

30th November 2015

Case Reference Number FS50602771

Dear Sir/Madam

Your reference: FOI/398714

Complaint from [REDACTED]

The Information Commissioner has received a complaint from [REDACTED] stating that they have not received a decision regarding the internal review they requested on 23/10/15. The request for information was dealt with under your reference cited above.

Guidance

The Commissioner has issued guidance regarding the time limits on carrying out internal reviews. The Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review, and in no case should the total time taken exceed 40 working days.

A full copy of this guidance is available on our website (www.ico.org.uk) under the Freedom of Information guidance section.

Enforcement

The Commissioner wants to ensure that a complainant has exhausted a public authority's internal review procedure, but at the same time the complainant should not be unreasonably delayed in having his complaint considered under section 50.

Internal reviews are referred to in the section 45 Code of Practice, and significant or repeated unreasonable delays in dealing with internal reviews will be monitored by the Enforcement team. In some instances regulatory action may be necessary.

More details about the Commissioner's FOI Regulatory Action Policy are available on our website using the following links:

[http://ico.org.uk/what we cover/taking action/foi eir](http://ico.org.uk/what-we-cover/taking-action/foi-eir)

Actions

If it is the case that you have not issued an internal review decision to [REDACTED] we recommend that you do so within 20 working days from the date of receipt of this letter.

If you have, in fact, already responded to [REDACTED] and believe that your response should already have been received we would recommend you contact them to confirm receipt if you have not already done so.

If you need to contact us about this complaint I can be contacted on the number below. Please quote the reference number at the top of this letter.

Yours sincerely

Jim Dunn (01625 545673)
Case Officer
Information Commissioner's Office

13th January 2016

Case Reference Number FS50602771

Dear Sir/Madam

Freedom of Information Act 2000 (FOIA)

Your reference: FOI/398714

Complaint from [REDACTED]

The Information Commissioner has received a complaint about the handling of the above request.

We have carried out an initial assessment of this case and consider it eligible for formal consideration under s50 of the FOIA.

The case will be allocated to a case officer who will contact you with further details of the complaint.

We emphasise that although we have assessed the complaint as being eligible for the Information Commissioner to decide whether a public authority has dealt with a request for information in accordance with Part I of the FOIA, no specific decision has been made as to the individual merits of the complaint at this time.

What actions may be required at this stage

Where information has been withheld because you (the public authority) have applied one of the exemptions in Part 2 of the FOIA, the case officer will need to have a copy of the information to judge whether or not any exemptions have been properly applied. We would also appreciate, where you are able, for you to be specific about which exemptions apply to each part of the information. At this stage we only ask that you prepare this information: please do not send it to us until it is requested by the case officer.

Providing information to the ICO

Finally, you should be aware that the Information Commissioner often receives requests for copies of the letters we send and receive when dealing with casework. Not only are we obliged to deal with these in accordance with the access provisions of the Data Protection Act 1998 (DPA) and the Freedom of Information Act 2000 (FOIA), it is in the public interest that we are open, transparent and accountable for the work that we do.

?

However, whilst we want to disclose as much information as we reasonably can, there will be occasions where full disclosure would be wrong. It is also important that the disclosures we make do not undermine the confidence and trust in the Commissioner of those who correspond with him. ? ?

?

I would be grateful if, at the appropriate time, you would indicate whether any of the information you provide in connection with this matter is confidential, or for any other reason should not be disclosed to anyone who requests it. I should make clear that simply preferring that the information is withheld may not be enough to prevent disclosure. You should have a good reason why this information should not be disclosed to anyone else and explain this to us clearly and fully.

If you need to contact us about any aspect of this complaint please call our helpline on 0303 123 1113, or 01625 545745 if you would prefer not to call an '03' number, being sure to quote the reference number at the top of this letter.

Yours sincerely

Jim Dunn
Sent on behalf of
Andrew White
Group Manager
Information Commissioner's Office

Dear Sir/Madam,

Thank you for your email of 13 January 2016, to my colleague Kevin Symm.

Further to my email of 22 December 2015, I can advise that in relation to our FOI Case Reference 398714, we are in active and detailed dialogue with a number of third parties to which the information directly relates.

We expect to conclude this dialogue very shortly – within the next 5 working days at most – immediately after which we will be issuing a detailed response and making disclosure to the customer in response to the questions raised.

I trust this information is of assistance, if you require any additional information or wish to discuss this directly with me I would be most grateful if you could call me on 0151 233 0411 or email me at Michael.jones2@liverpool.gov.uk

Many thanks

Mike

Michael Jones | Deputy Head of Democratic Services & Information Manager

Liverpool City Council | Cunard Building | Water Street | Liverpool | L3 1DS

T: 0151 233 0411 | E: michael.jones2@liverpool.gov.uk | E: Michael.jones2@liverpool.gcsx.gov.uk

Online: www.liverpool.gov.uk

Postal address:

Liverpool City Council | Municipal Buildings | Dale Street | Liverpool | L2 2DH

☒ LCC auto signature (2)

From: casework@ico.org.uk [<mailto:casework@ico.org.uk>]

Sent: 13 January 2016 08:44

To: Information Requests

Cc: Symm, Kevin

Subject: Confirmation from ICO to PA - complaint from [REDACTED] accepted [Ref. FS50602771]

13th January 2016

Case Reference Number FS50602771

Dear Sir/Madam

Freedom of Information Act 2000 (FOIA)

Your reference: FOI/398714

Complaint from [REDACTED]

The Information Commissioner has received a complaint about the handling of the above request.

We have carried out an initial assessment of this case and consider it eligible for formal consideration under s50 of the FOIA.

The case will be allocated to a case officer who will contact you with further details of the complaint.

We emphasise that although we have assessed the complaint as being eligible for the Information Commissioner to decide whether a public authority has dealt with a request for information in accordance with Part I of the FOIA, no specific decision has been made as to the individual merits of the complaint at this time.

What actions may be required at this stage

Where information has been withheld because you (the public authority) have applied one of the exemptions in Part 2 of the FOIA, the case officer will need to have a copy of the information to judge whether or not any exemptions have been properly applied. We would also appreciate, where you are able, for you to be specific about which exemptions apply to each part of the information. At this stage we only ask that you prepare this information: please do not send it to us until it is requested by the case officer.

Providing information to the ICO

Finally, you should be aware that the Information Commissioner often receives requests for copies of the letters we send and receive when dealing with casework. Not only are we obliged to deal with these in accordance with the access provisions of the Data Protection Act 1998 (DPA) and the Freedom of Information Act 2000 (FOIA), it is in the public interest that we are open, transparent and accountable for the work that we do.

However, whilst we want to disclose as much information as we reasonably can, there will be occasions where full disclosure would be wrong. It is also important that the disclosures we make do not undermine the confidence and trust in the Commissioner of those who correspond with him. ? ?

I would be grateful if, at the appropriate time, you would indicate whether any of the information you provide in connection with this matter is confidential, or for any other reason should not be disclosed to anyone who requests it. I should make clear that simply preferring that the information is withheld may not be enough to prevent disclosure. You should have a good reason why this information should not be disclosed to anyone else and explain this to us clearly and fully.

If you need to contact us about any aspect of this complaint please call our helpline on 0303 123 1113, or 01625 545745 if you would prefer not to call an '03' number, being sure to quote the reference number at the top of this letter.

Yours sincerely

Jim Dunn
Sent on behalf of
Andrew White
Group Manager
Information Commissioner's Office

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openness by public bodies and data privacy for individuals.

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

Tel: 0303 123 1113 Fax: 01625 524 510 Web: www.ico.org.uk

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11th March 2016

Case Reference Number FS50602771

Dear Sir/Madam

Your ref: **FOI/398714**

Freedom of Information Act 2000 (FOIA)

Complainant: [REDACTED]

We wrote to you on previously to let you know that we have accepted this case for investigation. I have now been asked to investigate it.

You should now reconsider the way the council has handled this request and respond as detailed below

ICO's approach

On receipt of a complaint under the FOIA, the Information Commissioner will give a public authority one opportunity to justify its position to him, before issuing a decision notice. Please consider the guide for public authorities on the Information Commissioner's website for more information about how we handle complaints:

http://www.ico.org.uk/for_organisations/freedom_of_information/guide.aspx

The request

On 10 August 2015 the complainant made the following request for information under the FOIA for:

"Please provide a copy of the full due diligence Report produced by KPMG in fulfilment 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. Finally, may I point out, as [REDACTED] also pointed out in December 2014 in the correspondence on [REDACTED] that a document defining itself as an "extract" of a "fuller Report" cannot possibly be intended by anyone to be the final written report superseding all previous information, and if indeed your office should continue to assert this I will immediately complain to the Information Commissioner."

You responded on 8 September 2015 provided some information on the process which the report when through. On 19 October 2015 you said that you do not hold the information as specified in the request however you do hold some information falling within the scope of the request. However you applied Sections 36(2)(b)(ii), 41, 43(1) and 43(2) and withheld the information from disclosure.

The Commissioner understands that the complainant requested a review of the decision on 23 October 2015 however the council has not responded to this.

What you need to do now

Where possible the Information Commissioner prefers complaints to be resolved by informal means, and we ask both parties to be open to compromise. It is also your responsibility to satisfy the ICO that you have complied with the law. The ICO's website has guidance which you should refer to in order to check whether your original response to the information request was appropriate.

This is your opportunity to finalise your position with the ICO. With this in mind, you should revisit the request. After looking at our guidance, and in light of the passage of time, you may decide to reverse or amend your position. If you do, please notify the complainant and me within the timeframe specified at the end of this letter. This may enable us to close this case informally without the need for a decision notice.

In any event, we need the following information from you to reach a decision.

- A copy of the withheld information (clearly marked with which exemptions apply).
- Detailed explanations for the parts of the FOIA
- In particular please answer the following questions in relation to the application of these exemptions
 - a) Please clarify if you have now carried out a review of your decision as requested by the complainant on 23 October 2015.
 - b) You have argued that there is no full report falling within the scope of the complainant's request other than the final report which was disclosed with the engagement letter. You explained your view that the information which does fall within the scope of the request is a

set of emails relating to issues and issue updates. However in her request for review the complainant raised concerns at this response and provided arguments outlining why she believed this response not to be correct.

For the absence of doubt therefore, please can you state categorically whether there was a report as described in point 2 of the council's letter to the complainant of 8 September 2015, which is a separate report to the one disclosed with the engagement letter. Point 2 stated:

- 2) *"Issues update / Final report" work conducted August-October 2014: In August KPMG produced a draft "Issues update document" which summarised progress on the issues identified during the fieldwork phase. This document went through a number of redrafts as matters were resolved, including being renamed "Final report" on 9th October, albeit it retained similar form and content to the previous "Issues update document" drafts. 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 - 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. Subsequent drafts of the "Final report" contained some further changes as KPMG finalised their review and report.'*

c) Section 36

Section 36 is a prejudiced based exemption which works in a slightly different way to the other prejudiced based exemptions contained within the Act. Section 36 can only be engaged if in the reasonable opinion of the qualified person disclosure would result in any of the effects set out in section 36(2) of the Act.

In order for the ICO to determine whether section 36 was correctly applied please provide a copy of the submissions given to the qualified person in order for them reach their opinion and a copy of the opinion

which was subsequently provided. If either the submissions or opinion were not written down please describe the nature of the submissions and the opinion itself.

Furthermore, if in providing such documents, the following is not clear, please provide a response to the following questions:

- When was this opinion sought and when was it given?
- What information did the qualified person have access to when giving this opinion?
- For example, did the qualified person have access to the information itself or just a summary of the information that had been withheld?
- Was the qualified person provided with any submissions supporting a recommendation that the exemption was engaged?
- Similarly, was the qualified person in fact provided with any contrary arguments supporting the position that the exemption was not engaged?

Please can we ask you to also provide a response to the questions provided on the form attached to this email relating to the application of section 36 by the qualified person.

d) Section 41

For section 41(1)(a) to be met the information must have been provided by a third party. Therefore please identify which third party provided the council with the withheld information.

For section 41(1)(b) to be met disclosure of the withheld information must constitute an actionable breach of confidence. In the ICO's view a breach will be actionable if:

1. The information has the necessary quality of confidence. (Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial; information which is of importance to the confider should not be considered trivial.)

2. The information was communicated in circumstances importing an obligation of confidence. (An obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend upon the nature of the information itself, and/or the relationship between the parties.)

3. Unauthorised disclosure would cause a specific detriment to either the party which provided it or any other party. (Please note that the approach taken by the courts in **some** cases is that detriment is not always a prerequisite to an actionable breach of confidence.)

Therefore, with reference to the three criteria above, please explain why disclosure of the withheld information to the public would constitute an actionable breach of confidence.

Although section 41 is an absolute exemption, the law of confidence contains its own built in public interest test with one defence to an action being that disclosure is in the public interest. Therefore please explain the public interest arguments considered by the council in this case and explain why it was concluded that there was not a sufficient public interest in disclosure of the information in order to defend any actionable breach.

e) Section 43

Section 43(1)

Provide evidence to support the position that the withheld information constitutes a trade secret. For example, is it the case that the information

is used to gain a competitive advantage but it is not generally known in that trade or business? Are steps taken to keep the information secret?

Section 43(2)

Please identify the party or parties whose commercial interests would, or would be likely to be prejudiced if the withheld information was disclosed.

Please provide a detailed explanation to support the position that disclosure of the withheld information would, or would be likely to prejudice a party's commercial interests. Please explain clearly how the damage would occur should the information be disclosed.

Please ensure that you provide evidence which demonstrates a clear link between disclosure of the information that has actually been requested and any prejudice to commercial interests which may occur.

If the prejudice relates to the commercial interests of third parties, in line with the Information Tribunal decision in the case *Derry Council v Information Commissioner* (EA/2006/0014), the ICO does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns. Therefore, please clarify on what basis you have established that disclosure of a third party's interests may occur and *please provide copies of correspondence the council has had with third parties in relation to this request.*

Likelihood

The ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two

possible limbs upon which a prejudice based exemption can be engaged; i.e. either prejudice 'would' occur or prejudice 'would be likely to' occur.

With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15).

With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).

Please confirm which threshold of likelihood the council is relying on in this case, i.e. the lower threshold that disclosure 'would be likely' to have a prejudicial effect or the higher threshold that disclosure 'would' have a prejudicial effect.

f) The public interest test

In order to determine whether the public interest tests have been applied appropriately, the ICO will require answers to the following questions as regards each of the exemptions identified by the council.

- i) What public interest arguments in favour of maintaining the exemption neither confirming nor denying whether the information is held were taken into account?
- ii) Please explain why you consider that on balance the public interest in maintaining the exemption outweighs that in disclosing of the withheld information. Please include details of any particular weighting exercise that has been carried out.

Please ensure that your submissions focus on the content of the information that has actually been withheld rather than simply being generic public interest arguments.

We strongly recommend that your response is guided by recent decision notices, our guidance and our lines to take, which demonstrate the Information Commissioner's approach to the exemptions and procedural sections of the FOIA. These can be found on our website:

- <http://search.ico.org.uk/ico/search/decisionnotice>
- <https://ico.org.uk/for-organisations/>

Having revisited the request, you may decide to apply a new exemption. We will consider new exemptions but it is your responsibility to tell the complainant why the new exemption applies and to provide us now with your full submissions.

For the avoidance of doubt, you should now do the following.

- Consider whether to change your response to the information request, and let us know the outcome.
- Send us the withheld information.
- Send us your full and final arguments as to why you think the exemptions apply.
- Answer all of the questions in this letter.

Please provide your response within 20 working days of the date of this letter, that is by 8 April 2016, ensuring that you fully set out your final

position in relation to this request. If you have any concerns please contact me at casework@ico.org.uk (quoting the above reference in this format [Ref. FS50602771]) or call me on 01625 545 853.

Yours sincerely

Ian Walley

Senior Case Officer

We are often asked for copies of the correspondence we exchange with third parties. We are subject to all of the laws we deal with, including the Data Protection Act 1998 and the Freedom of Information Act 2000. You can read about these on our website (www.ico.org.uk). Please say whether you consider any of the information you send us is confidential. You should also say why. We will only withhold information where there is good reason to do so.

Enquiries to: Kevin Symm
Your Ref: FS50602771
Our Ref: 398714



**Liverpool
City Council**

Mr Ian Walley
Information Commissioner's Office
Wycliffe House, Water Lane
Wilmslow, Cheshire
SK9 5AF

13 April 2016

Dear Mr Walley

Freedom of Information Act 2000 request 398714

Please find enclosed a copy of our original response and subsequent Internal Review to [redacted] regarding this matter. We have also enclosed copies of the information we feel [redacted] is asking for and a copy of the record of the Qualified Person's opinion.

If you have any further queries please let me know

Yours sincerely

A handwritten signature in black ink, appearing to be 'K Symm', written over a horizontal line.

**Mr Kevin Symm
Senior Information Officer**

Enquiries to: Kevin Symm
Your Ref:
Our Ref: FOI/398714



Email: [REDACTED]

19 October 2015

Dear [REDACTED]

Freedom of Information Act Request 398714

Thank you for your recent request received 11 August. Your request was actioned under the Freedom of Information Act 2000 in which you requested the following:

- 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.

Response:

Liverpool City Council holds information relevant to your request and can confirm the following:

The City Council can confirm that there is no 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"

To clarify; the process referred to in pages 29-32 of the document you referred to in your email to the 11 August under the heading "Financial and tax due diligence in relation to the proposed acquisition of Liverpool Direct Limited" does not refer to, or state that the production of any type of report was either asked for by the City Council or was part of KPMG's role in the process.

However, we can confirm that what KPMG assisted with was the establishment of, via email communication and telephone conversations with the relevant officers, an issues update, which summarised progress on issues identified. These communications were extremely fluid and were of varying sizes due to issues being resolved at various stages. The communications consisted of the relevant officers discussing any areas of improvement and the perceived steps necessary in order to ensure these improvements were both formulated and implemented.

The draft documents received by the City Council on 9th October included the "Draft red flag" paper and the original "Issues update" document which was subsequently produced and aided the resolution of the discussions for both parties in the production of the final

report which we have already disclosed by way of the Engagement letter.

As such there is no document identified by the City Council as 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" although subsequent drafts of the "final report" contained some further changes as KPMG finalised their review and report.

However, the information referred to in this response does, we feel, fall under the remit of your request and, as such; consideration must be given to its disclosure.

As has been confirmed the correspondence between the City Council and KPMG was developed in order to identify solutions to instances raised by way of the issues update and contains communications which represent information which, in the opinion of the City Council, fall under the remit of what is termed as 'free and frank exchange of views for the purposes of deliberation' in Section 36(2)(b)(ii) of the Freedom of Information Act 2000. To clarify; Section 36 of the Freedom of Information Act 2000, and specifically Section 36(2)(b) which states that information is exempt from disclosure if, in the reasonable opinion of a qualified person (in this instance Liverpool City Council's City Solicitor), disclosure would breach or inhibit one, or more of the following:

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

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 Local 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 rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the Local Authority. It is in accordance with the above the City Council feels that the release of the information you have requested would be done so in breach of Section 36(2)(b)(i) and (ii)

A requirement in regards to the application of Section 36 of the Freedom of Information Act 2000 obliges that we clearly identify the likelihood of prejudice in relation to the disclosure of the information requested. The City Council feels that the disclosure of this information would inhibit the ability of the City Council and its officers 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 issues update is a set of emails which includes discussions which, if made public, would have a direct impact upon the honest provision of advice on the part of City Council officers if those officers felt what they considered to be honest advice would be made public.

Decision making, especially in regards to the criteria set out in the terms of your request, is an extremely important part of the function of the City Council and its officers must feel free to discuss and explore, either internally or with external staff and organisations, some difficult matters. Any loss or impact upon this freedom would, in the opinion of the City Council, inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision

making.

The terminology used in these subsections is not explicitly defined in the Act, but the following is taken from the Information Commissioner's Office guidance note regarding the application of Section 36 of the Freedom of Information Act 2000:

- 'Inhibit' means to restrain, decrease or suppress the freedom with which opinions or options are expressed.
- Examples of 'advice' include recommendations made by more junior staff to more senior staff, professional advice tendered by professionally qualified employees, advice received from external sources, or advice supplied to external sources. However, an exchange of data or purely factual information would not in itself constitute the provision of advice or, for that matter, the exchange of views.
- The 'exchange of views' must be as part of a process of deliberation.
- 'Deliberation' refers to the public authority's evaluation of competing arguments

It is with this in mind that the City Council feels the application of Section 36(2)(b)(ii) appropriate in these circumstances as the information we hold represents an exchange of views for the purposes of deliberation the disclosure of which would impact upon the free and frank exchange of views

Additionally, the City Council feels that the application of Sections 41, 43(1) and (2) of the Freedom of Information Act 2000 is also appropriate in these circumstances

The information contained within the issues log represents how KPMG would react to, or deal with, certain sets of circumstances which have arisen and, consequently, are discussed by the relevant officers.

The information discusses how KPMG have reacted to similar circumstances and suggests how problems may be remedied with actions provided by KPMG to the City Council for deliberation. This, in the opinion of the City Council is information which is covered by Section 41, 43(1) and 43(2) of the Freedom of Information Act 2000.

The information is reasonably considered to be provided to the City Council on a confidential basis, indeed KPMG have provided the following statement in regards to any potential disclosure:

Our report is provided solely for the benefit of parties referred to in our engagement letter and must not be quoted, copied or referenced to or distributed, in whole or in part, without prior written consent.

If we were to reveal this information in essence it would demonstrate how KPMG would deal with an issue. This, both in the opinion of the City Council and KPMG constitutes what Section 43(1) of the Freedom of Information Act 2000 refers to as a trade secret. In such circumstances the release of this information would provide KPMG's competitors with information which they could use in order to gain a competitive advantage over KPMG should they be aware of KPMG's potential reaction. Coupled with competitors own market intelligence disclosure would impact upon KPMG's market position which would, in

accordance with the statement KPMG have already provided above, lead to the possibility of legal recourse against the City Council for actionable breaches of both Section 43(1) and 41 of the Freedom of Information Act 2000

The relevant guidance from the Information Commissioner's Office in regards of the terms actionable states:

"Actionable", means that one can go to court and vindicate a right in confidence in relation to that document or information. It means being able to go to court and win." (Hansard HL (Series 5), Vol.618, col.416)

"... the word "actionable" does not mean arguable ... It means something that would be upheld by the courts; for example, an action that is taken and won. Plainly, it would not be enough to say, "I have an arguable breach of confidence claim at common law and, therefore, that is enough to prevent disclosure". That is not the position. The word used in the Bill is "actionable" which means that one can take action and win." (Hansard Vol.619, col. 175-176).

There can be no public interest in the disclosure of information which, even if only potentially, could result in an actionable breach of confidence and commercial sensitivity which could, as a direct result, require the City Council to defend its actions in a court of law at the expense of the tax payer.

However, in accordance with Section 16 of Freedom of Information Act 2000, which places a duty on public authorities to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it, we can confirm that the City Council is presently in discussions with KPMG's lawyers with a view to establishing if they would consent to the disclosure of any of the correspondence concerned, subject to the impact to their commercial activities and in the context of the exemptions listed above.

In accordance with the application of Section 36, 41 and 43 of the Freedom of Information Act 2000 we have not provided all of the information requested. As such we are required to serve you with the following section 17 notice.

The City Council will consider appeals, referrals or complaints in respect of your response and these must be submitted these in writing to informationrequests@liverpool.gov.uk within 28 days of receiving your response.

The matter will be dealt with by an officer who was not previously involved with the response and we will look to provide a response within 28 working days.

If you remain dissatisfied you may also apply to the Information Commissioner for a decision about whether the request for information has been dealt with in accordance with the Freedom of Information Act 2000.

The Information Commissioner's website is www.ico.gov.uk and the postal address and telephone numbers are:-

Information Commissioner's Office, Wycliffe House
Water Lane, Wilmslow
Cheshire SK9 5AF Fax number 01625 524 510 Telephone 01625 545745
Email – mail@ico.gsi.gov.uk (they advise that their email is not secure)

Information Team Municipal Buildings Dale Street Liverpool L2 2DH
Telephone 0151 233 0418 Email informationrequests@liverpool.gov.uk

I trust this information satisfies your enquiry

Yours sincerely



Mr Kevin Symm
Senior Information Officer

Enquiries to: Mike Jones
Our Ref: FOI/398714



Liverpool
City Council

Email: [REDACTED]

7 March 2016

Dear [REDACTED]

Freedom of Information Request 398714

I am writing in respect of your request for a review of the City Council's response to your request for information, dated the 11 August, which was handled under the Freedom of Information Act 2000. This matter has been assigned to me to investigate and review. The result of my review is contained within this letter.

The information you originally requested was as follows

- *Please provide a copy of the full due diligence Report produced by KPMG in fulfilment 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.*

We provided the following response –

"The City Council can confirm that there is no full due diligence report produced by KPMG in fulfilment of its engagement to provide "Financial and tax due diligence in relation to the proposed acquisition of Liverpool Direct Limited"

To clarify; the process referred to in pages 29-32 of the document you referred to in your email to the 11 August under the heading "Financial and tax due diligence in relation to the proposed acquisition of Liverpool Direct Limited" does not refer to, or state that the production of any type of report was either asked for by the City Council or was part of KPMG's role in the process.

However, we can confirm that what KPMG assisted with was the establishment of an issues update, which summarised progress on issues identified. These communications were extremely fluid and were of varying sizes due to issues being resolved at various stages. The communications consisted of the relevant officers discussing any areas of improvement and the perceived steps necessary in order to ensure these improvements were both formulated and implemented.

The draft documents received by the City Council on 9th October included the "Draft red flag" paper and the original "Issues update" document which was subsequently produced and aided the resolution of the discussions for both parties in the production of the final report which we have already disclosed by way of the Engagement letter.

As such there is no document identified by the City Council as the full due diligence Report

produced by KPMG in fulfilment of its engagement to provide "Financial and tax due diligence in relation to the proposed acquisition of Liverpool Direct Limited" although subsequent drafts of the "final report" contained some further changes as KPMG finalised their review and report.

However, the information referred to in this response does, we feel, fall under the remit of your request and, as such; consideration must be given to its disclosure.

As has been confirmed the correspondence between the City Council and KPMG was developed in order to identify solutions to instances raised by way of the issues update and contains communications which represent information which, in the opinion of the City Council, fall under the remit of what is termed as 'free and frank exchange of views for the purposes of deliberation' in Section 36(2)(b)(ii) of the Freedom of Information Act 2000. To clarify; Section 36 of the Freedom of Information Act 2000, and specifically Section 36(2)(b) which states that information is exempt from disclosure if, in the reasonable opinion of a qualified person (in this instance Liverpool City Council's City Solicitor), disclosure would breach or inhibit one, or more of the following:

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

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 Local 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 rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the Local Authority. It is in accordance with the above the City Council feels that the release of the information you have requested would be done so in breach of Section 36(2)(b)(i) and (ii)

A requirement in regards to the application of Section 36 of the Freedom of Information Act 2000 obliges that we clearly identify the likelihood of prejudice in relation to the disclosure of the information requested. The City Council feels that the disclosure of this information would inhibit the ability of the City Council and its officers 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 issues update is a set of emails which includes discussions which, if made public, would have a direct impact upon the honest provision of advice on the part of City Council officers if those officers felt what they considered to be honest advice would be made public.

Decision making, especially in regards to the criteria set out in the terms of your request, is an extremely important part of the function of the City Council and its officers must feel free to discuss and explore, either internally or with external staff and organisations, some difficult matters. Any loss or impact upon this freedom would, in the opinion of the City Council, inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making.

The terminology used in these subsections is not explicitly defined in the Act, but the following is taken from the Information Commissioner's Office guidance note regarding the application of Section 36 of the Freedom of Information Act 2000:

- *'Inhibit' means to restrain, decrease or suppress the freedom with which opinions or options are expressed.*
- *Examples of 'advice' include recommendations made by more junior staff to more senior staff, professional advice tendered by professionally qualified employees, advice received from external sources, or advice supplied to external sources. However, an exchange of data or purely factual information would not in itself constitute the provision of advice or, for that matter, the exchange of views.*
- *The 'exchange of views' must be as part of a process of deliberation.*
- *'Deliberation' refers to the public authority's evaluation of competing arguments*

It is with this in mind that the City Council feels the application of Section 36(2)(b)(ii) appropriate in these circumstances as the information we hold represents an exchange of views for the purposes of deliberation the disclosure of which would impact upon the free and frank exchange of views

Additionally, the City Council feels that the application of Sections 41, 43(1) and (2) of the Freedom of Information Act 2000 is also appropriate in these circumstances

The information contained within the issues log represents how KPMG would react to, or deal with, certain sets of circumstances which have arisen and, consequently, are discussed by the relevant officers.

The information discusses how KPMG have reacted to similar circumstances and suggests how problems may be remedied with actions provided by KPMG to the City Council for deliberation. This, in the opinion of the City Council is information which is covered by Section 41, 43(1) and 43(2) of the Freedom of Information Act 2000.

The information is reasonably considered to be provided to the City Council on a confidential basis, indeed KPMG have provided the following statement in regards to any potential disclosure:

Our report is provided solely for the benefit of parties referred to in our engagement letter and must not be quoted, copies or referenced to or distributed, in whole or in part, without prior written consent.

If we were to reveal this information in essence it would demonstrate how KPMG would deal with an issue. This, both in the opinion of the City Council and KPMG constitutes what Section 43(1) of the Freedom of Information Act 2000 refers to as a trade secret. In such circumstances the release of this information would provide KPMG's competitors with information which they could use in order to gain a competitive advantage over KPMG should they be aware of KPMG's potential reaction. Coupled with competitors own market intelligence disclosure would impact upon KPMG's market position which would, in accordance with the statement KPMG have already provided above, lead to the possibility of legal recourse against the City Council for actionable breaches of both Section 43(1) and 41 of the Freedom of Information Act 2000

The relevant guidance from the Information Commissioner's Office in regards of the terms actionable states:

"Actionable", means that one can go to court and vindicate a right in confidence in relation to that document or information. It means being able to go to court and win." (Hansard HL (Series 5), Vol.618, col.416)

"... the word "actionable" does not mean arguable ... It means something that would be upheld by the courts; for example, an action that is taken and won. Plainly, it would not be enough to say, "I have an arguable breach of confidence claim at common law and, therefore, that is enough to prevent disclosure". That is not the position. The word used in the Bill is "actionable" which means that one can take action and win." (Hansard Vol.619, col. 175-176).

There can be no public interest in the disclosure of information which, even if only potentially, could result in an actionable breach of confidence and commercial sensitivity which could, as a direct result, require the City Council to defend its actions in a court of law at the expense of the tax payer.

However, in accordance with Section 16 of Freedom of Information Act 2000, which places a duty on public authorities to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it, we can confirm that the City Council is presently in discussions with KPMG's lawyers with a view to establishing if they would consent to the disclosure of any of the correspondence concerned, subject to the impact to their commercial activities and in the context of the exemptions listed above.

Internal Review

For purposes of clarity, I will be conducting our internal review based on your email to the City Council of 26 October, in which you stated –

"I refer to your response of 19 October, refusing my request.

Leaving aside, for the time being, the fact that you have applied at least one inappropriate exemption, and did not conduct a proper public interest test, I would like to ask for an internal review of the response's contention that what KPMG actually provided was "email communication and telephone conversations with the relevant officers" that were "extremely fluid and were of varying sizes due to issues being resolved at various stages." and that these communications were what the council has identified as all the information it holds relevant to my request.

This is not true, the Council identified the precise information I am seeking in the earlier partial response (8 September), although this response refusing my request appears now to contradict this.

In addition to the ample evidence of written reports that is already in the public domain, including the service as described in the KPMG Engagement letter and the specific statement by KPMG that "This extract forms part of a fuller Report..", as quoted in my initial request, the partial response you provided on the 8 September actually stated that:

"...for the Council as purchaser to gain the necessary assurance on the financial position of the Company there were two distinct phases to the due diligence work:

- 1. Fieldwork conducted June-July 2014: KPMG produced a "draft red flag" paper which identified matters to be reviewed/resolved as part of discussions between the parties.*

2. *"Issues update / Final report" work conducted August-October 2014: In August KPMG produced a draft "Issues update document" which summarised progress on the issues identified during the fieldwork phase. This document went through a number of redrafts as matters were resolved, including being renamed "Final report" on 9th October, albeit it retained similar form and content to the previous "Issues update document" drafts. 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."

I then made 8 further requests/reminders to provide these clearly identified documents, and eventually, 6 weeks later, received a response that did not provide them, but instead consisted of five pages of poorly argued obfuscation, which stated, among other things, that the engagement letter "does not refer to, or state that the production of any type of report was either asked for by the City Council or was part of KPMG's role in the process" and that "what KPMG assisted with was the establishment of, via email communication and telephone conversations with the relevant officers, an issues update, which summarised progress on issues identified". Neither of these specious contentions is true.

I have considered your review in the context of both your original request and the response provided to you. In addition, I have liaised with the relevant departments after having asked them to review their original response.

I am now in a position to provide the following –

Responding on a point by point basis, you state that 'you have applied at least one inappropriate exemption, and did not conduct a proper public interest test'.

The City Council relied upon the application of Sections 36, 41 and 43 of the Freedom of Information Act 2000, all of which are qualified exemptions. The public interest in disclosure was fully considered and included in the response and, as such, the City Council is unsure what this comment refers to – as no further explanation was offered we cannot assist further

In terms of your comments regarding the existence of a full due diligence report produced by KPMG, the City Council can only reiterate what we have already stated and, once again, confirm that there is no full due diligence report produced by KPMG. The information we do hold, as has already been confirmed, is exempt in accordance with Section 36 of the Freedom of Information Act 2000, with the additional information being exempt by virtue of Sections 41 and 43 respectively.

However, the purpose of this review is to look at the appropriateness and applicability of the exemptions applied, in this case Sections 36, 41 and 43 of the Freedom of Information Act 2000. This process is now complete and I can now confirm that it is the opinion of the City Council that, while appropriate and applicable, the application of Sections 41 and 43 were, in light of the public interest, not robust enough to withhold the information under.

With regard to this element of the review, it is my conclusion that the application of Sections 41 and 43 be not upheld.

The next element of your review required me to give consideration to the application of Section 36. The basis of the application of an exemption under Section 36 can only be made in accordance with the reasonable opinion of a Qualified Person (QP) and on the provision that the information is of a relevant nature.

While the public interest test is separate from this process, the opinion of the QP is significant and cannot be overlooked, especially when, as in this case, it is in agreement with the application of the relevant exemption. The release of the information and the overturning of the relevant exemption would, in this case, be in direct conflict with the reasonable opinion of the QP. As such the application of Section 36 remains relevant and appropriate.

In conclusion and to summarise, while the application of Section 41 and 43 were appropriate I feel, in this instance, that they do not stand up to the scrutiny of internal review and, as such, are not upheld. However, the application of Section 36 is upheld and the information remains exempt in accordance with the reasons provided under Section 36's application in our original response.

This concludes my review. As I have now reviewed your original response, you have exhausted the Council's appeals process for the purposes of this request.

Accordingly, should you remain dissatisfied, please contact the Information Commissioner's Office, via the following:

Website is www.ico.gov.uk and the postal address and telephone numbers are:-

Information Commissioner's Office, Wycliffe House, Water Lane
Wilmslow, Cheshire, SK9 5AF
Fax number 01625 524 510
Telephone 01625 545745

Email – mail@ico.gsi.gov.uk (they advise that their email is not secure)

Yours sincerely


Michael Jones
Deputy Head of Democratic Services



Information Commissioner's Office

Record of the qualified person's opinion Freedom of Information Act 2000 Section 36

When dealing with a complaint regarding section 36 of the Freedom of Information Act 2000, the ICO will expect to see evidence of the qualified person's opinion and how it was reached. We require this evidence in order to decide whether the opinion was a reasonable one. The following form sets out the minimum information that we expect public authorities to provide to us about the qualified person's opinion, in the event of a complaint.

Completing this form is a convenient way for public authorities to give us the information we need. It is intended as a tool to assist public authorities, but there is no statutory requirement for them to use it; if instead they are able to send us other documents that record the same information about the qualified person's opinion, we will accept those.

While the purpose of the form is to help in providing information to us when we are investigating a complaint, public authorities may also wish to use it when they are considering applying section 36, as part of the internal process of obtaining and recording the qualified person's opinion.

Please see the notes at the end for help in completing this form. For further information on section 36 of the Freedom of Information Act 2000, please see our [guidance document on Prejudice to effective conduct of public affairs \(section 36\)](#).

This form only records the qualified person's opinion under section 36(2) of the Freedom of Information Act. If the qualified person's opinion is that section 36(2) is engaged (ie that disclosure of the information would or would be likely to cause prejudice or inhibition), the public authority must then carry out the public interest test. As a matter of good practice, public authorities should also keep a record of the factors considered in the public interest test and the outcome of that test.

The public authority	
1. Name of the authority	Liverpool City Council
The qualified person	
2. Name (<i>see Notes below</i>)	Jeanette McLoughlin
3. Job title	City Solicitor & Monitoring Officer
4. Subsection of s36(5) under which qualified person is authorised (<i>see Notes below</i>)	S36(5)(7)(1)(i)(1)(i)
Information on which opinion was sought	
5. Brief description of the information requested	A 'due diligence' report conducted by a third party organisation on behalf of the City Council
6. Information was	<input checked="" type="checkbox"/> shown to qualified person <input type="checkbox"/> described to qualified person
Submission to the qualified person	
7. Date opinion sought	__ / __ / __ (DD/MM/YYYY)
8. Subsection(s) of s36(2) on which opinion was sought (<i>see Notes below</i>)	<input type="checkbox"/> 36(2)(a)(i) <input type="checkbox"/> 36(2)(a)(ii) <input type="checkbox"/> 36(2)(a)(iii) <input checked="" type="checkbox"/> 36(2)(b)(i) <input checked="" type="checkbox"/> 36(2)(b)(ii) <input type="checkbox"/> 36(2)(c)
9. Arguments put forward as to why prejudice/ inhibition would/ would be likely to occur	<ol style="list-style-type: none"> 1. The issues update represents discussions and deliberations which, if made public, would have a direct impact upon the honest provision of advice on the part of City Council officers if those officers felt what they considered to be honest advice would be made public. 2. Decision making, especially in regards to the criteria set out in the terms of your request, is an extremely important part of the function of the City Council and its officers must feel free to discuss and explore, either internally or with external staff and organisations, some difficult matters. Any loss or impact upon

	this freedom would, in the opinion of the City Council, inhibit free and frank discussions in the future
10. Counter arguments put forward	1. The City Council has considered its role as a Local Authority and its inherent responsibility to be transparent to tax payers, especially when, as with almost all undertakings, public money will, at some point be used or received. If the information requested was disclosed to the public it would encourage a better informed and open public debate and would ensure the Local Authority was subject to scrutiny in regards to the use of public money.
11. Any other factors taken into account	N/A

The qualified person's opinion

12. (see Notes below)

The qualified person's opinion is that, if the information requested were disclosed, the prejudice/ inhibition specified in the following section(s) of the Freedom of Information Act 2000

☐ 36(2)(a)(i)

☐ would occur ☐ would be likely to occur

for the following reasons(s):

.....

.....

☐ 36(2)(a)(ii)

☐ would occur ☐ would be likely to occur

for the following reasons(s):

.....

.....

☐ 36(2)(a)(iii)

☐ would occur ☐ would be likely to occur

for the following reasons(s):

.....

.....

Record of the qualified person's opinion

November 2011 Version: 1.0

☒ 36(2)(b)(i)

☒ would occur ☐ would be likely to occur

For the following reasons(s): The issues papers are an iterative process and they evidence observations and comment from external advisers upon a great number of contractual issues. From my review of the papers it is important that the context is highlighted. These communications from external advisers were addressing, at intervals, discussions and negotiations which were taking place in relation to the City Council exit from a multi-million pound joint venture agreement. Matters highlighted in these documents then went to inform advice which officers of the Council would give to decision makers about the basis of the termination agreement between the parties. As with the formation of a contractual relationship, so with the termination, there has to be room for negotiation between the parties and for each party to receive advice upon its negotiating stance. It is my view that disclosure of these documents inhibits free and frank provision of advice as it would prevent officers from advising in favour of a 'commercial settlement' on an issue, where, for example, there was a sensible requirement for a point to be conceded rather than become the subject of complex and protracted litigation. I would point out that there was not one such issue to be resolved here but a number.

☒ 36(2)(b)(ii)

☒ would occur ☐ would be likely to occur

For the following reasons(s): ...I re iterate the context as set out above. These issues were complex and not capable of easy resolution but neither party wished to enter into litigation which could have been the only route were it not open to the parties to have a sensible and pragmatic commercial discussion. These documents evidence differences between the parties which require free and frank exchanges in order to arrive at a resolution. If there was a full disclosure required it is my view that it would inhibit the pragmatism which is essential in negotiations at this level in matters of such complexity.

☐ 36(2)(c)

☐ would occur ☐ would be likely to occur

for the following reasons(s):

13. Date opinion was given
(see Notes below)

19/10/2015 (DD/MM/YYYY)

14. Qualified person's
signature (see Notes below)

Notes for completing this form

2. Where the public authority itself, rather than an individual, has been authorised as the qualified person, the name will be that of the highest decision making body of the authority.

4. Please refer to section 36(5) of the Freedom of Information Act 2000 for the list of qualified persons.

8. This lists the subsections of section 36 which the qualified person was asked to consider.

The full text of section 36(2) is as follows:

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

(a) would, or would be likely to, prejudice—

(i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or

(ii) the work of the Executive Committee of the Northern Ireland Assembly, or

(iii) the work of the Cabinet of the Welsh Assembly Government.

(b) would, or 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, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

12. This lists the subsections of section 36 which the qualified person decided were engaged. Please tick the relevant subsection(s), and in each case indicate whether the prejudice or inhibition would or would be likely to occur and the reasons for this.

13. This is the date on which the qualified person's opinion was given. If the form is completed after that, the date entered here must still be the date on which the opinion was given.

14. Where the public authority itself, rather than an individual, has been authorised as the qualified person, the form should be signed on behalf of the highest decision making body of the authority. In that case, please also print the name of the person signing on behalf of that body.

Record of the qualified person's opinion

November 2011 Version: 1.0

Enquiries to: Kevin Symm
Your Ref: FS50602771
Our Ref: 398714



Liverpool
City Council

Mr Ian Walley
Information Commissioner's Office
Wycliffe House, Water Lane
Wilmslow, Cheshire
SK9 5AF

13 April 2016

Dear Mr Walley

Freedom of Information Act 2000 request 398714

I write regarding your correspondence to the City Council dated 11 March in regards to a complaint submitted by [REDACTED]. Specifically, you have asked the City Council to address a series of points in regards to our original application of Sections 36, 41 and 43 of the Freedom of Information Act 2000

The City Council provided an internal review response to [REDACTED] on the 7 March, a copy of which is enclosed along with a copy of our original response. The Internal Review determined that the applications of Section 41 and 43 of the Section 14 of the Freedom of Information Act 2000 were not robust enough and, accordingly, did not uphold them. As such our refusal was based solely in accordance with the parameters of Section 36 of the Act

As a result we will not respond to the points in your correspondence of the 11 March in regards to Section 41 and 43 as these are no longer considered valid

In regards to our reliance upon Section 36 you have asked the City Council to address the following points.

Section 36 is a prejudiced based exemption which works in a slightly different way to the other prejudiced based exemptions contained within the Act. Section 36 can only be engaged if in the reasonable opinion of the qualified person disclosure would result in any of the effects set out in section 36(2) of the Act

In order for the ICO to determine whether section 36 was correctly applied please provide a copy of the submissions given to the qualified person in order for them reach their opinion and a copy of the opinion which was subsequently provided. If either the submissions or opinion were not written down please describe the nature of the submissions and the opinion itself.

Furthermore, if in providing such documents, the following is not clear, please provide a response to the following questions:

- When was this opinion sought and when was it given?
- What information did the qualified person have access to when giving this opinion?
- For example, did the qualified person have access to the information itself or just a summary of the information that had been withheld?
- Was the qualified person provided with any submissions supporting a recommendation that the exemption was engaged?

- Similarly, was the qualified person in fact provided with any contrary arguments supporting the position that the exemption was not engaged?

Please can we ask you to also provide a response to the questions provided on the form attached to this email relating to the application of section 36 by the qualified person.

The City Council can confirm the following:

1. The process of opinion being sought and provided began on the 8 September 2015 when a copy of the original request was first forwarded to our City Solicitor and the opinion provided on the 19 October 2015
2. The City Solicitor has access to all relevant information held by the City Council
3. As above
4. Yes, these are included in the S36 pro-forma
5. As above

Enclosed is a copy of what we consider to be the information requested by [REDACTED]

Yours sincerely



Mr Kevin Symm
Senior Information Officer

Dear Mr Walley

Can you confirm receipt of the file I posted to you last week which contained our formal response?

Regards,

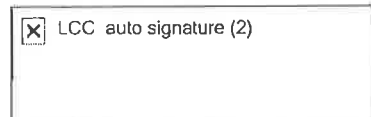
Kevin Symm | Senior Information Officer

Liverpool City Council | Cunard Building | Liverpool | L3 1DS

T: 0151 233 0418 | E: kevin.symm@liverpool.gov.uk

Postal address:

Liverpool City Council | Municipal Buildings | Dale Street | Liverpool | L2 2DH



From: casework@ico.org.uk [mailto:casework@ico.org.uk]

Sent: 11 March 2016 09:59

To: Information Requests

Cc: Symm, Kevin

Subject: re an FOI complaint to the ICO from [REDACTED] [Ref. FS50602771]

11th March 2016

Case Reference Number FS50602771

Dear Sir/Madam

Your ref: **FOI/398714**

Freedom of Information Act 2000 (FOIA)

Complainant: [REDACTED]

We wrote to you on previously to let you know that we have accepted this case for investigation. I have now been asked to investigate it.

You should now reconsider the way the council has handled this request and respond as detailed below

ICO's approach

On receipt of a complaint under the FOIA, the Information Commissioner will give a public authority one opportunity to justify its position to him, before issuing a decision notice. Please consider the guide for public authorities on the Information Commissioner's website for more information about how we handle complaints: http://www.ico.org.uk/for_organisations/freedom_of_information/guide.aspx

The request

On 10 August 2015 the complainant made the following request for information under the FOIA for:

"Please provide a copy of the full due diligence Report produced by KPMG in fulfilment 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. Finally, may I point out, as [REDACTED] also pointed out in December 2014 in the correspondence on [REDACTED], that a document defining itself as an "extract" of a "fuller Report" cannot possibly be intended by anyone to be the final written report superseding all previous information, and if indeed your office should continue to assert this I will immediately complain to the Information Commissioner."

You responded on 8 September 2015 provided some information on the process which the report when through. On 19 October 2015 you said that you do not hold the information as specified in the request however you do hold some information falling within the scope of the request. However you applied Sections 36(2)(b)(ii), 41, 43(1) and 43(2) and withheld the information from disclosure.

The Commissioner understands that the complainant requested a review of the decision on 23 October 2015 however the council has not responded to this.

What you need to do now

Where possible the Information Commissioner prefers complaints to be resolved by informal means, and we ask both parties to be open to compromise. It is also your responsibility to satisfy the ICO that you have complied with the law. The ICO's website has guidance which you should refer to in order to check whether your original response to the information request was appropriate.

This is your opportunity to finalise your position with the ICO. With this in mind, you should revisit the request. After looking at our guidance, and in light of the passage of time, you may decide to reverse or amend your position. If you do, please notify the complainant and me within the timeframe specified at the end of this letter. This may enable us to close this case informally without the need for a decision notice.

In any event, we need the following information from you to reach a decision.

- A copy of the withheld information (clearly marked with which exemptions apply).
- Detailed explanations for the parts of the FOIA
- In particular please answer the following questions in relation to the application of these exemptions

a) Please clarify if you have now carried out a review of your decision as requested

by the complainant on 23 October 2015.

- b) You have argued that there is no full report falling within the scope of the complainant's request other than the final report which was disclosed with the engagement letter. You explained your view that the information which does fall within the scope of the request is a set of emails relating to issues and issue updates. However in her request for review the complainant raised concerns at this response and provided arguments outlining why she believed this response not to be correct.

For the absence of doubt therefore, please can you state categorically whether there was a report as described in point 2 of the council's letter to the complainant of 8 September 2015, which is a separate report to the one disclosed with the engagement letter. Point 2 stated:

- 2) *"Issues update / Final report" work conducted August-October 2014: In August KPMG produced a draft "Issues update document" which summarised progress on the issues identified during the fieldwork phase. This document went through a number of redrafts as matters were resolved, including being renamed "Final report" on 9th October, albeit it retained similar form and content to the previous "Issues update document" drafts. 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 - 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. Subsequent drafts of the "Final report" contained some further changes as KPMG finalised their review and report.'*

c) Section 36

Section 36 is a prejudiced based exemption which works in a slightly different way to the other prejudiced based exemptions contained within the Act. Section 36 can only be engaged if in the reasonable opinion of the qualified person disclosure would result in any of the effects set out in section 36(2) of the Act.

In order for the ICO to determine whether section 36 was correctly applied please provide a copy of the submissions given to the qualified person in order for them reach their opinion and a copy of the opinion which was subsequently provided. If either the submissions or opinion were not written down please describe the nature of the submissions and the opinion itself.

Furthermore, if in providing such documents, the following is not clear, please provide a response to the following questions:

- When was this opinion sought and when was it given?
- What information did the qualified person have access to when giving this opinion?
- For example, did the qualified person have access to the information itself or just a summary of the information that had been withheld?
- Was the qualified person provided with any submissions supporting a recommendation that the exemption was engaged?
- Similarly, was the qualified person in fact provided with any contrary arguments supporting the position that the exemption was not engaged?

Please can we ask you to also provide a response to the questions provided on

the form attached to this email relating to the application of section 36 by the qualified person.

d) Section 41

For section 41(1)(a) to be met the information must have been provided by a third party. Therefore please identify which third party provided the council with the withheld information.

For section 41(1)(b) to be met disclosure of the withheld Information must constitute an actionable breach of confidence. In the ICO's view a breach will be actionable if:

1. The information has the necessary quality of confidence. (Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial; information which is of importance to the confider should not be considered trivial.)
2. The information was communicated in circumstances importing an obligation of confidence. (An obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend upon the nature of the information itself, and/or the relationship between the parties.)
3. Unauthorised disclosure would cause a specific detriment to either the party which provided it or any other party. (Please note that the approach taken by the courts in **some** cases is that detriment is not always a prerequisite to an actionable breach of confidence.)

Therefore, with reference to the three criteria above, please explain why disclosure of the withheld information to the public would constitute an actionable breach of confidence.

Although section 41 is an absolute exemption, the law of confidence contains its own built in public interest test with one defence to an action being that disclosure is in the public interest. Therefore please explain the public interest arguments considered by the council in this case and explain why it was concluded that there was not a sufficient public interest in disclosure of the information in order to defend any actionable breach.

e) Section 43

Section 43(1)

Provide evidence to support the position that the withheld information constitutes a trade secret. For example, is it the case that the information is used to gain a competitive advantage but it is not generally known in that trade or business? Are steps taken to keep the information secret?

Section 43(2)

Please identify the party or parties whose commercial interests would, or would be likely to be prejudiced if the withheld information was disclosed.

Please provide a detailed explanation to support the position that disclosure of the withheld information would, or would be likely to prejudice a party's commercial interests. Please explain clearly how the damage would occur should the information be disclosed.

Please ensure that you provide evidence which demonstrates a clear link between disclosure of the information that has actually been requested and any prejudice to commercial interests which may occur.

If the prejudice relates to the commercial interests of third parties, in line with the Information Tribunal decision in the case *Derry Council v Information Commissioner* (EA/2006/0014), the ICO does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns. Therefore, please clarify on what basis you have established that disclosure of a third party's interests may occur and *please provide copies of correspondence the council has had with third parties in relation to this request.*

Likelihood

The ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; i.e. either prejudice 'would' occur or prejudice 'would be likely to' occur.

With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15).

With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).

Please confirm which threshold of likelihood the council is relying on in this case, i.e. the lower threshold that disclosure 'would be likely' to have a prejudicial effect or the higher threshold that disclosure 'would' have a prejudicial effect.

f) The public interest test

In order to determine whether the public interest tests have been applied appropriately, the ICO will require answers to the following questions as regards each of the exemptions identified by the council.

- i) What public interest arguments in favour of maintaining the exemption neither confirming nor denying whether the information is held were taken into account?
- ii) Please explain why you consider that on balance the public interest in maintaining the exemption outweighs that in disclosing of the withheld information. Please include details of any particular weighting exercise that has been carried out.

Please ensure that your submissions focus on the content of the information that has actually been withheld rather than simply being generic public interest arguments.

We strongly recommend that your response is guided by recent decision notices, our

guidance and our lines to take, which demonstrate the Information Commissioner's approach to the exemptions and procedural sections of the FOIA. These can be found on our website:

<http://search.ico.org.uk/ico/search/decisionnotice>

<https://ico.org.uk/for-organisations/>

Having revisited the request, you may decide to apply a new exemption. We will consider new exemptions but it is your responsibility to tell the complainant why the new exemption applies and to provide us now with your full submissions.

For the avoidance of doubt, you should now do the following.

Consider whether to change your response to the information request, and let us know the outcome.

Send us the withheld information.

Send us your full and final arguments as to why you think the exemptions apply.

Answer all of the questions in this letter.

Please provide your response within 20 working days of the date of this letter, that is by 8 April 2016, ensuring that you fully set out your final position in relation to this request. If you have any concerns please contact me at casework@ico.org.uk (quoting the above reference in this format [Ref. FS50602771]) or call me on 01625 545 853.

Yours sincerely

Ian Walley
Senior Case Officer

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18th April 2016

Case Reference Number FS50602771

Dear Mr Symm

Thank you for your email.

I have not been in the office since Thursday last week however our scanning department has confirmed the receipt of a large file from the council relating to the case so I would presume that we have received the information safely.

Kind regards

Ian Walley
Senior Case Officer

Mr Ged Fitzgerald
Chief Executive
Liverpool City Council
Municipal Buildings
Dale Street
Liverpool
L2 2DH

8 June 2016

Dear Mr Fitzgerald

Freedom of Information Act 2000 (FOIA)

Complainant: [REDACTED]

Case Reference Number FS50602771

Please find enclosed a copy of the decision notice relating to a complaint from [REDACTED]

The complaint has been considered by the Commissioner and the decision notice sets out the reasons for the decision. If you disagree with the decision notice you have the right to appeal to the First-tier Tribunal (Information Rights).

The Commissioner will publish this decision on the ICO website, but will remove all names and addresses of complainants. If you choose to also reproduce this decision notice, then the Commissioner expects similar steps to be taken.

I hope the above information is helpful.

Yours sincerely



Ian Walley
Senior Case Officer

Mr K Symm
Liverpool City Council
Municipal Buildings
Dale Street
Liverpool
L2 2DH

8 June 2016

Dear Mr Symm

Freedom of Information Act 2000 (FOIA)

Complainant: [REDACTED]
Case Reference Number FS50602771


Please find enclosed a copy of the decision notice relating to a complaint from [REDACTED]. This has been sent to Mr Ged Fitzgerald, Chief Executive of Liverpool City Council.

The complaint has been considered by the Commissioner and the decision notice sets out the reasons for the decision. If you disagree with the decision notice you have the right to appeal to the First-tier Tribunal (Information Rights).

The Commissioner will publish this decision on the ICO website, but will remove all names and addresses of complainants. If you choose to also reproduce this decision notice, then the Commissioner expects similar steps to be taken.

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Yours sincerely



Ian Walley
Senior Case Officer