

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 November 2023

Public Authority: UK Infrastructure Bank
(HM Treasury)

Address: 1 Horse Guards Road
London
SW1A 2HQ

Decision (including any steps ordered)

1. The complainant has requested a copy of the loan agreement between UK Infrastructure Bank ('UKIB') and CityFibre. UKIB refused to provide the requested information, citing section 43(2) (commercial interests) of FOIA.
2. The Commissioner's decision is that the requested information is exempt under section 43(2).
3. The Commissioner does not require further steps.

Request and response

4. On 30 June 2023 the complainant made the following request:

"I would like to request a copy of the loan agreement for the deal mentioned in this press release:

<https://www.ukib.org.uk/news/UKIB-to-act-as-cornerstone-lender-in-CityFibre-deal-to-bring-high-quality-full-fibre-broadband-to-millions-of-homes-across-England-and-Scotland>"

5. On 25 July 2023 UKIB responded. It refused to disclose the loan agreement ('the Agreement'), citing section 43(2) (commercial interests) of FOIA.
6. On 25 July 2023 the complainant requested an internal review, querying why a redacted version of the loan agreement couldn't be disclosed.
7. On 18 August 2023 UKIB provided the outcome to its internal review. It upheld its previous position.

Reasons for decision

Section 43(2) - commercial interests

8. Section 43(2) states that information may be withheld if its disclosure would, or would be likely to, prejudice the commercial interests of any legal person (including the public authority holding the information).
9. In order to engage section 43(2), it's not sufficient to argue that because information is commercially sensitive, its disclosure would, or would be likely to, prejudice commercial interests. There must be a causal link between disclosure and the prejudice envisaged.
10. In this case, UKIB is concerned that disclosure of the agreement would be likely to prejudice both its own commercial interests and the third party in question – CityFibre (also known as the borrower).
11. In relation to its own commercial interests, UKIB has explained:
 - "Disclosure in this case would signal to the market that UKIB cannot adequately protect commercially sensitive information. The release of the Agreement would be likely to discourage other businesses from applying for loans from UKIB, or sharing information freely with UKIB in the future, out of a concern that their sensitive information or loan agreements with UKIB may not be protected."
 - "Disclosure of the agreement would reveal commercially sensitive information such as the interest rate, the repayment schedule and the contractual risk allocation agreed between UKIB and the Borrowers (CityBank)...other potential Borrowers would seek to use the terms in the Agreement as a benchmark of terms offered by UKIB which would be likely to have a negative effect on UKIB's bargaining position in respect of future transactions."

12. In relation to CityFibre (and others) commercial interests, UKIB explained:

- "Disclosure of the Agreement would prejudice CityFibre's commercial interests as it would reveal the terms by which they have been able to access finance."
- "Disclosure of the information would involve revealing contractual provisions which have been agreed upon as a result of confidential negotiations. This would therefore provide insight into CityFibre's bargaining position as well as its preferences for contractual positions in both the Agreement as well as agreements more widely."
- "...the entirety of the Agreement is sensitive...even if elements of the Agreement retain standard wording, the inclusion of such standard wording is the result of a negotiation process...For example, a competitor or a party wishing to negotiate with CityFibre in future would gain a detailed understanding of the issues in respect of which standard terms sufficed as compared to those in respect of which there was very substantial amendment to LMA standard terms. This would give that other party very valuable insight into how best to approach negotiations involving CityFibre..."
- "The Borrowers also noted that the Agreement was entered into as one part of a wider financing arrangement in which similar terms to those in the Agreement were agreed between CityFibre and private sector financial institutions. Disclosure of the Agreement could therefore also reveal the commercially sensitive information of those institutions."

13. The Commissioner is satisfied that UKIB consulted CityFibre about disclosure of the agreement under FOIA, which it was required to do.

14. Returning to paragraph 9, a public authority must demonstrate a causal link between disclosure and the prejudice envisaged. If an organisation enters into a financial agreement with a public authority, it must be aware that the details of this agreement would be disclosable under FOIA. The Commissioner's guidance¹ states:

'At the outset of a procurement exercise, and in any contract agreement documents, it is good practice to make your suppliers

¹ [Section 43 - Commercial interests | ICO](#)

aware that any information they provide (as part of the tendering process, or an ongoing relationship, or with respect to any agreed contracts) may, potentially, be disclosable under FOIA. This helps manage their expectations about what might happen to the information they provide to you.'

15. Therefore the Commissioner has rejected UKIB's first argument at paragraph 11. He does however accept the rest of the arguments, in relation to both UKIB and CityFibre's commercial interests. However, he must consider the extent to which the withheld information engages section 43(2).
16. During this investigation, the Commissioner asked the UKIB to reconsider the application of section 43(2) to the whole of the agreement. He noted that his guidance says 'Where the information requested is a contract, rather than applying section 43 in a 'blanket' fashion and viewing the contract as a whole, you need to consider each clause within the contract individually, with a view to identifying whether it may be disclosed.'²
17. The Commissioner also cited a previous decision³ in which he ordered the public authority to disclose standard, non-specific information which was commonly included in contracts or is 'so general and common sense...there is no causal link between disclosure and the prejudice that section 43(2) is designed to protect.'
18. In response, UKIB explained:

"The agreement is not of standard form, and is very different from standard form procurement contracts entered into by public bodies, which differ only in terms of key schedules...The agreement is a fully negotiated document, rather than a document which is largely made up of unamended and unamendable standard terms and conditions.'
19. The Commissioner accepts that if the Agreement in its entirety would be likely to reveal negotiation tactics, or terms, that would put either UKIB or CityFibre at a disadvantage; the whole agreement would engage section 43(2).

² [Section 43 - Commercial interests | ICO](#)

³ [ic-97816-d0q5.pdf \(ico.org.uk\)](#)

20. UKIB has also explained:

“Disclosing even parts of the Agreement would also send a negative signal to the market, undermining the relationship of trust between UKIB and its customers. The information in the Agreement is subject to obligations of confidentiality between the parties, including confidentiality clauses in the Agreement.”

21. The Commissioner rejects this argument for the same rationale contained in paragraph 15. His guidance specifically states ‘Having a confidentiality clause in place does not guarantee that information will not be disclosed under FOIA, and you should be wary of attempts to impose a blanket confidentiality clause on all the information contained in a contract.’
22. However, the Commissioner has reviewed the Agreement which is 149 pages. Having done so, he accepts that it’s a ‘fully negotiated document.’ Even the definitions, which are repeated throughout the Agreement are specific to the circumstances and understanding reached between UKIB and CityFibre.
23. Since the Commissioner has decided section 43(2) is engaged, he will go onto consider the balance of the public interest.

The public interest test

Factors in favour of maintaining the exemption

24. UKIB was launched by the Chancellor of the Exchequer in June 2021. Its core objective is to help tackle climate change and support regional and local economic growth.
25. UKIB has explained that harm to its commercial interests “would amount to harm to the public purse and the exceptionally compelling public interest objectives that UKIB exists to serve, namely helping to combat climate change and to boost regional and local economic growth.”
26. It’s gone onto say “Given the very great importance of UKIB’s specific objectives, as endorsed by Parliament (in passing primary legislation to establish a statutory footing for UKIB), the risks posed by the disclosure sought in this case are all the more weighty.”

Factors in favour of disclosure

27. Disclosure would hold the UKIB accountable for how public money is spent and the circumstances in which its loaned. It would increase confidence in, and allow the public to scrutinise, the work UKIB is doing to fulfil its objectives.

28. UKIB is concerned that disclosure would be likely to skew the market, and affect both UKIB and CityFibre's ability to negotiate or compete in a commercial environment. However, the Commissioner notes that the opposite could occur; greater transparency around the loan process and finances of CityFibre may encourage more organisations to improve the content and quality of their proposed agreements.

Balance of the public interest

29. The Commissioner has decided that the public interest lies in maintaining the exemption.
30. UKIB has pointed out that 'substantial transparency was provided about the nature, value and objectives behind the Agreement.'⁴
31. The complainant hasn't put forward any specific public interest arguments for disclosure. In the absence of any further arguments, the Commissioner is satisfied that the information that's in the public domain sufficiently meets the public interest without causing any of the prejudice outlined in this notice.

⁴ [Factsheet-CityFibre.pdf \(ukib.org.uk\)](#); [UK Infrastructure Bank to act as cornerstone lender in CityFibre deal to bring high quality full fibre broadband to millions of homes across England and Scotland | UK Infrastructure Bank \(ukib.org.uk\)](#)

Right of appeal

32. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

33. 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.
34. 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

Alice Gradwell
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Wycliffe House
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