

MEETING:	AUDIT AND GOVERNANCE COMMITTEE
DATE:	13 MAY 2013
TITLE OF REPORT:	COMMERCIAL CONFIDENTIALITY
REPORT BY:	HEAD OF GOVERNANCE

1. Classification

Open.

2. Key Decision

This is not a key decision.

3. Wards Affected

County-wide.

4. Purpose

To provide the Audit and Governance Committee with a briefing on commercial confidentiality.

5. Recommendation

THAT the contents of this briefing report are noted.

6. Key Points Summary

- Commercial confidentiality is a legal concept which deals with the protection of a business' commercial interests and trade secrets.
- Breach of confidence is actionable under civil law and can have serious consequences if a breach of confidential information is established and damage has occurred.
- Commercial confidentiality is also referred to within the context of requests for Freedom of Information.
- It arises within the Council when dealing with external partners or agencies.
- Section 41 and 43 Freedom of Information Act 2000 set out exemptions from the right to know if the information requested was provided to the public authority in confidence (S41); or if the information requested is a trade secret or the release of the information is likely to prejudice the commercial interests of any person (S43).

7. Alternative Options

- 7.1 There are no alternative options identified in this report.

8. Reasons for Recommendations

- 8.1 The issue of commercial confidentiality was raised at a meeting of the General Overview and Scrutiny Committee on 14 January 2013. This report gives a brief overview of the concept of commercial confidentiality and its impact on relationships between Herefordshire Council and external agencies.

9. Introduction and Background

- 9.1 On 14 January 2013 the Economic Development Manager Hereford Futures presented a report to the General Overview and Scrutiny Committee. The report was an update on the governance and oversight arrangements of Hereford Futures. At this meeting a number of questions were raised regarding the supplying of information requested under the Freedom of Information Act 2000. Namely, that Freedom of Information requests had been sent to Herefordshire Council asking for minutes of board meetings of Hereford Futures. The Committee heard that the Leader of the Council viewed the minutes of the board meeting prior to attendance at the next one. The minutes were not kept at the Council offices. Hereford Futures is a not for profit private company limited by guarantee. The company are advising and assisting the physical redevelopment of 100 acres of land immediately to the north of the historic centre of Hereford. The information was not supplied in response to the request and the issue of commercial confidentiality was raised.
- 9.2 The Freedom of Information Act 2000 has specific exemptions provided to ensure that 'trade secrets' or 'commercial interests' are protected by non-disclosure of information that may have a prejudicial effect on an individual. This has been commonly referred to as 'commercial confidentiality'.
- 9.3 Herefordshire Council have a number of private sector partners who undertake projects or services on behalf of the Council. This may result in the Council holding information about that private sector partner that is commercially confidential. This information may also be subject to requests for information under the Freedom of Information Act 2000.
- 9.4 The purpose of this report is to give a briefing on commercial confidentiality including information of breach of confidence and the exemption under Freedom of Information Act.

10. Key Considerations

- 10.1 The law governing the breach of commercial confidence is used to protect a business' commercial information and its trade secrets.

Breach of Confidence

What information can be treated as confidential?

- 10.2 For information to be treated as confidential three elements must be present. Firstly, that the information has the necessary quality of confidence. This means that it cannot be information that is already in the public domain. Secondly, it must have been given under circumstances placing an obligation of confidence. This could be achieved through a

number of circumstances, the most obvious being where one party tells the other that the information that they are giving is to remain confidential. It is worth noting however that if the first element of confidence is not satisfied then a person cannot make the information confidential just by saying so. Finally, if disclosure of the information were to take place it would result in harm to an individual or an interest.

- 10.3 There can be express confidentiality agreements signed between persons where it is agreed that the information is confidential and cannot be disclosed. However, it is not necessary for an agreement to be in place for there to be an implied confidentiality agreement. For example, it would not be a defence for a person to state that they had not signed a confidentiality agreement and were therefore able to disclose the information, if the circumstances implied that the information given was confidential or misread the impact disclosure would have.

When can a breach occur?

- 10.4 A breach of duty of confidence occurs when a confidant, without permission of the confider, uses the confidential information for his own benefit or discloses it to another party. It need not matter whether the information was used innocently ie the confidant forgot that the information was confidential.

Are there any defences to a breach of confidence?

- 10.5 There are two defences to a breach of confidence. These are:
1. To deny that the information was confidential.
 2. To claim that disclosure was justified. For example, disclosure was in the public interest such as disclosing the information to the Police. However, disclosure will never be justified for 'commercial exploitation' of the information.

What remedies are available to a party whose confidence has been breached?

- 10.6 Where a breach of confidence has been identified, the confider will be able to seek remedies. These could be an injunction, damages or an ability to see the amount of profit made by the use of the confidential information.
- 10.7 The Human Rights Act 1998 gives individuals a right to freedom of expression but these rights would have to be carefully balanced with the current laws on confidentiality.

Commercial Confidentiality and the Freedom of Information Act 2000

- 10.8 Commercial confidentiality refers to safeguarding the privacy of sensitive information of companies. It is a concept developed since the introduction of the Freedom of Information Act 2000.

Section 41

- 10.9 Section 41 of the Freedom of Information Act 2000 sets out an exemption from the 'right to know' where the information requested was provided to the local authority in confidence. For this exemption to apply then the following two components must be present:
1. The information must have been given to the local authority by another person. (In this context a person may be an individual, a company, a local authority or any other 'legal entity').

2. Disclosure of the information would give rise to an actionable breach of confidence. (As referred to in 10.2 of this report)

Can confidential information be disclosed?

- 10.10 There are three circumstances where the disclosure of confidential information can be disclosed. These are:
1. Disclosure with consent of the person to whom the obligation of confidentiality is owed;
 2. Disclosures which are required by law such as statutes, court orders etc;
 3. Disclosure where there is an overriding public interest. This shall not be the overriding public interest test within the Freedom of Information Act exemptions, it is a consideration required by the development of common law. The courts have taken the view that the grounds for breaching confidentiality must be valid and very strong. A duty of confidence should not be overridden lightly.

Section 43

- 10.11 Section 43 of the Freedom of Information Act 2000 sets out an exemption from 'the right to know' if the information requested is a trade secret or the release of the information is likely to prejudice the commercial interests of any person. A person can be an individual, a company, the public authority itself or any other legal entity.
- 10.12 Within the Freedom of Information Act there is a duty on a public authority to confirm or deny whether or not it holds the information requested. With regards to trade secrets this duty shall still apply. However with commercial interests the public authority is exempt from the duty to confirm or deny.

What type of information could be subject to this exemption?

- 10.13 There are many different types of commercial information that a public authority may possess which could affect commercial interests. These may include, not only:

Procurement - this could contain future procurement plans, information provided during a tendering process, how contractors have performed under a contract.

Regulation - public authorities may be supplied with information in order to perform their regulatory functions e.g. issuing of licences or whilst investigating potential breaches of regulations that they are responsible for.

Public authority's own commercial activities - some public authorities are permitted to engage in commercial activities.

Policy development - during policy development information could be gained from companies in a specific business sector.

Policy implementation - public authorities may hold information in relation to the assessment of the business proposals when awarding grants.

Private Finance Initiative/Public Private Partnerships - this is the most developing area of public authority models throughout the United Kingdom. This is where private sector partners are involved in the financing and delivering of public sector projects and services. A public authority would be privy to much information on both the project that the private partner are involved with and more general information on the private partner's business.

How to determine whether this information is exempt?

- 10.14 The next step in the process after identifying the commercially sensitive information would be to apply the test of prejudice. This would involve asking a number of questions to see whether the giving of the commercially sensitive information is likely to prejudice the commercial interests of any person. The questions likely to be considered are:
- 1. Does the information relate to, or could it impact on a commercial activity?**
 - 2. Is that commercial activity conducted in a competitive environment?**
 - 3. Would there be damage to reputation or business confidence?**
 - 4. Whose commercial interests are affected?** For example, the releasing of information regarding budgets could impact on a public authority's bargaining power.
 - 5. Is the information commercially sensitive?** For example, information revealing profit margins is likely to be more commercially sensitive than a final price charged.
 - 6. What is the likelihood of the prejudice being caused?** While prejudice need not be certain, there must be a significant risk rather than a remote possibility of prejudice.

The Overriding Public Interest Test

- 10.15 In determining whether to disclose information with a commercial interest, the public authority must weigh up the prejudice caused by the possible disclosure against the likely benefit to the applicant and the wider public.
- 10.16 Although there is a strong public interest in openness, this will not override all other considerations.
- 10.17 Some of the factors that would need to be taken into consideration are:
- 1. The accountability for the spending of public money**
 - 2. The protection of the public** - For example, there may be circumstances where a public authority holds commercial information on the quality of products.
 - 3. The circumstances under which the public authority obtained the information**
 - 4. Competition issues**

Time Limits

- 10.18 A section 43 exemption would not apply beyond 30 years as this is the point at which information becomes a 'historical record'.

Minutes of the board meetings of Hereford Futures

- 10.19 This report was requested as a result of a discussion of minutes of the Hereford Futures board not being divulged to a member of the public under the notion of 'commercial confidentiality'. This report has provided a brief explanation of the concept of commercial confidentiality. It is clear that information given at the board meetings may be classed as commercially confidential information, subject to the tests as outlined above. It must be noted that each individual case must be based on its own merits. Therefore any disclosure of such information must be carefully considered ensuring that the Council is not breaching any law by doing so.

11. Community Impact

11.1 There are no community impacts in this briefing report.

12. Equality and Human Rights

12.1 There are none.

13. Financial Implications

13.1 If the Council were to be found in breach of confidence then a successful claimant could be awarded damages. There may also be significant court costs for the Council.

14. Legal Implications

14.1 Failure to follow the rules of confidence may result in a Claimant bringing an action against the Council. Should the Council fail to give information under a Freedom of Information Act 2000 exemption then a person may refer the refusal to the Information Commissioner. Should the referral be successful then a judgement would be made against the Council which would be made public. The Council would also be compelled to release the withheld information.

15. Risk Management

15.1 This recommendation asks Members to note the contents of this report which sets out the general background and principles to commercial confidentiality. Failure of the Council to adhere to the rules of confidence may result in a Claimant bringing an action in Court against them. If the Council wrongly withholds information under the Freedom of Information Act 2000 then a person may refer the matter to the Information Commissioner.

16. Consultees

16.1 N/A.

17. Appendices

17.1 N/A.

18. Background Papers

18.1 None identified.