

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 6 December 2016

**Public Authority:** London Borough of Lewisham

**Address:** Second Floor  
Lewisham Town Hall  
Catford Road  
London  
SE6 4RU

#### Decision (including any steps ordered)

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1. The complainant requested from the London Borough of Lewisham ("the Council") a copy of the Brockley Private Finance Initiative ("PFI") contract. The Council disclosed some parts of the contract but withheld other parts under sections 40(2) and 43(2).
2. The Commissioner's decision is that the Council has incorrectly applied section 43(2) to the information that it has withheld under that exemption.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - To disclose to the complainant all of the information that it has withheld under section 43(2).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

#### Request and response

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5. On 15 June 2015 the complainant requested the following information from the Council under FOIA:

*"I understand the London Borough of Lewisham signed a PFI contract with Regenter (1B3) in order to carry out works to residential housing stock properties in the Brockley area ('the PFI contract').*

*Under the Freedom of Information Act 2000 please provide me with copies of the following:*

*1. A FULL copy of the PFI contract under which work was undertaken on the above mentioned property (we believe this was around June 2007 but other documents we have seen appear to state that it could be as early as 2005.)*

*2. Please provide the dates when the commission of the contract was entered into and when it was finalised.*

*3. I would like to know whose signature/s are on the final contract and their job title.*

*4. Please provide a copy of ALL the minutes from meetings that discussed the PFI contract from the build up to the meeting where the PFI contract was signed off.*

*5. Please provide information that shows how a leaseholder is responsible for any fees. If referring to a specific clause please provide full details of the clause and contract.*

*6. Please provide a copy of the Independent Adjudicator's Management Audit Report which relates to these Pfi Works and the £6,114.22 bill we received. (As amended on 31/03/2015.)"*

6. The Council responded on 25 September 2015 and provided some information within the scope of the request but refused to provide the remainder. It cited the exemptions in sections 40(2), 41 and 43(2) as a basis for withholding information.
7. The complainant requested an internal review on 24 November 2015. The Council provided the outcome of its internal review on 11 February 2016. It provided further information to the complainant but continued to withhold some information contained in the PFI contract under sections 40(2) and 43(2).

## Scope of the case

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8. The complainant contacted the Commissioner on 15 January 2016 to complain about the way his request for information had been handled. Specifically, he complained about the Council's application of exemptions to the withheld information.
9. During the course of the Commissioner's investigation, the complainant confirmed that he did not wish to complain about the Council's application of section 40(2) to personal data contained in the contract. This included the signatures of individuals contained in the contract, after the Council offered to allow the complainant to view the signatures but confirmed that it did not wish to publish them because of fears over their potential misuse if they were placed in the public domain.
10. The Commissioner considered whether the Council has correctly applied section 43(2) to the information that it withheld under that exemption.

## Reasons for decision

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### Background

11. The Commissioner understands that the Brockley PFI contract was entered into by the Council on 4 June 2007 with Regenter B3 Ltd ("Regenter B3"). Under the contract, Regenter B3 took over responsibility from the Council for the refurbishment, management services and maintenance services for approximately 1800 properties in the area of Brockley in the London Borough of Lewisham from September 2007 for a period of 20 years. The Commissioner further understands that the PFI contract is based on a standard form of contract developed by central Government, with variations negotiated with the Department for Communities and Local Government and financial changes agreed with the Treasury.

### Section 43(2) – Prejudice to commercial interests

12. Section 43(2) provides that information is exempt if its disclosure would, or would be likely to prejudice the commercial interests of any person. The Council argued that disclosure of the information withheld under section 43(2) would be likely to prejudice its own commercial interests and those of Regenter B3. The information withheld under section 43(2) is largely financial in nature.

## Engagement of section 43(2)

13. The Commissioner initially considered whether the relevant criteria for the engagement of section 43(2) were satisfied. These were:
  - (i) whether the prejudice claimed by the Council was relevant to section 43(2);
  - (ii) the nature of the prejudice being claimed by the Council; and
  - (iii) whether there was a likelihood of the prejudice being claimed by the Council occurring.
14. The Council informed the Commissioner that, as with all PFI arrangements, Regenter B3 is a special purpose vehicle set up to enter into the Brockley PFI project agreement and to provide the finance through a mixture of equity investment and loans from the banking sector. It also informed her that the company establishes a supply chain to include a building sub-contractor to undertake major works and a housing manager to deal with the housing and leasehold management of the estate.
15. The Council went on to explain that, in consequence, Regenter B3 was required to enter into a multiplicity of agreements with its sub-contractors and credit agreements with lenders who lend money to it to meet its upfront costs of the works and management and in respect of which it would be reimbursed through the unitary charge paid to it by the Council through the period of the PFI contract.
16. The Council confirmed that that it had obtained the views of Regenter B3 as to the application of section 43(2) to information that it had withheld and provided the Commissioner with a copy of the correspondence it had received from Regenter B3 with regard to this.
17. The Council argued that all of the information that it had redacted should continue to be withheld as it related to pricing and/or business solutions which had an effect on pricing. The Council considered that if the information were to be disclosed that it would:

*"1. give rival bidders insight into Regenter B3's pricing and how it would price future products. The Council is keen to make savings through negotiation of operational PFI Schemes including the Brockley Housing PFI and one method of obtaining such savings is through benchmarking or market testing the Contractors or its sub-contractor's works and services. If the current Contractor's and sub-contractors' prices and rates and or business solutions were disclosed, then any competitive exercise to obtain such*

*savings would be undermined as competitors would be aware of the current Contractor's pricing.*

*2. affect any refinancing proposals. The Contractor may wish to refinance the Brockley Housing PFI and under the terms of the Project Agreement, the Council is entitled to a share in any savings created through such refinancing. The terms of not just the Facility Agreement but all credit agreements, bank margins and finance terms which will be included in the financial model, the Contractor's proposal, the Unitary Charge, credit agreements and related documentation. Such references have been redacted and the Council considers that this information is not only commercially sensitive but it is in the public interest for such information to remain confidential.*

18. The Council went on to argue that:

*"...a further reason why it considered that the public interest in withholding the information which has been redacted so far outweighs the public interest in disclosing it is that the Council would lose the confidence of its contractors if it is considered that pricing and other commercially sensitive information which it has agreed to keep confidential under the terms of the Project Agreement entered into in good faith is subsequently disclosed to requesters of information in breach of contract terms."*

**(i) Applicable interest within the exemption**

19. The Commissioner considered whether the prejudice claimed by the Council is relevant to section 43(2). The Commissioner is satisfied that the potential prejudice identified by the Council is relevant to its commercial interests and those of Regenter B3.

**(ii) The nature of the prejudice**

20. The Commissioner next went on to consider whether the prejudice being claimed was "real, actual or of substance", that is that it is not trivial and whether there was a causal link between disclosure and the prejudice claimed. The Commissioner is satisfied that the prejudice being claimed is not trivial or insignificant and that there is the relevant causal link.

**(iii) The likelihood of prejudice**

21. The Council argued that the disclosure of the withheld information would be likely to prejudice its own commercial interests and also those of Regenter B3. The Commissioner notes that the test that needs to be satisfied in this regard is whether disclosure of the withheld information

would have *"a very significant and weighty chance"* of causing the prejudice that has been identified (*Department for Work and Pensions v The Information Commissioner and FZ [2014] UKUT 0334*).

22. The Commissioner was informed by the Council that in order to address the issue of the application of section 43(2) in more detail, it had obtained the views of Regenter B3, which were provided to the Commissioner. The Council confirmed that it supported Regenter B3 in the majority, although not all, of its arguments as to the commercial sensitivity of the redacted information and also as to the application of the public interest test.
23. Regenter B3 informed the Council that it considered that the redactions in the previously disclosed documents should be retained in their entirety on the basis that disclosure would or would be likely to prejudice its and/or the Council's commercial interests.
24. The information withheld by the Council in the main contract document included the following:
  - the amount of the capital contributions to be paid by the Council to Regenter B3;
  - the amount of the licence fee paid by Regenter B3 to the Council;
  - the minimum sum of money required in an estimate for work which would allow the Council to require Regenter B3 to obtain competitive tenders for work;
  - the maximum amount for which Regenter B3 is required to indemnify the Council for uninsured losses; and
  - the minimum sum of money necessary for works to constitute small works under the contract.
25. Regenter B3 identified three parts of the contract in relation to which it had specific concerns over disclosure. The relevant parts of the contract were:
  - (a) Schedule 4 – Payment Mechanism;
  - (b) Schedule 11 – Limits on liability; and
  - (c) Schedule 13 – Facility Agreement

**(a) Schedule 4 – Payment Mechanism**

26. The information withheld by the Council included:

- the leasehold dwelling charge in respect of each leasehold dwelling;
- the rented dwelling charge in respect of each rented dwelling;
- the minor breach deduction;
- the charge for tree maintenance; and
- the charge for vehicle removal.

27. In relation to Schedule 4, Regenter B3 stated that:

*“Regenter B3 considers that the redactions in relation to the Payment Mechanism should be maintained in their entirety. The redactions included within the document effectively set out the detail of (a) the charges and (b) the deductions (for performance or availability failures). This information is at the commercial heart of any PFI contract and the release of the information would place Regenter B3 (and its ultimate parent company) John Laing PLC at a substantial disadvantage in relation to future housing PFI transactions.*

*The release of this information would be particularly damaging in this instance because other information (which Regenter B3 regarded and continues to regard as commercially sensitive, and which the Council agreed was commercially sensitive in Schedule 23) has already been released. So, if the information was to be released, any rival bidder would know (a) how we carry out our services and (b) the price we attribute to it. The combined information would give rival bidders a highly beneficial insight into how we would be likely to price future projects.*

*Although it may be argued that all housing projects are different, there are substantive commonalities in many aspects of such projects. For example, the PFI contracts themselves are substantively the same, with near identical risk sharing provisions. Also many of the inputs (housing management, responsive repair) will be the same regardless of the underlying project.*

*We do not consider that the time elapsed since the legal completion of these documents should be regarded as diminishing the risk of harm relating to this information. The*

*costs can be indexed using regional construction costs indices easily. Furthermore, the relatively small number of deals means that scrutiny will be given to all projects where information is freely available.*

*The release of the Payment Mechanism and the Facility Agreement would allow the bidder to strip out the finance cost and then gain an understanding of the real costs of carrying out the work.*

*The release of this information would be likely to prejudice the commercial interest of Regenter B3."*

28. Commenting on Regenter B3 arguments, the Council stated that:

*"The Council considers that the argument that the information would give rival bidders insight into Regenter B3's pricing and how it would price future products has merit, as it is true that there are substantive commonalities in PFI contracts. Indeed as financial support is provided by central government departments towards the cost of the capital element of PFI projects, the structure of PFIs and their drafting are standardised with few derogations permitted. Whilst it true that PFI housing contracts are changing in their nature (as they now provide for new build of affordable housing and a degree of regeneration of the relevant estate), there is still a substantial element of housing management and refurbishment to existing housing stock. It is also accepted that there are not many PFI housing deals in the UK market or new ones coming on stream. It is believed that there are approximately 40 current schemes with some new one housing PFIs coming on to the market. Thus the knowledge of the pricing of Regenter B3 as a potential bidder in a limited market would be likely to be prejudicial.*

*Local authorities and central government are concerned to make savings in both operational PFI schemes and any future schemes and competitiveness in the market is an important method to achieving this. Thus the Council, like many authorities, do not consider it in the public interest to place in the public domain the costs of Regenter B3 and its sub-contractors' costs in carrying out works or services under the PFI contract.*

*The Council, in the context of the current austerity and in accordance with central government guidelines, seeks to make savings through negotiations with its PFI contractors. This can involve the omission of services or benchmarking under the terms of the contract. Additionally, the Contractor itself may wish*



*to replace its sub-contractors and to seek savings in so doing which the Council would benefit from. To reduce costs or make savings is in the public interest and the withholding of this redacted information outweighs the public interest in disclosing the costs during the PFI term."*

**(b) Schedule 11 – Limits on liability**

29. The information withheld by the Council included:

- the maximum deductible amounts in respect of claims;
- the limits of the amounts of indemnity;
- the excess in respect of terrorism; and
- the aggregate limit of liability of the Council.

30. In relation to Schedule 11, Regenter B3 stated that:

*"Regenter B3 considers that the redactions in relation to the Insurance Schedule should be maintained in their entirety. The redactions included within the document effectively set out the limits on the liability as well as important financial information concerning the deductibles etc. This limit on liability offered by a bidder is a significant differentiator between the commercial benefits of bids and to release this information would be detrimental to Regenter B3's prospects in future PFI competitions."*

31. Commenting on Regenter B3's arguments, the Council stated that:

*"In relation to the argument made by Regenter B3 it is accepted that information as to caps on liability could enable competitors to work out the premia. This is not restricted to PFI contracts. Insurance companies themselves request that such information be kept confidential. Such a restriction is usually limited to a short period, say 3 years so it is not clear that such information in itself remains commercially sensitive beyond this period. However, regular benchmarking and negotiation over insurance is a regular occurrence in relation to PFIs and is encouraged by Central Government. Thus on balance, the Council agrees that the public interest in retaining this redacted information outweighs the public interest in disclosing it during the PFI term."*

**(c) Schedule 13 – Facility Agreement**

32. The information withheld by the Council included:

- the names of the parties to the agreement;
- the initial percentage shares taken by named banks;
- details of who constitutes shareholders;
- the minimum amounts of advances under the agreement;
- the minimum amounts of prepayments under the agreement;
- the percentage margins applicable to each advance or loan under the agreement;
- the percentage commissions payable under the agreement;
- the maximum amounts of expenditure or debt that can be incurred by the borrower without the agreement of the agent; and
- the minimum sums of any transfers of the loans by the lenders.

33. In relation to Schedule 13, Regenter B3 stated that:

*“Regenter B3 considers that the redactions in relation the Facility Agreement should be maintained in their entirety. Regenter B3 notes that the Council is not a signatory to this agreement and it is simply part of the project agreement in order to prevent the parties from changing it without the permission of the Council. We consider that the release of this information could prejudice both the interests of the Regenter B3 and the Council, if Regenter B3 were ever to seek to refinance this project.*

*In the event of a refinancing, which could result in a substantial reduction in the monthly cost of the debt, the benefit of the reduction is shared between the Council and Regenter B3 (by virtue of clause 80 of the Project Agreement). If a potential new lender was to know Regenter B3's cost of borrowing it would have a strong incentive to minimise the reduction in such costs, to the minimum in felt necessary to gain the lending opportunity. The pricing decision would be unduly "anchored" by the price currently being paid, rather than being based on the actual cost of finance.*

*The length of time since the legal completion of this document will not diminish the risk of harm relating to this information. A diligent financier looking at this as refinancing opportunity would look to establish what their potential lender was currently paying for their existing financing facility.*

*The release of this information would prejudice the financial interests of Regenter B3 and the Council in the event that refinancing was to take place."*

34. Commenting on Regenter B3's arguments, the Council stated that:

*"The Council supports the views of Regenter B3, as it is clearly in the public interest for the Council to co-operate in any refinancing of the project under which it will receive a share of the savings. Refinancing of PFIs are common and are considered a good way of obtaining savings under a PFI. The Council considers that the benefit of retaining redactions in the Facility Agreement outweighs the public interest in disclosing the same. Facility Agreements are entered into between the PFI contractor and its financiers and its equity providers. The Council is not a party to this Facility Agreement and has no power to change it. It is highly unusual to release the commercially sensitive information in facility agreements, as this might undermine attempts to obtain better terms from any lender willing to refinance the project. In recent years, the Council has worked with PFI contractors to seek the financing of PFI projects. Thus the Council agrees that the public interest in retaining this redacted information outweighs the public interest in disclosing it during the PFI term."*

### **The Commissioner's view**

35. The Commissioner reminds herself that the test that needs to be satisfied as to whether section 43(2) is engaged is whether disclosure of the withheld information would have *"a very significant and weighty chance"* of causing the prejudice that has been identified.
36. In dealing with the likelihood of prejudice, the Commissioner notes that in the case of *John Connor Press Associates Ltd v The Information Commissioner (EA/2005/0005)*, the Information Tribunal stated that:

*"...the commercial interests of a public authority might be prejudiced if certain information in relation to one transaction were to become available to a counterparty in negotiations on a subsequent transaction."* (para 15)

37. The Tribunal went on to note that certain factors should be considered in such cases, stating that whether or not prejudice was likely *"...would depend on the nature of the information and the degree of similarity between the transactions."* (para 15)
38. As regards the issue of the degree of similarity between the Brockley PFI contract and other potential transactions Regenter B3 and the Council might have been considering entering into at the time that the request was made, the Commissioner notes that neither party identified in their submissions any similar transactions that they were likely to be involved in at that time.
39. As to any future similar PFI contracts that either of the parties might be involved with, the Commissioner notes the Council's comment that, when presenting its arguments for the withholding of Schedule 4, it *"... accepted that there are not many PFI housing deals in the UK market or new ones coming on stream."*
40. The Commissioner has therefore concluded that, at the point that the request was made, it appeared that the chances of either party being involved in a transaction similar to the Brockley PFI contract in the foreseeable future did not seem to be strong.
41. The Commissioner also notes that PFI contracts by their nature are very complex, lengthy agreements. This means that inevitably it is not straightforward to draw comparisons between them, even where they relate to contracts for the delivery of similar types of services, such as housing. In addition, each PFI contract is likely to have a significant number of unique elements depending on factors such as the nature of the services to be delivered under the contract, the scale of the tasks to be undertaken, where the tasks are to be undertaken, the duration of the contract and the structure of the financing of the contract. In relation to a housing PFI contract, such as the Brockley PFI contract, the relevant factors would more specifically include factors such as the number and types of properties to be included in the scheme and the scope of the repairs, maintenance and management that was being proposed.
42. The Commissioner also notes the Council's comments that *"...housing PFI contracts are changing their nature (as they now provide for new build of affordable housing and a degree of regeneration of the relevant estate)..."*. This would appear to further reduce the likelihood of Regenter B3 or the Council entering a PFI contract which would be similar to the Brockley PFI contract in the foreseeable future.
43. In addition, the Commissioner notes that the information that was withheld under section 43(2) is largely financial in nature. She is aware

that the assessment of bids for public sector contracts, particularly larger ones, is often not determined solely on the basis of financial factors. Non-financial factors, particularly those related to service delivery, are often of much greater consequence than financial factors. Consequently, this may limit the scope for the disclosure of the withheld financial information leading to prejudice to Regenter B3's commercial interests in any future similar tendering exercise.

44. As well as the above considerations, the Commissioner believes that a very important factor in assessing the application of section 43(2) is the age of the withheld information at the time that the request was made. The Brockley PFI contract was signed in June 2007 and the request made in June 2015. During the course of that period of eight years there were very significant changes in the economic and financial environment in the United Kingdom. Given this passage of time and the changes that occurred during that period, the Commissioner is not persuaded that the disclosure of the withheld information would allow competitors of Regenter B3 to draw conclusions about the financial information that might be included in any tenders that it might submit for future similar PFI contracts or for bidders to draw conclusions about what financial terms might be acceptable to the Council, again in relation to any future similar PFI contract for which it was inviting tenders.
45. In light of the age of the withheld information and the limited likelihood of the Council or Regenter B3 being involved in the foreseeable future in a procurement exercise for a PFI contract which would be similar in nature to the Brockley PFI contract, the Commissioner is not satisfied that the disclosure of the withheld information would be likely to prejudice their commercial interests.
46. In addition to considerations as to the impact of disclosure on its involvement in any future similar procurement exercises, Regenter B3 and the Council also argued that disclosure of financial information in the Facility Agreement in Schedule 13 of the contract would be likely to prejudice their commercial interests if Regenter B3 sought to refinance the project. This was on the basis that disclosure of this information would allow potential new lenders to know Regenter B3's cost of borrowing which might then lead to those potential new lenders minimising the reduction in rates to the minimum necessary to be successful in gaining the refinancing contract.
47. The Commissioner notes again that, given the age of the information contained in the schedule and the changes that have occurred in the financial sector during that time, it would not be straightforward for potential new lenders to draw definite conclusion from that information as to what might be acceptable to Regenter B3 in relation to refinancing its borrowing. In addition, any terms offered to the Regenter B3 would

be determined by prevailing market conditions and not by disclosure of the rates that are contained within an agreement that was made eight years previously.

48. It appears to the Commissioner that in order to attempt to gain the business of Regenter B3, any potential new lenders would be aware that they were in competition with other lenders also attempting to obtain that business and, consequently, that they would need to offer refinancing at rates which were more attractive than those offered by their competitors. The consequence of these market forces should therefore be that Regenter B3 should be offered refinancing at competitive rates.
49. Finally, the Council argued that it would be likely to suffer prejudice to its commercial interests if the withheld information were to be disclosed as it would result in it losing the confidence of its contractors if pricing and other commercially sensitive information, which it had agreed to keep confidential under the contract, was subsequently disclosed in breach of the terms of that contract.
50. The Commissioner notes that the arguments that she has received from the Council and Regenter B3 regarding the application of section 43(2) contain references to Schedule 23 of the contract. This details information which is stated to be commercially sensitive. The schedule identifies all of the information detailed within it as being commercially sensitive for "*[i]n each case for the longer of (i) 5 years from Financial Close and (ii) the Expiry Date.*"
51. Given that the contract is for a period of 20 years, if it runs its course, the Commissioner is of the view that it is not realistic to expect that information identified in the schedule would remain commercially sensitive for the duration of the contract. She notes that the Council has already released some of the information. Consequently, she is not persuaded that just because information is referred to in Schedule 23 that it should automatically be regarded as commercially sensitive in nature. She has therefore sought to consider the commercial sensitivity of the withheld information based on the arguments that have been received from the Council and Regenter B3.
52. The Commissioner acknowledges that public authorities can, understandably, have concerns over the impact that the disclosure of information may have on their relationships with contractors. However, she believes that private sector contractors entering into contracts with public sector organisations will be aware and understand that, as a result of FOIA, there will be a much greater degree of transparency of publicly funded contracts than contracts in the private sector. She considers that the disclosure of information which is not commercially

sensitive, or has lost its commercial sensitivity due to the passage of time, should not unduly affect the relationships between contractors and public authorities, particularly as contractors would be aware that public authorities would be releasing information under their statutory duties under the Act. Taking this into account and the fact that she is not persuaded as to the continuing commercial sensitivity of the withheld information, the Commissioner does not believe that the disclosure of the withheld information under FOIA should have an adverse effect on the relationship between the Council and Regenter B3 or its other contractors.

53. In light of all of the above considerations, the Commissioner is not persuaded that disclosure of the withheld information would have a very significant and weighty chance of causing the prejudice to the commercial interests of the Council and Regenter B3 that they have identified. Consequently, she has determined that section 43(2) is not engaged and that the information withheld under that exemption should be disclosed to the complainant.

## **Other matters**

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54. The Commissioner notes with concern that not only was it necessary to serve an Information Notice on the Council to obtain information to be able to progress her investigation but that the Council did not comply with the notice within the timeframe required. The Council consequently ran the risk of the Commissioner commencing contempt of court proceedings against it.
55. Despite being eventually provided with the information that she needed, the Commissioner notes that this significantly delayed the completion of her investigation and wasted a considerable amount of her staff's time. She does not expect to see a recurrence of similar problems in any future dealings she may have with the Council.

## Right of appeal

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56. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

57. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
58. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed** .....

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**