

Martin Orpen
request-103xxxxxxxxxxxxx@xxxxxxxxxxxxxxxxx.xxx

27 February 2012

Dear Mr. Orpen

FREEDOM OF INFORMATION ACT 2000 – REQUEST 1205

Thank you for your request for information, which we received on 30 January 2012. You asked us for a copy of the legal advice that we have received in relation to the Library's assertion of copyright over scanned images of newspaper pages published at <http://www.britishnewspaperarchive.co.uk>. You also asked us for a detailed description of the production process that created those images, and specifically for details of the unit cost of the image, the cost of the equipment used, the training period required for the operators of the equipment and the financial compensation that they receive.

We have considered your request for information and I deal with each element of your request in detail below.

Legal Advice

I can confirm that the British Library does hold legal advice in relation to the assertion of intellectual property rights over images created from public domain works, which was provided by Farrer & Co in 2007 and updated in 2011. These documents are exempt from disclosure under Section 42 of the Freedom of Information Act.

Section 42 is a qualified exemption which sets aside the right of access to information where the public interest in maintaining the exemption outweighs the public interest in disclosure, and which provides that information is exempt from disclosure where a claim to legal professional privilege could be maintained in legal proceedings.

The factors weighing in favour of disclosure are:

- There is general public interest in ensuring that public bodies should be accountable for the quality of their decision making, and in ensuring that the decision making process is as transparent as possible.
- There is general public interest in informing the ongoing public debate in relation to various aspects of copyright in the digital world.
- There is some public interest in knowing whether or not legal advice was followed by a public body.

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The factors weighing in favour of maintaining the exemption are:

- There is significant public interest in maintaining the convention of confidentiality between lawyer and client
- There is strong public interest in preserving the Library's ability to protect and defend its legal interests, which support the public good. That ability would be materially prejudiced by disclosure of legal advice which may be relied upon in future to inform future policy or defend against future litigation.
- There is general public interest in ensuring that decisions made by public authorities are taken in a fully informed legal context. Authorities require legal advice for the effective performance of their operations, and that advice of necessity must be given in confidence by lawyers fully apprised of the facts, and without such comprehensive advice any decision making by the authority may be compromised.

The factors in favour of disclosure are in this case outweighed by those against. This letter therefore acts as a refusal notice under Section 17(1) of the Act in relation to these documents.

The British Library's position remains that where skill, judgement and/or labour are used in the creation of an image of works that have fallen into the public domain, a new copyright will exist in relation to that image. This is not the case for a mere mechanical facsimile such as a photocopy, but the threshold of originality under UK law is very low and where the parameters of the image capture or the manipulation of the resulting image require human skill or judgement, or where the handling of the original to create the image requires significant human skill or labour, then the procedure can not be regarded as a mere mechanical copy and the resulting image constitutes a new copyright work.

The Library takes this position in part so as to ensure that the output of the Library's digitisation projects remains under the control of the Library, and that the resulting work thereby belongs to the nation. Large scale digitisation projects are almost prohibitively expensive, and one of the main ways that the Library manages to accomplish such work is via public/private partnerships where a commercial partner undertakes the work on our behalf on a contractual basis. This is the case with the current Newspaper Archive project undertaken with **brightsolid**. In return for their support our partners gain the contractual right to exploit images deriving from the content of our collections for a limited time. However, by asserting our copyright over the resulting images the Library ensures that the results of the project ultimately belong to the nation, and therefore the Library retains the ability to make such content freely available for the public good via our reading rooms, and additionally retains the option to make such content available freely and more widely at a later date should it so choose.

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The Production Process

The website at <http://www.britishnewspaperarchive.co.uk> is the result of the Library's public/private partnership with brightsolid, who are digitising public domain newspapers from the British Library's newspaper archive at no expense to the Library or the public purse. As such, much of the operational information that you have requested is an internal matter for brightsolid and is therefore not held by the Library.

Specifically, the Library holds no record of:

- The unit cost of the image created
- The cost of the equipment used to create the image
- The training period undertaken by the operators of that equipment
- The financial compensation received by those operators

The Library does however hold some information about the image production process, insofar as it is described in the Library's contract with brightsolid. Please find enclosed a copy of the relevant schedules from the contract. Please note however that material throughout the body of these schedules falls under an exemption under the Act, namely Section 43.

Section 43(2) is a qualified exemption that provides that information is exempt from disclosure if such disclosure would (or would be likely to) prejudice the commercial interests of any party, where the public interest in maintaining the exemption outweighs the public interest in the disclosure of the information.

Commercial interests refer specifically to a party's ability to buy and sell goods or services, and may be prejudiced by damage to business reputation, damage to customer/supplier/investor confidence, negative impact on revenue, threats to ability to obtain supplies or finance, or by revelation of market sensitive data in a competitive environment.

The Office of Government Commerce (OGC) gives detailed advice in the Civil Procurement guidelines as to what elements of a contract may be released into the public domain, and we have followed these guidelines throughout.

Schedule 2 & Related Annexes (Specific Details)

This schedule is the detailed service description of the contract. As such it contains detailed information relating to brightsolid's methodologies & operations, technical capabilities, marketing plans and other strategic information, all of which would prejudice their commercial interests if disclosed by allowing competitors an unfair advantage when competing against brightsolid in future negotiations.

The factors weighing in favour of disclosure are:

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- There is general public interest in the accountability for use of public funds
- There is general public interest in proper scrutiny of government actions in carrying out procurement in accordance with published policy, and in an open and honest way
- There is strong public interest in ensuring that public money is used effectively, and in ensuring that the Library is getting value for money when procuring goods and services, but this interest is significantly reduced by the provision of the generality of the Services Description which should be sufficient to satisfy the public interest in this regard.

The factors in favour of maintaining the exemption are:

- There is general public interest in preventing potential harm to the competitive interests of parties involved in supply of goods and services to government which would in turn make it harder for public bodies to procure goods and services, resulting in less effective use of public money
- There is general public interest in ensuring that business feels able to engage in commerce with public bodies without the risk of commercial data being compromised to the detriment of commercial interests
- There is general public interest in protecting the commercial interests of the private sector (which plays an important role in the general health of the economy)
- There is very strong public interest in preventing the prejudice to **brightsolid's** commercial interests that would be caused by revealing details of their marketing plans, technological capabilities, operating methodologies and such like, and this is supported by the OGC's guidance in relation to the redaction of such information.

The factors in favour of disclosure are outweighed by those in favour of maintaining the exemption. Please note that Annex C is not redacted – the graphic illustrations are simply obscured by poor image quality, and do not contain any information of material significance to your request for information.

The specific details in Schedule 2 (excluding Annex A & Annex C) that are exempt from disclosure under Section 43(2) were provided to the Library by **brightsolid** in confidence, and **brightsolid's** solicitors have informed the Library that disclosure of this information would be viewed by **brightsolid** as an actionable breach of confidence. As such, the details that have been withheld from disclosure in Schedule 2 (excluding Annex A & Annex C) are also exempt from disclosure under Section 41 of the Freedom of Information Act.

Section 41 provides that information is exempt if it was obtained by the public authority from any other organisation and the disclosure of that information to the public would constitute a breach of confidence actionable by that organisation.

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Section 41 is an absolute exemption and we are not therefore required to consider the public interest in disclosure.

Schedule 4

This schedule is the detailed material handling standards for the contract. The methodologies and technical standards involved are proprietary to brightsolid and formed the basis of their tender. Disclosure of this information would prejudice their commercial interests if disclosed by allowing competitors an unfair advantage when competing against brightsolid in future negotiations.

The factors weighing in favour of disclosure are:

- There is general public interest in the accountability for use of public funds
- There is general public interest in proper scrutiny of government actions in carrying out procurement in accordance with published policy, and in an open and honest way
- There is strong public interest in ensuring that public money is used effectively, and in ensuring that the Library is getting value for money when procuring goods and services, but this interest is significantly reduced by the provision of the generality of the Services Description which should be sufficient to satisfy the public interest in this regard.
- There is strong public interest in ensuring that the Library's collection is not damaged in the execution of this contract, but this is reduced by the disclosure of the headings in this schedule that should demonstrate that all relevant standards and provisions have been thoroughly addressed and thereby satisfy the public interest in this regard.

The factors weighing in favour of maintaining the exemption are:

- There is general public interest in preventing potential harm to the competitive interests of parties involved in supply of goods and services to government which would in turn make it harder for public bodies to procure goods and services, resulting in less effective use of public money
- There is general public interest in ensuring that business feels able to engage in commerce with public bodies without the risk of commercial data being compromised to the detriment of commercial interests
- There is general public interest in protecting the commercial interests of the private sector (which plays an important role in the general health of the economy)
- There is very strong public interest in preventing the prejudice to brightsolid's commercial interests that would be caused by revealing details of their technological capabilities, operating methodologies and such like, and this is supported by the OGC's guidance in relation to the redaction of such information.

The factors in favour of disclosure are outweighed by those in favour of maintaining the exemption.

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In addition, the aggregation of information in Schedule 4 (as opposed to the specific details) constitutes a trade secret, in that the unique approach to work detailed therein is specific information used in business, is proprietary to the supplier of that information (in this case, **brightsolid**), and would be liable to cause real or significant harm to the owner's commercial interests if disclosed. Section 43(1) therefore also applies to Schedule 4.

Section 43(1) is a qualified exemption that provides that information is exempt if it is a trade secret and where the public interest in maintaining the exemption outweighs the public interest in the disclosure of the information.

Factors in favour of disclosure:

- There is general public interest in the accountability for use of public funds
- There is general public interest in proper scrutiny of government actions in carrying out procurement in accordance with published policy, and in an open and honest way
- There is strong public interest in ensuring that public money is used effectively, and in ensuring that the Library is getting value for money when procuring goods and services, but this interest is significantly reduced by the provision of the generality of the Services Description which should be sufficient to satisfy the public interest in this regard.
- There is strong public interest in ensuring that the Library's collection is not damaged in the execution of this contract, but this is reduced by the disclosure of the headings in this schedule that should demonstrate that all relevant standards and provisions have been thoroughly addressed and thereby satisfy the public interest in this regard.

Factors in favour of maintaining the exemption:

- There is general public interest in preventing potential harm to the competitive interests of parties involved in supply of goods and services to government which would in turn make it harder for public bodies to procure goods and services, resulting in less effective use of public money
- There is general public interest in ensuring that business feels able to engage in commerce with public bodies without the risk of commercial data being compromised to the detriment of commercial interests
- There is general public interest in protecting the commercial interests of the private sector (which plays an important role in the general health of the economy)
- There is very strong public interest in preventing the prejudice to **brightsolid's** commercial interests that would be caused by revealing details of their technological capabilities, operating methodologies and such like, and this is supported by the OGC's guidance in relation to the redaction of such information.

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THE WORLD'S KNOWLEDGE

The factors in favour of disclosure are outweighed by those in favour of maintaining the exemption.

In addition, the specific details in Schedule 4 that are exempt from disclosure under Sections 43(1) & 43(2) were provided to the Library by **brightsolid** in confidence, and **brightsolid**'s solicitors have advised the Library that disclosure of this information would be viewed by **brightsolid** as an actionable breach of confidence. As such, the details that have been withheld from disclosure in Schedule 4 are also exempt from disclosure under Section 41 of the Freedom of Information Act.

Section 41 provides that information is exempt if it was obtained by the public authority from any other organisation and the disclosure of that information to the public would constitute a breach of confidence actionable by that organisation.

Section 41 is an absolute exemption and we are not therefore required to consider the public interest in disclosure.

This letter therefore acts as a refusal notice under Section 17(1) of the Act in relation to the information withheld from both schedules.

You may find it useful to know that the use of these exemptions in relation to this information has already been assessed by the Information Commissioner in relation to another request for the same information. His decision that the British Library acted correctly to withhold this information from disclosure on the basis detailed above can be found in Decision Notice FS50361862 at:

http://www.ico.gov.uk/~media/documents/decisionnotices/2011/fs_50361862.ashx.

We have of course reassessed the potential prejudice that would or might be caused by the requested disclosure of this information, and reassessed the balance of public interest in this regard as it stands at the date of your current request. However, the position remains unchanged from the date of the previous request assessed in Decision Notice FS50361862, in that the information remains current and proprietary to **brightsolid**.

If you are unhappy with our response to your request and wish to make a complaint or request a review of our decision, you should write to:

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Please note, complaints and requests for internal review received more than two months after the initial decision will not be handled.

If you are not content with the outcome of the internal review, you may appeal directly to the Information Commissioner at the address given below. You should do this within two months of our final decision. There is no charge for making an appeal.

Further information on the Freedom of Information Act 2000 is available from the Information Commissioner's Office:

Wycliffe House
Water Lane
Wilmslow
SK9 5AF

Telephone 08456 30 60 60 or 01625 54 57 45

Website www.ico.gov.uk

Yours sincerely

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