



Neutral Citation Number:

**IN THE FIRST-TIER TRIBUNAL**  
**GENERAL REGULATORY CHAMBER**  
**(INFORMATION RIGHTS)**

**Appeal No: EA/2015/0114**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50561396**  
**Dated: 20 April 2015**

**Appellant: Wiltshire Council**

**Respondent: The Information Commissioner**

**2nd Respondent: British Telecom PLC**

**Heard at: Field House**

**Date of Hearing: 2, 3 November Deliberations 27 November**

**Before**

**Chris Hughes**

**Judge**

**and**

**Henry Fitzhugh and Andrew Whetnall**

**Tribunal Members**

**Date of Decision: 20 March 2016**

**Attendances:**

For the Appellant: Robin Hopkins

For the Respondent: Rupert Paines

For the 2<sup>nd</sup> Respondent: Jonathan Swift QC, Christopher Knight

**Subject matter:**

Freedom of Information Act 2000

Environmental Information Regulations 2004

**Cases:**

**IN THE FIRST-TIER TRIBUNAL** **Appeal No:**  
**EA/2015/01140114**  
**GENERAL REGULATORY CHAMBER**  
**(INFORMATION RIGHTS)**

**SUBSTITUTED DECISION NOTICE**

**Dated:** 22 March 2016

**Public authority:** Wiltshire Council

Address of Public authority: County Hall, Bythesea Road, Trowbridge, Wiltshire, BA14  
8JN

**Name of Complainant:** Mr Enwistle

**The Substituted Decision**

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal in part and substitutes the following decision notice in place of the decision notice dated 20 April 2015.

**Action Required**

The Council disclose the Implementation Plan, the Project Payment Plan and the Milestones Payment Table previously withheld within 35 days.

Dated this 22 day of March 2016

Judge Hughes

[Signed on original]

## **REASONS FOR DECISION**

### Introduction

1. This case concerns information about plans for the provision of broadband services in Wiltshire. Wiltshire Council (the Appellant in these proceedings, “the Council”) has let a contract to British Telecom (the Second Respondent “BT”) to improve services in its area. The provision of superfast broadband across the UK has been a public policy priority for the current and previous Governments. While a substantial proportion of premises in the UK can expect to have access to superfast broadband as a result of private sector commercial investment; 100% coverage cannot be achieved as a result of market forces, since approximately one-third of UK premises consist mostly of rural or less densely populated communities, or areas where it is difficult to justify the level of civil engineering work necessary to connect them using fibre. As a result, it is not commercially viable for service providers to construct large scale superfast broadband networks to those premises.
2. While the amounts of subsidy will vary from area to area, the total amount is very significant indeed: as the Public Accounts Committee of the House of Commons put it in 2013, “BT will ... benefit from owning assets created from £1.2 billion of public funding once [phase 1 of] the Programme is complete” (Open Bundle 3/G/5/723). In Wiltshire in particular, figures indicate that BT’s contribution to the creation of the network under the Contract was £12.8m, with £22.8m filled by a combination of government funds. Almost two-thirds of the cost of the scheme is therefore met by Government subsidy.
3. This public subsidy constitutes state aid. The Programme has been classified as an approved aid scheme, so the aid need not be notified to the European Commission. In order to comply with the rules of the scheme, any local broadband project contract (such as the Contract) must target only “white NGA areas” and “basic white areas”, namely:
  - White NGA areas: “areas where (i) NGA broadband services at an access (download) speed of more than 24 Mbps are not available at affordable prices and there are no private sector plans to deliver such services in the next three years; or (ii) there is no NGA broadband infrastructure, nor any private sector investment plans to roll out such infrastructure in the next three years”.

- Basic White areas: “(i) areas where basic broadband services at an minimum download speed of 2 Mbps are not available at affordable prices and there are no private sector plans to deliver such services in the next three years; or (ii) areas where there is no basic broadband infrastructure, nor any investment plans by a private sector network operator to deliver such infrastructure in the next three years”.
4. The Programme has (as presently envisaged) three phases. The first, from early 2012 to early 2014 (with £1.2bn public subsidy), aimed to increase UK superfast coverage from the approximate two-thirds commercial coverage to 90% coverage. The second, from early 2014 to June 2015, was intended to raise coverage from 90% to 95% and involved c. £500m public subsidy. The third phase involves a small amount of funding (£10m) for pilot projects to seek alternative ways to provide at least ‘basic’ (ie. 2 mbps) coverage to the remaining 5% of properties, with possible further phases to follow. Contracts under the Programme could be awarded by local bodies in two ways: either by utilising a framework agreement put in place by BDUK or by opting for a bespoke procurement. BT was appointed to the BDUK framework together with Fujitsu, but Fujitsu withdrew approximately halfway through phase 1. BT obtained all 44 contracts in phase 1: 33 through the framework agreement, and 11 through bespoke procurements. The contract between the Council and BT was a phase 1 call-off contract from the BDUK framework.

The request for information

5. On 14 July 2014 Mr Enwistle wrote to the Council in these proceedings seeking information:-
- 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 on 1 August withholding certain information relying on section 43(2) of FOIA since it had concluded that disclosure would be likely to prejudice the commercial interests of both BT and the Council. The Council had concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure. Following an internal review of 14 October 2014 the Council

maintained its position. Mr Enwistle complained to the First Respondent (the Information Commissioner “the ICO”) who investigated.

7. In his decision notice the ICO found that s43(2) was not engaged with respect to the meeting minutes which should therefore be disclosed. He considered the arguments of the Council with respect to s43(2) and its view of impact of disclosure on BT that it would:-
  - 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.
  - Breach contractual obligations owed by the Council to BT.
8. The ICO considered that only the Speed and Coverage Template (SCT) part of the contract; which he stated outlined the areas which would be upgraded, the dates of upgrade and the speeds to be attained, engaged s43(2). He noted the arguments of the Council as to the uncertainty of the information contained in the SCT and the possibility of inappropriately raised public expectations. He felt that these problems could be dealt with by the Council providing information. He considered that disclosure of the areas where BT had no plans to roll out services could not prejudice its commercial interests. He concluded that the arguments for transparency and accountability were very strong since BT was receiving substantial public money and disclosure would enable the public to see where this money was being spent and enable those communities where there was no plan to roll out the service to consider whether to make other arrangements. He concluded that the information requested should be disclosed.
9. The Council appealed against this decision to the tribunal and BT, joined as a party supported their arguments. Significant discussions between the parties prior to and during the course of the tribunal resulted in concessions and agreements on many issues including where the ICO acknowledged that commercial prejudice did permit non-disclosure and the redaction of personal information. The issues raised by this wide-ranging request have been pursued between the ICO, the Council and BT; of necessity, the interests and perspectives of commercial competitors of BT are

unknown and subject to conjecture by the parties before the tribunal but highly relevant if the commercial interests of BT are engaged. Substantial amounts of material were placed in the public domain initially in response to the request; further information was disclosed as a result of this process. The tribunal is satisfied that the decisions taken following discussions between the parties are proper and endorses them.

10. The residue of disputed information were from the contract:-

- In Schedule 3(1) Reference Supplier Solution – those parts dealing with “Overview” and “Compliance Matrix” withheld under sections 43(2) and 41,
- In Schedule 3(1) “Compliance Matrix”, “Speed and Coverage Template” withheld under sections 43(2) and 41,
- In Schedule 4(1) “Implementation Plan” and “Project Plan” withheld under section 43(2)
- In Schedule 5.1 – The “Milestone Payments Table” withheld under section 43(2)

11. Section 43 provides:-

*“(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).2*

Section 41 provides:-

*(1) Information is exempt information if—*

*(a) it was obtained by the public authority from any other person (including another public authority), and*

*(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

### Evidence

12. Mr Miller, Head of Group Public Policy for BT gave evidence as to the regulatory arrangements under which BT was improving broadband provision. Its undertakings to Ofcom meant that it was heavily regulated and required to allow other internet service providers access to its networks on the same terms that it had access to them.

13. He considered that disclosure of the SCT, the project plan and the Implementation Plan would cause prejudice to BT's commercial interests. As standard practice BT and competing firms would seek to use publicly available information about major contracts entered into by competitors to understand the engineering solutions and methods they had adopted and to use this information in future tendering exercises. The information within the documents would assist competitors in understanding the different technical solutions which BT proposed to use in different circumstances. Even with just the SCT it would be open to competitors to dramatically improve their model of how BT approached a challenge such as this and use that in designing their own solutions upon which basis they could tender. While the basic structure of the service, the introduction of fibre optic cable between the exchange and a cabinet serving a number of premises is well known, variations to this basic structure could be of assistance to competitors. The commercial harm to BT could arise from impacting on future tenders; disclosure of certain information could result in "bid harm" assisting competitors in understanding BT financial models and assumptions and use of technology and using that to improve their bids; and "revenue harm" in impacting on its competitive advantage in rolling out the broadband network to the disadvantage of the different commercial operations of BT – Openreach, BT Wholesale and BT Retail.
14. However the SCT was indicative of the thinking of BT at the time that it submitted the tender. It was not a firm plan indicating if and when any specific area would receive superfast broadband. It was always subject to change. While there was some public frustration at the pace of roll-out and when it would reach individual consumers, the SCT would not be precise and reliable information.
15. The NAO report "The Superfast (Rural) Broadband Programme: update (January 2015) noted that there was significant competition with respect to the rollout to the final 5% of the UK and it was likely to need a large amount of funding, there had been significant numbers of bids for funding this phase of the rollout. It also noted the amount of information made available on the rollout of the phase 1 projects with detailed mapping and a postcode checker available in most areas. The witness explained that this enabled residents to understand what would become available to them more reliably than the contractual documents.
16. However the SCT gave an indication to competitors of where BT and when envisaged building new capacity. Competitors could then minimise their revenue risk in constructing competing services if they focused on areas where there was no specific intention, at the time of submitting the tender, of BT building new services.



These developments by other providers would not be subject to the requirement BT was subject to (in return for the state aid which a provider who was awarded a tender would receive) of opening services to all ISPs, he suggested that since such provision would not be subject to competition between ISPs but would be a monopoly where consumers would be prejudiced as they would only have one ISP they could use and would therefore not benefit from a competitive market which would be created if the service they received came through a state aided network.

17. The Compliance Template, which was prepared by BT as part of the tender process and indicated how BT considered its proposals performed against various criteria in the tender, would allow a competitor to tailor its bid to weaknesses in the BT tender and using that information build a schema for greater investment in areas of BT's weakness and so focussing its competitive efforts in the direction most likely to give it competitive advantage. This could be used in future tenders for a wide range of private and public contracts.
18. The disclosure of the figure in the minutes of 22 January 2014 would prejudice BT's current competitive advantage over its rivals in the broadband market.
19. The Coverage and Survey Completion Summary gave information as to the performance of different parts of the rolled out network and disclosure would assist commercial rivals in deciding whether and how to compete with BT.
20. Mr James George, Head of NGA Commercial Finance at BT gave evidence as to the financial harm disclosure could cause to BT of detailed financial information. He argued that the public reporting on the national programme to roll out superfast broadband, by Broadband UK and NAO ensured effective accountability and value for money for the taxpayer which was preferable to uncontrolled one-off disclosures of commercially sensitive information.
21. Sarah Cosentino a Business Analyst for the Council accepted the views of BT as to the commercial harm disclosure would cause BT and pointed to the harm disclosure would cause to the working relationship between BT and the Council with the likelihood that some information which was supplied to the Council would not now be received. Furthermore the disclosure of the SCT would generate confusion and a greater workload for the Council in explaining to the public the actual position and obstruct the Council's work in maximising the benefit to its area of rollout. The Council devoted considerable effort to ensuring accurate up to date information on rollout was available.

### Consideration

22. The “Overview” section of the Reference Supplier Solution gives information as to technological aspects of BT’s proposals and how technologies will be applied in the light of the effectiveness of those technologies to meet the needs of the project. The tribunal is satisfied that this information as to the approach of BT to the resolution of the problems in the light of the technology available to it is likely to give valuable information to competitors as to BT’s technological strengths and weaknesses. Similarly the Compliance Matrix provides BT’s objective assessment of the strengths and weaknesses of its proposals against the criteria laid down by the Council. Again this information amounts to a clear steer to competitors as to how to position their offers in future similar exercises to demonstrate superior performance in BT’s specific areas of weakness. In both these respects there was clearly a potential commercial prejudice to BT. The public benefit in disclosing this information at the time of the request cannot be entirely discounted. It is important to retain a clear view of the potential distinction (unacknowledged by the expert evidence) between BT’s commercial interests and the public interest.
23. The dominant position of Openreach and the extent to which its monopoly has been slow to erode suggest that the current framework has no substantially enhanced competition. In the context of extensive public support for further investment, some continuing advantage from that investment to BT, and a European framework that permits public financial contributions only where affordable alternative provision of faster broadband services is not in prospect it may be that there are significant arguments for transparency as to the terms of public contracts as soon as they are concluded. Given the failure of competition for framework contracts to materialize, the argued prejudice to BT’s position relates to future competitions the terms of which had yet to be specified as at the time of the request in 2014.
24. It may be argued that uncertainty relating to the provisional nature of contract coverage plans could have been explained; the public is used to understanding the provisional nature of many plans for public investment. The public advantage from disclosure would have included better information to potential local consumers about prospects for enhancement (albeit uncertain) enabling them to plan ahead and make representations. So far as the somewhat unusual market for broadband provision is concerned, disclosure would have given a clearer, if not a final, picture to potential providers (including those organized on behalf of particular communities) assisting them to some degree to plan ahead, whether as potential users of the networks to be provided, as potential providers of unsubsidized investment in competition with those

networks, or as potential competitors in remaining phases of supported provision. The tribunal is satisfied that there were potential public interests in disclosure of provisional plans for coverage and timing.

25. We lack evidence from prospective competitors to counter BT's arguments and the material before a tribunal such as this is of necessity more limited than for the consideration of such issues in the Competition Tribunal. Clearly the debate has been extensive. It would not be sensible now to order disclosure of the details of provision as planned at the time of the contract, when what was actually envisaged to be delivered, at the time of the request was more settled.
26. When the request was made in summer 2014 the SCT was already several years old and the indicative information it contained had been overtaken by developments on the ground with respect to actual or more definitely projected information. Publication would be more likely to generate confusion than provide assistance to the public.
27. It is foreseeable that this confusion could adversely affect the Council's commercial interest as it would need to devote further resources to responding to communications from residents, although the need to explain the possibility that plans could change could have limited the confusion. A retrospective order for disclosure of provisional plans now when better particulars are available would have limited advantage. On the basis that the SCT template also provides technical information of some value to competitors, we accept that there would have been some prejudice to BT from disclosure as at mid 2014, that this would have been sufficient to engage s43(2), and that there is limited public interest in a line by line examination of what could have been disclosed at the time.
28. The implementation and project plans provide information about the overall pace at which BT will install the new infrastructure, indicating how many premises could be connected in each stage of the plan phased quarter by quarter. It seems to the tribunal that this is of very little use to any competitor since it is specific to this county and says very little about the competence and effectiveness of BT and nothing at all about its technical approach. The tribunal is not satisfied that s.43(2) or s.41 are engaged.
29. The milestone payments table indicates the split of funding between the each stage of the project and BT has argued that this information would contribute significantly to allowing competitors to understand BT's solution and bid. There are two real problems with this argument. The first is that in response to a request for information Oxfordshire County Council released the equivalent table for its area. It seems to the

tribunal that the overall similarities between the two documents mean that, if indeed there is prejudice from the disclosure, then it is likely that this has already occurred. If it is not possible to glean meaningful information from this part of the contractual documentation then there is no prejudice. The tribunal is therefore not satisfied that the claimed exemptions apply.

Conclusion and remedy

30. The tribunal is therefore satisfied that the Council should now disclose the Implementation Plan, the Project Payment Plan and the Milestones Payment Table previously withheld.

31. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 22 March 2016

Promulgated 23 March 2016

Re-promulgated 29th March 2016