose business and therefore income. This would include ongoing and future negotiations related to this agreement and bids and negotiations they could be involved in for similar contracts.

This would be likely to lead to OpenView being unsuccessful in obtaining tenders or losing business to competitors. This loss of business would be harmful to their commercial interests. The link between the disclosure and harm is that knowledge of the information would allow competitors an advantage over OpenView in pricing tenders which would be likely to lead to OpenView being unsuccessful in gaining business.

In the event that the liability accepted by OpenView under these clauses was made public their ability to negotiate with suppliers and obtain value for money would be hampered by their knowledge of the level of cost that they would bear.

## **The Public Interest Test**

### **Factors in favour of disclosure**

1. It is in the public interest for the Council to be open and transparent, especially with regard to a unique and wide-ranging contract such as this.
2. There is a general public interest in facilitating the accountability of public authorities for decisions they take, and also allow individuals to understand decisions made by public authorities and how public money is spent.
3. The council has a fiduciary duty to its residents to spend council money properly.

### **Factors in favour of withholding**

1. It is not in the public interest for the council to disclose information that would be likely to damage the commercial interests of a company, as this could lead to financial problems for the company and or loss of jobs, which is not in the public interest.
2. It is not in the public interest for commercially sensitive information about one company to be released, when the same category of information relating to others companies is not so released, thus putting one company at a commercial disadvantage.
3. It is not in the public interest for information to be released which could negatively influence ongoing and future negotiations associated with this contract, as this would be likely to have an adverse effect on value for money for the council and by extension the people of Barnet.
4. The withholding of the exempt sections will not negatively affect accountability, as the council has full and proper mechanisms in place for this, and there are sufficient statutory methods for the public to be involved in ensuring accountability, for example the Overview and Scrutiny process, councillors involvement, and the Audit Commission Act process.

### **The weighting of the factors**

The factors in favour of disclosure all have considerable weight, particularly in the case of factor 1. The council has acknowledged this and has released data which in other circumstances could well be seen to fall under the exemption under section 43, but which the balance of the public interest found in favour of disclosure. With this in mind, the council has only withheld information in which it was felt that there was a considerably strong public interest argument in favour of withholding. The weighting of the factors is not a numerical calculation.

However, it was considered that the cumulative weight and strength of the factors in favour of withholding outweigh those in favour of disclosing. Therefore in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

## **S44**

### **Section 44**

The council contends that the withheld parts of the remaining schedules of the contract are exempt under section 44 of the Freedom of Information Act.

The council believes that the information is exempt as it falls within the Public Contracts Regulations 2006 - and in particular Regulation 43. The Public Contracts Regulations apply to this contract, and the tender was advertised in the OJEU.

In order for information to fall within regulation 43 it must be:

- Forwarded to the public authority by the tenderer

- The information was forwarded to the council by the tenderer. These were not documents jointly produced by the council and Capita – it was solely produced by OCS and submitted by them to the council as part of their bid for the contract;

and

- Reasonably designated by the tenderer as being confidential

- The information has been designated by the tenderer as being confidential. The council believes that the designation, in respect of the withheld information is reasonable. The council believes that in respect of the information withheld there is a duty of confidence.

The council also believes there is a common law duty of confidence in relation to this information:

- The information was imparted in circumstances giving rise to an expectation of confidence. Information submitted in a procurement exercise which contained financial information and detailed methodology is sensitive material and would be expected to be treated as confidential.
- The information has the necessary qualities of confidence. It is not available by other means, and is substantive and not trivial. The information cannot be obtained publically, or from OCS without payment for their services. The information contained detailed methodology for provision of a service including detailed costing.
- Unauthorised disclosure would be detrimental to the economic operator. The ICO guidance states that whilst one can never say with certainty what impact a disclosure in future would have, if a public authority can show that disclosing the information would or would be likely to be detrimental it should be regarded as confidential (subject to the other tests being made out).

## **Section 40(2) – Personal Data**

We consider that the absolute exemption set out in Section 40 (Personal information) subsection 2 applies to the names of individuals that have been redacted from these documents.

Personal Information is governed by the Data Protection Act 1998 and is defined as *any data which relate to a living individual who can be identified from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.* The withheld information is exempt because disclosure would contravene the first data protection principle which requires that personal data is processed fairly and lawfully. Disclosure of the requested information would breach this principle and in particular the requirement of fairness because these individuals would have a reasonable expectation of privacy and do not expect that the council would disclose their names or contact details in response to a freedom of information request.

The council's redaction policy states that officers' names and contact details under the level of Assistant Director will generally not be released. All of the posts redacted are under the equivalent of Assistant Director level. It is not practicable to contact all the individuals to ask their views on release.