Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 April 2015

Public Authority: Wiltshire Council
Address: County Hall
Bythesea Road
Trowbridge
Wiltshire
BA14 8JN

Decision (including any steps ordered)

1. The complainant made a request to Wiltshire Council ("the Council") for information regarding broadband service improvements in North Wiltshire. The Council refused the request under the exemption in section 43(2) (commercial interests) of FOIA and concluded that the public interest favoured maintaining the exemption.

2. The Commissioner's decision is that section 43(2) is engaged for only some of the information. Where the Commissioner has found that section 43 is engaged he has decided that the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

    - Wiltshire Council shall disclose the requested information to the complainant.

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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 14 July 2014 the complainant made a freedom of information request to the Council which read as follows:

   Would you please supply copies of all current contracts placed by or on behalf of Wiltshire Council for Broadband service improvements in North Wiltshire.

   Would you also please supply copies of the three most recent contracted supplier progress/delivery reports and copies of the minutes of the last three contract progress review meetings.

6. The Council responded to the request on 1 August 2014 when it explained that some of the requested information was being withheld as it engaged the section 43(2) exemption. The Council explained that disclosure would be likely to prejudice the commercial interests of both BT and itself and it had decided that the public interest in maintaining the exemption outweighed the public interest in disclosure.

7. The complainant subsequently asked the Council to carry out an internal review of its handling of his request and it presented its findings on 14 October 2014. The internal review upheld the decision to refuse to disclose the requested information under section 43(2). It also confirmed that it held the minutes of a number of meetings falling within the scope of the second part of the request which was not made clear in the initial response. However, it explained that this information was also being withheld under section 43(2) for the same reasons.

Scope of the case

8. On 6 November 2014 the complainant contacted the Commissioner to complain about the Council's decision to refuse to disclose some of the information he requested.

Reasons for decision

Section 43(2) – Commercial interests

9. The withheld information in this case is a contract (and associated reports and minutes of meetings) between the Council and British

Telecom (BT) to provide fast Broadband in areas of Wiltshire that have previously been poorly served. The scheme was partly funded by central government as part of its plans to provide superfast broadband throughout the UK. The contract includes a Speed and Coverage Template (SCT) which outlines which areas will receive upgrades, when this is expected to happen and planned broadband speeds.

10. The Council has withheld some of the requested information under the exemption in section 43(2) of FOIA. This provides that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.

11. In this case the Council has said that section 43(2) has been applied because disclosure would prejudice the commercial interests of its partner British Telecom (BT) for the following reasons:

- Create an expectation and reliance by the public and other commercial providers of broadband services about the extent of the upgrade work when there is still uncertainty.
- Would give a commercial advantage to its competitors as it would disclose future supplier strategy for its products that are not yet launched and BT's roll out network not yet deployed.
- Damage BT's reputation/business.
- Contractual obligations owed to BT.

12. The Council's reasons for applying section 43 appear to focus on the harm that would be caused by disclosure of the Speed and Coverage Template. The Council is concerned that disclosing this information would create expectation and reliance amongst people in the communities where improvements are planned and would also cause disappointment for people in areas where the SCT says that improvements are not planned. The Council explained that the roll out of broadband improvements is very fluid whereas the SCT is only a high level guide and is subject to change. It said that it did not want to raise expectations regarding the broadband speed people might expect to receive and did not want expectations to be dashed when in fact efficiencies may mean that homeowners are offered more than what is set out in the SCT. The Council suggests that any raised expectations or

disappointment caused by disclosure will damage the reputation of both the Council and BT. There has been extensive press scrutiny of the roll out and the Council suggested that the backlash that both itself and BT may face in relation to information which subsequently changes, would

be very detrimental to the brand and reputation of BT but also the integrity of the project itself.

13. The Council also said that disclosure would also raise the expectations of other Internet Service Providers who lease the BT Open Reach Infrastructure (which is being installed as part of the contract with the Council) to provide their own broadband services.

14. The Commissioner has considered the Council's arguments regarding this point and is satisfied that disclosure has the potential to adversely affect the reputation of BT if people are disappointed or have their expectations raised by the plans set out in the SCT. However, the Commissioner would also expect that the Council could successfully deal with any consequences by supplying additional information alongside the SCT so that it could be understood in context. For instance the Council could explain that this was only a high level guide and that the plans it describes are subject to change. Nevertheless, the Commissioner is prepared to accept that given the importance of the contract and the high levels of press scrutiny there could be some reputational damage to BT especially if there are found to be delays in progressing the roll out and this is sufficient to engage the exemption. The Commissioner is also mindful that BT are involved in similar partnerships with other local authorities across the country to improve broadband access and therefore disclosure could potentially have a wider impact than just the BT's reputation within Wiltshire.

15. As regards the other reasons given for engaging the exemption the Council also argued that disclosure would benefit BT's competitors by revealing where BT is 'going next' and significantly, which communities fall later in the programme. This would mean disclosing where and when BT intends to roll out its network together with planned speeds. The Council argues that this methodology provides a distinct advantage to other network infrastructure providers as it discloses where BT does not intend to build far in advance of the actual deployment itself. This in turn could, it argues, allow such competitors to revise their own commercial network deployment plans (which generally are not required to be disclosed publicly) to build where BT is not seemingly going to, which they might not have otherwise done based on their own commercial analysis.

16. The Commissioner has considered the Council's arguments and is satisfied that there is a realistic risk that BT's competitors would seek to build in areas which the SCT states there are no plans for BT to roll out improved services as part of its project. Indeed, the Commissioner understands that local communities and BT's competitors would

welcome disclosure for this very reason. However, the question is whether this would prejudice the commercial interests of BT. If BT realistically has no plans to roll out its services in certain postcodes identified in the SCT then it can't say that it would be disadvantaged if other providers choose to build in these areas instead.

17. The Council has not said much about the extent to which BT expects to expand the roll out of services into areas which are initially identified in the SCT as not receiving improvements except that it hopes to make efficiencies and gains. There is also the possibility of additional funding from government. In order to engage a prejudice based exemption like section 43 a public authority must be able to at least show that disclosure 'would be likely' to result in the prejudice which it envisages. The Commissioner's approach is that 'would be likely' means that there must be more than a hypothetical or remote possibility of prejudice occurring; there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%. In this case the Commissioner would accept that the chances of prejudicing BT's commercial interests in this way are far from certain, but nevertheless, it remains a realistic possibility. In a project of this scale it is reasonable to conclude that BT might realistically hope to expand the roll out of services into areas which were not originally identified in the SCT.

18. The Commissioner has found that disclosure of the SCT would be likely to prejudice the commercial interests of BT due to the possible damage to its reputation and by benefiting competitors. However for the other information redacted from the contract, section 43 appears to have been applied in a blanket fashion. No specific reasons have been given for withholding this information and this does not seem to raise the same concerns as disclosure of the SCT. Therefore, the Commissioner must find that section 43 is not engaged in respect of this information.

19. The complainant also specifically asked for copies of the last 3 progress/delivery reports and the last 3 progress review meetings. The Council did address this information specifically in its responses to the Commissioner but failed to provide any compelling reasons why this information should be withheld, except that it would be against the wishes of BT. It explained that it had been agreed that the meetings between the Council and BT would remain confidential and that the

    complexity of the programme called for regular meetings and discussions which must take place in an environment of free and frank disclosure between the participating partners. The Council made much of the fact that disclosure would be against the wishes of BT with whom

it had a contractual obligation not to disclose information. It said that if the information were disclosed BT would be much more reluctant to hold meetings with the Council and share information on the progress of the roll-out beyond that which it was contractually obliged to do. It explained that it had been told in writing by BT that:

"If we lost faith in the Authority's ability to respect our confidence that would have a material impact on our readiness to share information with the Authority in future. We can only operate effectively if both the Authority and BT can share commercially sensitive information with each other on a confidential basis."

20. Whilst this may well be the case, this is not in itself a reason not to disclose the information. The Council must be able to show that disclosure would prejudice a person's commercial interests, be that BT or the Council itself. The Council has not said why the minutes are commercially sensitive. Whilst any reluctance on the part of BT to share information with the Council may make it harder to manage the project, it does not imply that there is prejudice to their commercial interests. The Council has not adequately explained the nature of the prejudice that would be caused by disclosure of the minutes and reports. Therefore the Commissioner finds that section 43(2) is not engaged in respect of this information.

Public interest test

21. The Commissioner has found that section 43(2) is engaged in respect of the SCT only. The Commissioner has now gone on to consider the public interest test, balancing the public interest in disclosure against the public interest in maintaining the exemption.

Public interest arguments in favour of disclosure

22. The complainant argued that there was a very strong public interest in knowing what the Council and BT were going to deliver. He said that there was no routine publication of detailed information about the roll out and that since the project was being funded by public money the public was entitled to know what had been contracted on their behalf. Disclosure would also allow the public to better understand whether BT was delivering against its contractual obligations and if the Council was managing the contract effectively.

23. The complainant highlighted the fact that BT when giving evidence to the Public Accounts Committee had said that it was happy for councils to publish the SCT postcode level information after contract signature.[1]

24. For its part, the Council acknowledged that disclosure would promote accountability and openness to public scrutiny which would allow the public to examine and question whether public money is being spent in a manner which achieves good value, and to see whether the contract is being delivered properly.

Public interest arguments for maintaining the exemption

25. Against disclosure, the Council said that the public interest lies in protecting the commercial relationship which exists between the constituent parties to the contract and the detriment that a breakdown of confidence that would follow. It explained that communication and cooperation were currently at a higher level than what was contractually required and that negotiations were live for the next phase of funding and delivery. It argued that a significant breakdown in the trust and relationship could lead to a significant negative impact on the project.

26. The Council also said that there was a strong public interest in avoiding unwarranted prejudice to the commercial interests of third parties.

Balance of the public interest arguments

27. The Commissioner has first considered the public interest arguments for maintaining the exemption. Having accepted that the exemption is engaged he must also find that there is some public interest in not prejudicing the commercial interests of BT. The Commissioner's approach is that public authorities' commercial interests should not be unduly prejudiced as a result of doing business with the public sector. However, as the Commissioner noted when considering whether the exemption was engaged, whilst he accepts that disclosure of the SCT could affect the reputation of BT, both the Council and BT should be able to mitigate the worst effects of this by providing additional information to contextualise this and to make it clear that the information contained within the SCT was subject to change.

[1] Public Accounts Committee, The Rural Broadband Programme, 11 September 2013, HC 474 2013-2014

28. The Commissioner is also mindful of the fact that BT is a huge multinational company with a turnover of billions of pounds. Any reputational damage caused by disclosure of this information is unlikely to have any material impact on the success of the company and so the extent and severity of any prejudice caused to BT is limited.

29. Similarly, whilst disclosure may benefit competitors by revealing where BT does not intend to build the potential business that may be lost to other companies is minimal. Indeed, the areas where according to the SCT BT does not intend to build are presumably the least profitable or where it is more difficult to make the changes necessary to improve services. Therefore, it is not certain that BT's competitors would choose to invest in these areas even if they became aware that BT did not intend to build there.

30. The Commissioner has also taken into account the public statements made by BT to the effect that disclosure of the SCT is a matter for the individual local authorities and that it would be happy to support a public authority that chooses to disclose information. This suggests to the Commissioner that the negative effects of disclosure have been overstated or else that any prejudice caused to BT's commercial interests would not be particularly severe and could be easily borne by the company.

31. The Council has also suggested that disclosure would prejudice relations between the Council and BT. The Commissioner has given this argument some weight as it would not be in the public interest if the Council found it harder to manage the project because of a reluctance on the part of BT to voluntarily share information about progress where it was not otherwise contractually obliged to do so. At the same time though, the Commissioner considers it unlikely that BT would disengage with the Council to such an extent that it would damage the project. It is obviously in BT's own interests that the project is a success and is delivered as quickly and efficiently as possible. Indeed, the Council acknowledged that BT is still contractually obliged to provide some reports and meetings and that these are "completely adequate for managing the contract". Rather, the harm that would be caused would be to the Council's ability to manage "stakeholders and communications".

32. As regards the public interest in disclosure the Commissioner finds that the arguments for transparency and accountability are strong in this case. BT was given significant public funds to undertake the work set out in the SCT and disclosure would allow the public to see where this money is being spent and what they can expect to receive in return. It

will also allow the public to better understand how the Council is managing the contract and how BT are performing against the targets set in the contract.

33. In balancing the public interest the Commissioner is also mindful that many people, including the complainant, are in the dark about when, or if at all, they will get improvements to the service they receive and what this may be. In the Commissioner's view this weighs very strongly in favour of greater transparency in this case. Moreover, disclosure would also allow those communities that are not expected to be included in the roll out to consider whether they should make alternative arrangements.

34. In conclusion, the Commissioner has found that given the large sums of money involved, the obvious public concerns about the scheme and the lack of transparency there is a strong case for disclosure. In contrast, the Council's arguments for withholding the information are not very compelling and so for these reasons the Commissioner finds that the public interest in disclosure is not outweighed by the public interest in maintaining the exemption.

Right of appeal

35. 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
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

36. 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.

37. 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 .....

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