

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

### **Decision notice**

**Date:** 19 December 2022

**Public Authority:** Ashfield District Council  
Urban Road  
Kirkby in Ashfield  
Nottingham  
NG17 8DA

#### **Decision**

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1. The complainant requested, from Ashfield District Council (the Council), information relating to the rent being paid to the Council for some Council offices. The request comprised seven parts. While the Council gave answers in response to the last three parts, it refused to disclose information within scope of the first four parts because it is commercially sensitive.
2. The Commissioner's decision is that the Council was entitled to withhold the information requested in parts 1 – 4 of the request, under section 43 of FOIA ('commercial interests').
3. No corrective steps are required.

#### **Request and response**

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4. The complainant made the following information request to the Council on 19 April 2022:  
  
"Sports Gateway (SG) have been using the council owned offices on Watnall road for their commercial operations. Can you provide details of the rental agreement in place for these offices.

- 1) Are SG paying fair market rate? I understand they are not?
  - 2) what %age discount are they in receipt to discount fair market rate?
  - 3) what is the annual rental income ADC receives from SG for these facilities?
  - 4) how was the rental amount decided - who was involved in the decision?
  - 5) who signed off the rental amount - council officers and councillors?
  - 6) has the 151 officer been part of this agreement to ensure best option for council income?
  - 7) can the monitoring officer confirm this has been through due process?"
5. The final position of the Council, expressed in its internal review response of 31 October 2022, was to uphold its previous decision to withhold information within scope of parts 1 – 4 under section 43(2) of FOIA ('commercial interests').

### **Scope of the case**

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6. The complainant contacted the Commissioner on 30 September 2022 to complain about the way their request for information had been handled.
7. The complainant has said that the Council "refused to confirm some basic details" and that "they claim it is commercially sensitive information but i have merely asked them to confirm what i know is true and provide details of the level of discount and who signed this off".
8. Although the complainant also said that they want the Council to "answer the questions" and listed all seven parts of the request, the Commissioner can see that the Council has already provided answers to the complainant in respect of parts 5, 6 and 7. With that in mind, and given that the complainant has said they want to know "the level of discount and who signed this off" (see paragraph 7 above) the Commissioner will focus on parts 1 – 4 of the request and the Council's application of section 43(2).
9. In parts 1 and 2 of the request, the complainant is asking whether rent is being paid at 'fair market rate'. The information held by the Council within scope of that query is the rent figure – from that information the complainant could make their own determination as to whether it is 'fair market rate'.

10. Part 4 of the request comprises two questions – the complainant asked the Council how the rent was decided and who was involved in the decision. The complainant then essentially repeats the latter question (“who was involved in the decision?”) in subsequent parts of the request, with reference to specific officers. The Council gave answers to parts 5 – 7 of the request, so the Council has already provided information that addresses part 4 of the request to some extent. However, the complainant clearly remains dissatisfied and wants further information.

## **Reasons for decision**

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### **Section 43**

11. Section 43(2) of FOIA provides that information is exempt information if its disclosure would, or would be likely to, ‘prejudice’ (harm) the commercial interests of any person, including the public authority itself.
12. The Commissioner has detailed guidance<sup>1</sup> on section 43 on his website.
13. The information requested in parts 1 – 4 of the request is information about the rent being paid by Sports Gateway (a sports education and training provider) to the Council, and who decided the level of rent to be paid.
14. At internal review, the Council focused on its own commercial interests, whereas in its original response the Council had also referred to the interests of its tenant. In its submissions to the Commissioner, the Council has focused on its own commercial interests. Therefore the Commissioner will focus on the Council’s own commercial interests too.
15. The Commissioner is satisfied that the prejudice being envisaged by the Council relates to its commercial interests. His guidance explains that a commercial interest relates to a legal person’s ability to participate competitively in a commercial activity – in this instance, the commercial rental market.
16. Next, the Commissioner accepts that a causal link exists between the disclosure of information about rent being paid on commercial units and

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<sup>1</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

offices (enabling comparisons to be made) and prejudice to the Council's ability to obtain the best rent.

17. Lastly, the Commissioner considers that the envisaged prejudice 'would be likely to' occur. That was the Council's initial position of 26 September 2022, although at times in its responses the Council has also said that the prejudice 'would' occur. Given that the Council mentioned both 'would' and 'would be likely to', the Commissioner considered both and is satisfied that the lower threshold is met. 'Would be likely to' means that the risk of the prejudice occurring is real and significant, and more than hypothetical or remote.
18. Therefore he considers that the Council was entitled to apply section 43(2), and he will next consider the associated public interest test.
19. The complainant has expressed concerns about the fairness of the rent being charged, and has alleged "corruption" on the part of the Council, although the complainant provided the Commissioner with no evidence to support that allegation. The Commissioner also notes that there is a general public interest in public authorities being open and transparent.
20. However, the Council has emphasised the need to be able to participate competitively in the commercial rental market. The Commissioner's guidance lists a number of arguments that should be considered against disclosure, which include 'competition' – there is undoubtedly a public interest in allowing public authorities to withhold information which, if disclosed, would negatively affect their ability to compete commercially.
21. Other listed arguments that are relevant in this case include the 'ability to generate income' and 'negotiating position'. The Council has argued:

"releasing details of rent paid by individual lessees would negatively affect [the Council's] ability to participate competitively in the commercial rental market by prejudicing the position of the Council when negotiating future leases and by making it more difficult for the Council to negotiate higher rents than are charged currently".
22. On balance, therefore, the Commissioner's decision is that the public interest favours maintaining the section 43 exemption in this instance.
23. The Commissioner highlights a decision notice for FS50731179<sup>2</sup> which involved a similar request for the rent being charged by a Council for

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<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2260193/fs50731179.pdf>

some commercial units. In that case, the Commissioner similarly upheld the application of section 43(2).

### **Other matters**

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24. Although the complainant did not complain to the Commissioner about a delay in the Council's handling of the request as such, the Commissioner notes that the Council did not respond to the request within 20 working days. The Council has explained that the request was overlooked because it was not logged originally. No substantive response to the request was provided by the Council until 26 September 2022, over five months after the request was made.

## Right of appeal

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25. 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@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)

26. 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.
27. 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 .....**

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