

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 09 August 2010**

**Public Authority:** North East Lincolnshire Council  
**Address:** Municipal Offices  
Town Hall Square  
Grimsby  
North East Lincolnshire  
DN31 1HU

### Summary

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The complainant requested from North East Lincolnshire Council (the council) its procedures, methodology and calculations for the triennial rent increases in 1999, 2002 and 2005 for Humberston Fitties Chalet Park. The council responded by stating that there were no prescribed procedures for the calculation of rent increases and that the methodology used was an 'open market value'. However, it refused to provide its actual calculations and cited section 43(2) of the Freedom of Information Act (the Act). It said that disclosure of this information would or would be likely to prejudice its commercial interests. The Commissioner finds that section 43(2) is not engaged and has asked the council disclose its actual calculations for the rent review years of 1999, 2002 and 2005. He also finds that the council has breached sections 1(1), 10(1) and 17(1), (3) and (7) of the Act.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

## Background

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2. The council owns the freehold for the Humberston Fitties Chalet Park which comprises over 300 plots. It lets these plots to various tenants under a lease. The terms of this lease provide for rent reviews every three years from the second anniversary of the beginning of the lease. In the event of the tenant not accepting the rent requested by the council in its review notice, the rent is assessed on an open market value basis. This is the rent the council might reasonably be expected to obtain on the review date if it leased the property (with immediate vacant possession) in the open market to a willing third party on the same terms as those in the lease. However, if the open market value is less than the current rent the council is permitted under the lease to continue to charge the rent payable immediately before the review date. If the rent cannot be agreed between the parties the lease provides for arbitration by a single arbiter agreed between the parties or, if the council chooses, a chartered surveyor. If such a surveyor cannot be agreed, the lease provides for one to be appointed by the Royal Institution of Chartered Surveyors. The full terms of the lease may be obtained from HM Land Registry for a fee.

## The Request

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3. On 1 September 2008 the complainant requested answers to twelve questions in connection with the Humberston Fitties Chalet Park in North East Lincolnshire. The council later provided satisfactory answers to eleven of these questions leaving question number 7 still outstanding. This requested:  
  
*'Copies of the council's procedures, methodology and calculations in respect of the triennial rent increases in 1999, 2002 and 2005'.*
4. The council's initial response to this question was made in its letter dated 30 September 2008 when it stated that the rent reviews were conducted in accordance with the Third Schedule of the lease.
5. On 16 October 2008 the complainant expressed his dissatisfaction with this answer and in particular the council's failure to provide the methodology and calculations in respect of triennial rent increases.
6. The council responded on 9 December 2008 when it stated that rent reviews were conducted in accordance with the provisions of paragraph 3 of the Third Schedule of the lease. It clarified that the 'Open Market

Value' was established by the council's surveyor following an appraisal of market comparable rents in the usual way, and in the same way as it was open to the tenant to establish an Open Market Rent level. It added that the lease provided for a determination of the rental level if its proposal was not accepted by the tenant.

7. The complainant replied on 31 January 2009 stating the council's response was still not satisfactory.
8. The council responded on 16 February 2009 stating that the 'Open Market Value' basis had been consistently applied.

## **The Investigation**

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### **Scope of the case**

9. On 20 April 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular, he pointed out that the council had failed to provide him with its calculations to substantiate and fully explain the application of the 'open market value' for assessing the triennial rent increases.
10. During the course of the Commissioner's investigation all of the twelve questions in the complainant's request dated 1 September 2008, with the exception of question number 7, were resolved informally and therefore are not addressed in this Notice. The only outstanding aspect of question number 7 is the council's calculations for the rent reviews for 1999, 2002 and 2005.

### **Chronology**

11. On 5 June 2009 the Commissioner wrote to the council regarding the complainant's outstanding complaints to which it issued a response on 2 July 2009 with some further information.
12. On 6 November 2009 the Commissioner wrote to the council again inviting it to reconsider its response to a number of the complainant's questions in his initial request dated 1 September 2008 including its answers to question 7.
13. The council responded on 20 November 2009 stating that in relation to question 7 there were no prescribed procedures or methodology for the calculation of rent increases. It added that rent reviews were conducted on a negotiated approach based on an Open Market Value

assessment in accordance with the Third Schedule of the lease. It said that if no agreement was reached the lease provided for third party determination.

14. Having discussed the matter with the complainant the Commissioner wrote to the council on 6 January 2010 stating that the complainant was still unhappy with its answer to question 7 and asked it to reconsider its position once more and disclose the requested information.
15. The council responded on 22 January 2010 but failed to disclose the requested information or give any reason as to why it was unwilling to do so.
16. The Commissioner discussed the council's response with the complainant again following which he wrote to the council on 15 March 2010 stating that it had still failed to disclose its actual calculations in respect of the triennial rent increases for 1999, 2002 and 2005.
17. The council responded on 30 March 2010 and reiterated its comment that there were no prescribed procedures or methodology for the calculation of rent increases. It said that rent reviews were conducted on a negotiated approach based on 'Open Market Value', in accordance with the Third Schedule of the lease, as detailed in its previous letters. It added that if no agreement was reached then the lease allowed for third party determination. In respect of its actual calculations the council said that this information included information it had already exempted from disclosure under the Act. It clarified that disclosure of the actual calculations would, or would be likely to, prejudice its commercial interests and therefore was exempt under section 43(2) of the Act. It then considered the public interest arguments for and against disclosure and concluded that balance was in favour of the information being withheld.
18. On 21 April 2010 the Commissioner wrote to the council indicating his initial thoughts that disclosure of the rent review calculations would not be likely to prejudice its commercial interests. He drew the council's attention to his decision in the case of [Brightlingsea Town Council FS50101351](#).
19. On 18 May 2010 the Commissioner wrote to the council again and requested its actual calculations for the rent reviews and any further arguments it wished to raise in the light of his Decision Notice in the case of [Brightlingsea Town Council FS50101351](#).

20. The council replied on 25 May 2010 with copies of the withheld information together with its further and more detailed arguments as to why it believed it was justified in applying section 43(2) of the Act. It said that disclosure would or would be likely to prejudice its commercial interests by giving an advantage to third parties (tenants) when future rent reviews were undertaken and to competitors in the setting of rents.

## Analysis

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### Exemptions

21. The council has applied section 43(2) of the Act to the rent review calculations on the basis that disclosure would or would be likely to prejudice its commercial interests.

### Section 43 – commercial interests

22. In order for the Commissioner to agree that section 43(2) has been engaged the council must demonstrate that disclosure of the requested information would, or would be likely to prejudice its commercial interests.
23. In the case of [Hogan v The Information Commissioner and Oxford City Council \(EA/2005/0030\)](#) the Information Tribunal stated that:

“The application of the ‘prejudice test’ should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption... Second, the nature of ‘prejudice’ being claimed must be considered... A third step for the decision-maker concerns the likelihood of occurrence of prejudice.”
24. The prejudice test has two limbs; either ‘would prejudice’ or ‘would be likely to prejudice’. In this case the council has not specified which limb it intends to rely upon. In the Tribunal Case [McIntyre vs Ministry of Defence EA/2007/0068](#) the Tribunal found that where a public authority had not specified which limb it was applying the Commissioner should apply the lower test (or the second limb). The Commissioner has therefore considered whether disclosure would be likely to prejudice the council’s commercial interests.
25. In the Information Tribunal’s decision of [John Connor Press Associates Limited v The Information Commissioner EA/2005/005](#) the tribunal

interpreted the words 'likely to cause prejudice' as meaning that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15). This interpretation followed the judgment of Mr Justice Mundy in *R (on the application of Lord) v Secretary of State for the Home Office* [2003]. In this case the Court concluded that 'likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not'. This approach was also adopted by the Information Tribunal in the case of [North Western and North Wales Sea Fisheries Committee and the Information Commissioner EA/2007/0133](#).

26. The second limb of the prejudice test places a lesser evidential burden on the public authority to discharge.
27. If the Commissioner is satisfied that section 43(2) is engaged he must then consider the public interest arguments for and against disclosure of the requested information.

### **Applicable interests**

28. In this case the council has argued that disclosure would or would be likely to prejudice its commercial interests by giving an advantage to third parties (tenants) when future rent reviews are undertaken and competitors in the setting of rents. The council has argued that disclosure of its rent review calculations would or would be likely to prejudice its ability to obtain the most competitive rental income from tenants.

### **Does the information relate to, or could it impact on, a commercial activity?**

29. The term 'commercial interests' is not defined in the Act. However the Commissioner has considered his [Awareness Guidance No 5](#) on the application of section 43. This comments that:

*'...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services'.*

30. In this case the Commissioner is satisfied that the withheld information does relate to a commercial activity, namely the obtaining of a competitive rental income.

## **Nature of the prejudice**

31. The Commissioner's view is that the use of the term 'prejudice' is important to consider in the context of the exemption in section 43. It implies not just that the disclosure of information must have some effect on the application of the interest, but that this effect must be detrimental and/or damaging in some way.
32. In this case the council believe that disclosure of the requested information would or would be likely to have a detrimental effect on its ability to obtain best value in terms of rental income by giving its tenants an advantage when negotiating a new rent during the review process.
33. The council has argued that no single rent review is an independent set of negotiations but is part of a series contemplated throughout the leases of all of the plots and throughout any renewals of those leases. As such the council believes that its ability to negotiate a particular method of rent review depending on the state of the market at a particular time should be preserved in the interests of being able to obtain best value in terms of rental income. The various methods of rent reviews include using the Retail Price Index (RPI) or increases in capital value. There are also other permutations which the council believes it could legitimately use in future negotiations.
34. It is the council's view that if the pattern of previous internal considerations of tactics used became widely known, then the tenants would be better informed and would have an advantage in knowing how the council would be likely to approach the next rent reviews.
35. The council has pointed out that all rent reviews have the potential (if not agreed) to go to arbitration, which is a quasi legal process in which each side would produce evidence to support its adopted position and (by extension) to decline to produce evidence that could undermine such a position. The council does not consider that it should undermine its case at arbitration by supplying information from the past (including evidence of past tactics) that could be used as evidence against it.
36. The complainant does not believe that disclosure of the rent calculations for the previous concluded years (1999, 2002 and 2005) would have a detrimental and/or damaging effect on the council's commercial interests. He has pointed out that assessment of market rent at the review date is time specific and markets and their conditions can change over time. In other words a fresh assessment has to be made for every rent review notice, influenced by prevailing market forces at that time. The complainant believes that each

triennial calculation is determined and duly authorised for the sole purpose of issuing the corresponding rent review notice to the tenant. In his view the calculation should be soundly based on appropriate evidence which will stand up to scrutiny, both internally and externally, if brought into question. He believes that the council effectively has a monopoly as the landlord and is not at risk of being undercut by competitors offering a lower ground rent. In his view the council has as much responsibility to provide value for money to its leaseholders, who are also Council Tax payers, as it has to the public in general.

37. The Commissioner does not accept the council's view that disclosure of the requested information would, or would be likely to have a detrimental and/or damaging effect on its commercial interests. It is the Commissioner's view that once a market rent has been agreed (with or without negotiation or arbitration) the review has effectively been concluded. In arriving at this conclusion he has taken into account his comments in the decision of [Brightlingsea Town Council FS50101351](#) where he noted that the withheld information:

'.....discusses the rental amount and what was hoped to be achieved in terms of the level of rent from the negotiations taking place with the tenant. However, he also notes that the rent was agreed between both parties six months prior to the complainant's request and the Council is happy to disclose the amount agreed. While the Commissioner may accept that disclosure of such discussions during the negotiation process would or would be likely to be prejudicial to the commercial interests of the Council, as this could lead to, for example, a lesser amount being achieved, he does not accept there would be any prejudice once the rent has been agreed, as at this point negotiations with the tenant over the level of rent had ended. It is also the Commissioner's view that there is a strong public interest in the general public knowing what rent was agreed for publicly owned land, how this was arrived at and whether a competitive price was achieved'.

38. In the present case the requested information (which has been withheld by the council under section 43(2) of the Act) comprises of its calculations for the rent reviews in 1999, 2002 and 2005. These have now all been concluded and the last one in 2008 (which is not subject to this request) was completed in or about March 2008, five months before the complainant's information request. The 2005 review was actually completed and the new rent agreed in or about October/November 2005, which was almost three years before the complainant made his information request.
39. The Commissioner accepts (as he did in the case of [Brightlingsea Town Council FS50101351](#)) that disclosure of the rent review calculations



during the negotiations or arbitration process would be likely to have a detrimental effect on the council's commercial interests. However, now that the rent reviews for 1999, 2002 and 2005 have been concluded (the first of which was nine years before the complainant's information request and the last of which was almost three years before) he does not believe that disclosure of the calculations would be likely to prejudice the council's commercial interests.

40. Furthermore, the Commissioner is mindful that the approach adopted by the council for the rent calculation for each review year may (as it has in the past) vary according to the prevailing market conditions at the time. Therefore, the approach for one review may not be used for, and therefore form a precedent for, a subsequent review. However, the procedure for disputing the rent calculation in the landlord's review notice by the tenant remains the same and is set out in the Third Schedule of the lease. It provides that 'if the tenant serves a counternotice the market rent shall be determined in default of agreement.....by an independent surveyor acting as an arbitrator'.

### **Likelihood of prejudice**

41. For the reasons already stated in paragraphs 37 to 40 above the Commissioner found no evidence of the likelihood of a real and significant risk of prejudice being caused to the council's commercial interests by disclosure of the requested information
42. The Commissioner has therefore concluded that the exemption in section 43(2) has not been engaged. For this reason it has not been necessary for him to consider the public interest arguments for and against disclosure.

### **Procedural Requirements**

43. Section 1(1) of the Act provides that any person making a request for information is entitled to be informed in writing by the public authority whether it holds the information described and if so to have it communicated it to him
44. Section 10(1) of the Act provides that a public authority must comply with section 1 promptly and in any event not later than the twentieth working day following receipt of the request. In not providing the requested information the council breached sections 1(1)(b) and 10(1).
45. Section 17(1) of the Act provides that if a public authority is to any extent intending to rely on a claim that the requested information is exempt under Part II of the Act it must within the time for complying

with section 1 give the applicant notice which (a) states this fact, (b) specifies the exemption in question and (c) states (if that would not otherwise be apparent) why the exemption applies.

46. By failing to specify the exact exemption upon which it wished to rely until its email to the Commissioner on 30 March 2010 (some 19 months after the original information request) the Commissioner finds that the council breached section 17(1)(a), (b) and (c) of the Act.

## **The Decision**

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47. The Commissioner's decision is that the council did not deal with the request for information in accordance with the Act in that:
- It incorrectly applied section 43(2) to the requested information
  - It breached section 1(1)(a) by not confirming that it held the 'rent calculations' element of the request and section 1(1)(b) by not providing the complainant with the requested information
  - It breached section 10(1) by not providing the requested information within 20 working days
  - It breached section 17(1)(a), (b) and (c) by not citing the exemption upon which it intended to place reliance within 20 working days
  - It also breached section 17(3)(b) by not applying a public interest test and section 17(7) by not giving details of its complaints' procedure in its refusal notice

## **Steps Required**

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48. The Commissioner requires the council to take the following steps to ensure compliance with the Act:
- To disclose its calculations for the 1999, 2002 and 2005 rent reviews.
49. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## **Failure to comply**

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50. Failure to comply with the steps described above 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.

## Right of Appeal

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51. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 9th day of August 2010**

**Signed .....**

**Anne Jones  
Assistant Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## **Legal Annex**

### **Freedom of Information Act 2000**

#### **Section 1(1)**

Provides that –

“Any person making a request for information to a public authority is entitled-

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

#### **Section 10(1)**

Provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

#### **Section 17(1)**

Provides that –

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

#### **Section 43(2)**

Provides that –

“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).”