

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 16 February 2017

**Public Authority:** Ledbury Town Council  
**Address:** Town Council Offices  
Church Offices  
Ledbury  
Herefordshire  
HR8 1DH

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to a neighbourhood plan. Ledbury Town Council disclosed some information and withheld other information under the FOIA exemptions for information accessible by other means (section 21) and prejudice to commercial interests (section 43(2)).
2. The Commissioner's decision is that Ledbury Town Council has failed to demonstrate that section 43(2) is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the withheld 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 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 29 July 2016, the complainant wrote to Ledbury Town Council (the "council") and requested information in the following terms:

*"1. All financial records concerning income and expenditure for Ledbury's Neighbourhood Plan since its inception. I require details of payments made, including amounts and to whom. I would like this detailed down to the level of being able to identify recipients of payments and a brief transparent description of the cost to which each relates.*

*2. Details of payments made to Foxley Tagg since they were engaged by Ledbury Town Council, itemised against each of the work packages so far undertaken*

*3. A breakdown of future budgeted costs, specifically detailing the work package outputs expected of Foxley Tagg relating to each*

*4. A schedule of work packages to which (2) above relates*

*5. A project management plan itemising key outputs, referenced to Foxley Tagg's contract.*

*6. A copy of the final report and accompanying budget that you have submitted to Big Lottery in respect of the Awards for All grant.*

*7. A detailed breakdown of the number of people who participated in each of the consultation events which the Neighbourhood Plan has delivered since its inception."*

6. The council responded on 26 August 2016. It disclosed some information and withheld other information under section 21 of the FOIA, directing the complainant to information published on its website. The council also withheld the information in parts 3-5 of the request under the FOIA exemption for prejudice to commercial interests – section 43(2).
7. Following an internal review the council wrote to the complainant on 5 October 2016. It stated that it was maintaining its position.

## Scope of the case

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8. On 10 October 2016 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly applied section 43(2) to withhold the information in parts 3-5 of their request.

## Reasons for decision

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### Section 43(2) – commercial interests

10. The council has withheld the information identified in parts 3-5 of the request, namely:

*“3. A breakdown of future budgeted costs, specifically detailing the work package outputs expected of Foxley Tagg relating to each*

*4. A schedule of work packages to which (2) above relates*

*5. A project management plan itemising key outputs, referenced to Foxley Tagg's contract.”*

11. Section 43(2) provides an exemption from disclosure for information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is therefore subject to the public interest test.
12. “Commercial interests” in the context of this exemption encapsulates a wide variety of activities. In this case, the withheld information relates to work carried out for the council by Foxley Tagg Planning Consultants Ltd (the “consultant”) in relation to the council's Neighbourhood Development Plan (NDP). The Commissioner is satisfied that the withheld information relates to a commercial activity and falls within the scope of the exemption.
13. In order for the exemption to be engaged it is necessary for it to be demonstrated that disclosure of information would result in some identifiable commercial prejudice which would or would be likely to affect one or more parties.
14. The ICO has been guided on the interpretation of the phrase ‘would, or would be likely to’ by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two

possible limbs upon which a prejudice based exemption can be engaged; i.e. either prejudice 'would' occur or prejudice 'would be likely to' occur.

15. With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed 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).
16. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
17. The council has argued that disclosing the information would be likely to prejudice its own commercial interests and the commercial interests of the consultant.
18. The Commissioner has gone on to consider the nature of the prejudice.

*The nature of the prejudice to the consultant*

19. The council confirmed that, in handling the request, it sought the views of the consultant as to what information it might be reluctant to place in the public domain. The Commissioner notes that this approach is in keeping with the recommendations of the code of practice issued under section 45 of the FOIA<sup>1</sup>.
20. The Commissioner notes that the consultant has argued that the information should not be disclosed because it is "commercially sensitive" and that its disclosure would be likely to prejudice its commercial interests by providing competitors with information which would normally remain private.
21. The Commissioner notes that the reasoning provided by the council is highly generic in nature, does not identify any explicit elements of the withheld information and does not make concrete the connection between disclosure and specific commercial prejudice.

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<http://webarchive.nationalarchives.gov.uk/20150730125042/http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

22. The Commissioner acknowledges that, in the consultation correspondence between the council and the consultant there are references to the potential benefits of the information to competitors and the fact that this is not the only NDP which the consultant is currently engaged with.
23. The Commissioner accepts that an argument could be made that disclosing the information would be likely to result in prejudice to the consultant's commercial interests but the level of detail required should be enough to demonstrate that the chance of prejudice being suffered should be more than a hypothetical possibility. Simply saying that information would be of value to competitors does not, in the Commissioner's view meet the evidential threshold required to demonstrate there is a real and significant risk of prejudice occurring.
24. Where an authority has failed to provide adequate arguments in support of the application of an exemption, the Commissioner does not consider it is her responsibility to generate arguments on its behalf.
25. In the absence of sufficient arguments the Commissioner has concluded that the council has failed to show that disclosure would be likely to result in prejudice to the commercial interests of the consultant.

*The nature of the prejudice to the council*

26. The council has argued that disclosing the information, with knowledge of the consultant's concerns in relation to the alleged prejudice, would be likely to result in a breakdown of trust between it and the consultant. The council has argued that this might result in the consultant withdrawing from the project forcing it to find a suitable replacement, resulting in further costs being incurred.
27. The council has further argued that disclosing the information might dissuade other companies from bidding for this or other tenders because of concerns about how the council handles commercial information.
28. Firstly, the Commissioner has found above that it has not been shown that disclosure of the information would be likely to result in prejudice to the commercial interests of the consultant. It follows, therefore, that the rationale for breaking ties with the council, namely, its disclosure of commercially prejudicial information falls away.
29. Secondly, since the coming into force of the FOIA the Commissioner considers that public authorities should always advise contractors or potential contractors that any information held can be subject to disclosure in response to requests. Authorities should ensure that

contracts made with third parties do not contain blanket restrictions on disclosure.

30. The Commissioner accepts that there will be certain cases where information can be legitimately withheld, however, decisions in this regard should generally be made on a case by case basis taking into account specific information requested and the circumstances at the time a request is made.
31. The Commissioner does not consider it plausible that businesses and other third party contractors would decline to engage with public authorities because of the risk of information disclosure, particularly where potentially lucrative public sector contracts are at stake. The Commissioner has not been provided with any evidence that this is generally the case or that in this specific case a potential outcome of disclosure would be that the consultant withdraws from its relationship with the council.
32. The council has also argued that disclosure of the information might also place it at risk of legal action and the associated costs this could incur. The council has not expanded on this argument but, in any event, the Commissioner does not consider that this falls within the scope of the exemption as it relates to financial interests rather than commercial interests.
33. Having considered the relevant arguments the Commissioner considers that the council's position is far too speculative to meet the threshold required to engage the exemption. The ascribed link between disclosure and the putative prejudice is tenuous and relies on too many contingencies which have not been shown to be more than hypothetical possibilities.
34. The Commissioner has, therefore, concluded that the council has failed to show that disclosure of the information would be likely to result in prejudice to its own commercial interests.
35. As the Commissioner has found that the council has failed in respect of its own interests and the interests of the consultant to engage the exemption she has not gone on to consider the public interest.

## Right of appeal

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36. 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)

37. 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.
38. 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** .....

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