

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 16 August 2022

**Public Authority:** Coventry City Council

**Address:** The Council House  
Earl Street  
Coventry  
CV1 5RR

#### **Decision (including any steps ordered)**

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1. The complainant has requested information from Coventry City Council regarding rooftop and greenfield mobile mast site agreements.
2. Coventry City Council withheld some information on the basis of section 43(2) (commercial interests), provided some information, and stated that further information was not held.
3. The Commissioner's decision is that section 43(2) was correctly applied and the public interest in maintaining the exemption outweighs the public interest in disclosure.
4. No steps are required.

## Request and response

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5. On 16 June 2021 the complainant requested information in the following terms:

[A] "Please provide me with all documents and electronic communications relating to the rooftop and greenfield mobile mast site agreements that your Council may have entered into with any of the following organisations (Code Operators) since 28 December 2017. The information should include internal emails and minutes of discussions relating to the site agreements.

- a. EE Limited
- b. Hutchison 3G UK Limited
- c. Arqiva Services Limited
- d. On Tower UK Limited
- e. Cornerstone Telecommunications Infrastructure Limited (CTIL)
- f. Airwave Solutions Limited
- g. Vodafone Limited; and
- h. Telefonica O2 UK Limited

Please provide the following information in respect of those agreements:

[B.1] The number of agreements with any of the Code Operators that were renewals of existing agreements and the number of agreements relating to new sites.

[B.2] In respect of those agreements which were renewals, the number of renewals completed prior to the contractual expiry of the existing agreement.

[B.3] Where the agreements were renewals, the rent paid under the previous agreement and the consideration paid under the renewed agreement; and

[B.4] Any legal costs incurred by the Council in dealing with these agreements and which was not paid by the Code Operators."

6. The council responded on 9 July 2021. In relation to each request item it stated:

[A] – Information regarding meeting minutes is not held because "no meetings were had in the three agreements which the Council have

entered into". Emails relating to the site agreements are withheld on the basis of section 43 (commercial interests) of the FOIA.

It provided some information in relation to [B.1] and [B.2]. It stated that no information is held in relation to [B.4] because all the costs were covered by the Operators. The remainder of the information was refused on the basis of section 43 (commercial interests) of the FOIA.

7. The complainant requested an internal review on 12 July 2021.
8. The council responded on 20 August 2021 with the outcome of an internal review in which it upheld its original position.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 22 September 2021 to complain about the way their request for information had been handled. Specifically that the council had refused to provide information on the basis of section 43(2) of the FOIA.
10. The scope of the case is to consider whether the council has correctly engaged section 43(2) in order to refuse the requested information.

### **Reasons for decision**

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#### **Section 43(2) – Commercial interests**

11. Section 43(2) states 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).
12. The term 'commercial interests' is not defined in the FOIA; however, the Commissioner has considered his guidance on the application of section 43<sup>1</sup>, which clarifies that: "A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent."
13. The withheld information comprises:  

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<sup>1</sup> <https://ico.org.uk/for-organisations/section-43-commercial-interests/#432>

- Emails relating to valuations or negotiations for the agreements;
- Where the agreements were renewals, the rent paid under the previous agreement and the consideration paid under the renewed agreement;

### **Does the information relate to a person's commercial interests?**

14. The council has provided the Commissioner with some of the withheld information, being the contractual lease arrangements between the council and the code operators ("the Providers"). The Commissioner has not viewed the emails relating to the valuations or negotiations of the agreements however he has not considered this necessary in order to reach a decision.
15. The information in scope of the request provides the contractual terms and details of the payments to be made by the Providers as rent to the council. The Commissioner accepts that the information is therefore commercial in nature.

### **The likelihood of the prejudice occurring**

16. 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.
17. The Commissioner has been guided on the interpretation of the phrase "would, or would be likely to" by a number of First-tier Tribunal (Information Rights) ("the 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; either prejudice "would" occur, or prejudice "would be likely to" occur.
18. With regard to "would be likely to" prejudice, the 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).
19. 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).

### **The council's position**

20. The council considers that disclosure of the specific details regarding the financial arrangements, would be likely to prejudice the commercial interests of both the itself and the Providers, for the following reasons:

- the agreements were individually negotiated and agreed by the council with the Providers;
- disclosure would limit the council's ability to negotiate higher value agreements in the future;
- revealing individually negotiated terms could be detrimental to a Providers' commercial interest. It discloses part of the Providers' business model, and the rents negotiated. Competitors could exploit this information for their own commercial interest;
- disclosure of information may cause unwarranted reputational damage or loss of confidence in the council.
- the overall impact could be distortion to the market price with a detrimental impact for the council in terms of other contracts and procurements.

**Is section 43(2) engaged?**

21. The Commissioner must be satisfied that the nature of the prejudice is "real, actual or of substance" and not trivial or insignificant. He must also be satisfied that some causal relationship exists between the potential disclosure and the stated prejudice.
22. The Commissioner accepts the council's position that the commercial details of the agreements would be of use to competitors at a time when the council is renewing the leases. He accepts that this could be prejudicial to both the existing Providers and the council.
23. The Commissioner also accepts that providing the details of rents paid by Providers discloses a part of the Providers' business models which could give competitors at an unfair advantage in a competitive market.
24. The Commissioner therefore finds that the section 43(2) exemption is engaged as prejudice to commercial interests would be likely to result through disclosure. As the exemption is engaged, the Commissioner must consider the balance of the public interests for and against disclosure.

**Public interest test**

25. The exemption under section 43(2) is subject to the public interest test. This means that, even when a public authority has demonstrated that

the exemption is engaged, it is required to consider the balance of public interest in deciding whether to disclose the information. The public interest is not a tightly defined concept, and can cover a range of principles including, but not limited to: transparency and accountability; good decision-making by public bodies; upholding standards of integrity; ensuring justice and fair treatment for all; securing the best use of public resources and in ensuring fair commercial competition in a mixed economy.

### **Public interest in favour of disclosure**

26. The council identified the following factors in favour of disclosure:
- Promote accountability and transparency for the council's decisions and in its spending of public money.
  - Assist the public to understand and challenge the council's decisions.
  - Enable the public to better scrutinise the public monies spent.
  - Inform the public of activities carried out on their behalf, allowing for more user involvement and collaborative decision making.
27. The complainant made the following statement regarding the public interest in disclosure:

"corporate, private companies are slashing rents paid to councils for siting telecoms infrastructure, up and down the country. Councils, which are democratically elected bodies, now have substantially less income to pour into communities - and such financial sacrifices have not even come with the guarantee of greater coverage due to multiple agreements getting caught up in the courts, and slowing down digital roll-out as a result."

### **Public interest arguments in favour of maintaining the exemption**

28. The council's public interest arguments in favour of maintaining the exemption are based upon the above stated prejudicial impacts of disclosure used for engaging the exemption.
29. In summary, the council argues that the effect of publishing the withheld information would be likely to harm the commercial interests of both the Providers and the council. Disclosure could distort the market price and prejudice the council's ability to obtain competitive rents in the future which would not be in the public interest.

30. Furthermore disclosure of the information could cause damage to the council's reputation, which may negatively impact future negotiations on other such contracts and agreements. Any resulting negative impact on public finances would not be in the public interest.

**Balance of the public interest**

31. On balance, the Commissioner finds that the transparency argument is outweighed by the requirement for the council to secure the best negotiated terms in future agreements. Whilst transparency would enable the scrutiny expressed by the complainant, the Commissioner considers that maintaining the competitive market could have a greater beneficial impact on the public purse.
32. The conclusion of the Commissioner is that the public interest in the maintenance of the exemption outweighs the public interest in disclosure in this case. The council is not, therefore, obliged to disclose this information

## Right of appeal

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33. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

34. 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.
35. 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 .....**

**Janet Wyles**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**