

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 May 2014

Public Authority: Devon County Council
Address: County Hall
Topsham Road
Exeter
EX2 4QD

Decision (including any steps ordered)

1. The complainant has requested information relating to when the parish of Combyne Rousdon and the Trinity ward of East Devon District Council will receive enhanced broadband under the Connecting Devon and Somerset Scheme. The Commissioner's decision is that Devon County Council has corrected applied the exemption for information provided in confidence at section 41 of the FOIA. He does not require any steps to be taken in order to ensure compliance with the legislation.

Request and response

2. On 23 August 2013, the complainant wrote to Devon County Council and requested information in the following terms:

"Please would you supply us with plans that the Connecting Devon and Somerset Scheme, for enhanced broadband, have for the parish of Combyne Rousdon and the Trinity Ward of EDDC? W [sic] do not seek detailed information merely which areas of the parish will receive enhanced broadband and when. More importantly my organisation would like to know if any areas of the parish will not be included in the scheme. When we submitted a bid to Defra we were obliged to inform them if we were to be included in CDS's scheme which CDS would not tell us. We note that the Minister has requested that County Councils provide the sort of information we seek."

3. The council responded on 17 September 2013 and refused to provide the requested information citing the exemption at section 41 of the FOIA.
4. The complainant requested an internal review on 17 September 2013. The council responded on 14 October 2013 maintaining its original position in relation to section 41 and also applying the exemption at section 22 of the FOIA.

Scope of the case

5. The complainant contacted the Commissioner on 24 October 2013 to complain about the way his request for information had been handled.
6. During the Commissioner's investigation, the council also sought to rely on the exemption where disclosure would prejudice the commercial interests of any person at section 43(2) of the FOIA.
7. The Commissioner has considered the council's application of section 41 to the withheld information.
8. As the Commissioner's decision is that the council was correct to apply the exemption at section 41 of the FOIA in this case, he has not deemed it necessary to consider the application of the exemptions at section 22 and section 43(2) of the FOIA.

Reasons for decision

Section 41 – Information provided in confidence

9. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and the disclosure would constitute an actionable breach of confidence.

Was the information obtained from another person?

10. The first step is for the Commissioner to consider whether the information was obtained by the council from any other person in order to satisfy the requirement of section 41(1)(a).
11. The withheld information in this case is a map showing the draft phased deployment of enhanced broadband. It is contained within a schedule of the contract for the provision of deployed services under the Connecting

Devon and Somerset Broadband Delivery UK ('CDS') initiative between Somerset County Council and British Telecommunications Public Limited Company ('BT') dated 29 January 2013 ('the CDS contract'). It is referred to as the Speed and Coverage Template ('SCT'). The Commissioner understands that the SCT was inserted into the contract from documents that were originally provided to CDS by BT in confidence during the project's bid and competitive dialogue process.

12. The Commissioner's guidance 'Information provided in confidence relating to contracts'¹ states that a concluded contract agreed between a public authority and another person is not usually information being provided by one party and obtained by the other. Therefore, in most cases, information in a concluded contract cannot benefit from the section 41 exemption because it has not been obtained by the public authority from another party. However, the guidance also states that depending on the circumstances of the case, some information relevant to a contract may count as confidential information obtained from another party, for example, information regarding a pre-contractual negotiating position or technical information either contained within the body of a contract or provided as a separate schedule. The guidance refers to the Tribunal decision in *Derry City Council v Information Commissioner*² in which the following was stated:

"We are also conscious of the fact that contracts will sometimes record more than just the mutual obligations of the contracting parties. They will also include technical information, either in the body of the contract or, more probably, in separate schedules. Depending, again, on the particular circumstances in which the point arises, it may be that material of that nature could still be characterised as confidential information "obtained" by the public authority from the other party to the contract, (or perhaps a "trade secret" under section 43 (1) of the Act) in which event it may be redacted in any disclosed version".

13. As the Commissioner was not entirely clear whether the SCT constituted a mutually negotiated contract, he asked the council for further clarification as to whether the withheld information in this case had been

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/CONFIDENCEANDCONTRACTS.ashx

² Appeal number EA/2006/0014 11 December 2006

provided to it by a third party and drew the council's attention to his guidance referred to in the above paragraph. The council confirmed that the SCT was provided to it by BT. The Commissioner therefore considers that the SCT, being technical information contained within a schedule to the CDS contract, was obtained by the council from a third party and therefore this requirement is satisfied.

14. Having established that the requested information was in fact obtained from another person, the Commissioner must next consider whether or not its disclosure to the public (otherwise than under the FOIA), would constitute a breach of confidence 'actionable' by that or any other person.

Actionable claim for breach of confidence

15. Whilst it is not the only test for establishing confidence, the Commissioner finds that the appropriate test for this case is that which is set out in the case of *Coco v Clark* [1969] RPC 41. According to the decision in this case a claim for breach of confidence can be established where:

"... three elements are normally required if ... a case of breach of confidence is to succeed. First, the information itself ... must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it..."

16. All three elements must be present for a claim to be made. However, for that claim to be 'actionable' within the meaning of section 41(1)(b) of the FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed. This requires consideration of whether or not there would be a public interest defence to such a claim.

Obligation of confidence

17. Even if information is to be regarded as confidential, a breach of confidence will not be actionable if it was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.
18. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark*,

suggests that the 'reasonable person' test may be a useful one. The test was described as follows:

"If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence."

19. The council explained that disclosing detailed information relating to broadband speed and coverage is contrary to the terms and obligations under the CDS contract and provided the Commissioner with clauses from the contract relating to 'Commercially Sensitive Information', 'Freedom of Information' and 'Confidentiality'.
20. The Commissioner notes that a confidentiality clause in a contract is not enough in itself to prevent disclosure. If it were it would be relatively straight forward for all public authorities bound by the FOIA to opt out of their obligations under the FOIA. It is the Commissioner's view that there must be an actionable breach of confidence for the exemption to be engaged. Nonetheless, having viewed the clauses within the CDS contract in this case, the Commissioner accepts that the requested information has been provided in circumstances importing an obligation of confidence.

Necessary quality of confidence

21. For information to have the necessary quality of confidence it must be more than trivial and not otherwise accessible.
22. The Commissioner is satisfied that the information in this case, that being a map showing the draft phased deployment of enhanced broadband, is not trivial.
23. However, as stated above, this alone is not sufficient to indicate that the material has the necessary 'quality of confidence'. Therefore the Commissioner has considered whether the information is otherwise accessible.
24. The council has not specifically confirmed that the information is not otherwise accessible. However, given its arguments relating to preserving the confidentiality of the information, it is reasonable to deduce that the information is not accessible elsewhere. The Commissioner therefore accepts that the withheld information in this case has the necessary quality of confidence.

Detriment to confider

25. Having considered whether the information in this case was imparted in circumstances giving rise to a duty of confidence and had the necessary quality of confidence, the Commissioner must also consider whether unauthorised disclosure could cause detriment to the confider.
26. The Commissioner considers that where commercial information is purported to have been imparted in confidence, there would have to be a detrimental impact to the commercial interests of the confider for the exemption to be engaged.
27. The council has said that release of the requested information would be likely to prejudice the commercial interests of the council and BT and that this is why the requested information contained in the CDS Contract was designated as commercially sensitive and subject to the clauses for 'Commercially Sensitive Information'. It said that it has consulted with BT on a number of occasions - in respect of the original FOI request, the subsequent internal review, following publication of a Public Accounts Committee transcript and following receipt of the Commissioner's enquiries. BT has articulated the reasons their commercial interests would be prejudiced in a letter to the council dated 20 March 2014. The Commissioner notes that BT considers that the information within that letter is commercially sensitive and the confidential information of BT. BT specifically requested that the Commissioner keep the contents of this letter confidential. It said that disclosure of the rationale in the letter would also in itself impact on BT's commercial interests by providing competitors with information regarding BT's confidential commercial policy and deployment strategy. The Commissioner has therefore used a confidential annex to detail the detriment to the confider which would result from disclosure of the requested information in this case.
28. For the reasons detailed in the confidential annex, the Commissioner is satisfied that disclosure of the withheld information would cause detriment to the confider, BT, and therefore considers that this limb of the confidence test has been met.

Public interest in confidence

30. As Section 41 is an absolute exemption there is no requirement for an application of the conventional public interest test. However, case law suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. The Commissioner has therefore gone on to consider whether there would be a defence to a claim for breach of confidence.

31. Whereas in the case of qualified exemptions, the public interest test operates in favour of disclosure unless exceeded by the public interest in maintaining the exemption applied, the reverse is the case in respect of the duty of confidence public interest test as it is assumed that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.
32. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure of the information requested against both the wider public interest in preserving the principle of confidentiality and the impact that disclosure of the information would have on the interests of the confider. As the decisions taken by courts have shown, very serious public interest matters must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality.
33. The council has said that it can fully appreciate the interest from the public in the programme and how it could affect individuals across Devon and Somerset. It said that information about whether an area will be benefiting from improved broadband and when could influence business decisions, such as relocation to a particular area, or household decisions such as property purchases in areas believed to be benefiting from fast broadband. It also acknowledged the need for openness, transparency and accountability and the strong public interest in disclosure given the spending of public resource on the programme.
34. The complainant has said the chair of a Public Accounts Committee and the minister responsible for the BDUK scheme have both said that the information should be made available. He also said that the RDPE (Rural Development Programme for England) scheme of DEFRA (the Department for Environmental, Food and Rural Affairs) required his business to indicate whether it was in the BDUK or not and that it said such information could be obtained from the county council.
34. The Commissioner drew the council's attention to the complainant's reference in his information request that a minister has requested that county council's provide this sort of information. The Commissioner understands that the Rt Hon Maria Miller MP requested this in a letter dated 19 July 2013. The council said that in response to that letter, the CDS Partnership published a map which sets out the final intended coverage of the programme and it is this map that the CDS team intend to update with improvements to the mapping and added functionality. The Commissioner understands that this published map is not the same

as the withheld information in this case. The council provided a link to a dedicated interactive map on the CDS website³ intended to keep the public up to date with plans for the broadband rollout which is updated quarterly.

35. The council provided the following reasons why it would not be in the public interest to disclose the requested information:

If disclosed into the public domain it may deter BT within the Programme, and BT and other bids within the BDUK national programme in the future. This ultimately, in rural areas where market failure is prevalent, would only compound the digital exclusion and isolation which the current government and EU policies are working to eradicate. It would lead to less information being shared by BT, for fear of confidential information being made public and / or impact to their brand, which is not in the public interest and may impact CDS' ability to demonstrate value for money.

If the Programme changes, which is always a risk, then there would be a significant detrimental effect on businesses and households who have used the information to influence decisions including affecting property prices in affected areas. BT has confirmed the council's view that the speed and coverage template *'is essentially indicative and subject to change'*, which can change the intended deployment in Combyne Rousdon (this includes which Phase of the CDS Programme Combyne Rousdon is in, length of time taken and / or whether deployment is possible to part or all of Combyne Rousdon). We believe that providing changeable information would not serve to benefit the public.

The council is very concerned that by breaching the CDS contract it is at risk of liability. This could mean public money having to be paid out not only to defend a claim but to pay any quantifiable damages awarded to BT by the courts or in settlement for breach of the CDS contract, not to mention staff time being diverted from the challenging implementation timetable. This assumes that BT do not terminate the CDS contract for material breach of contract. Even if the council successfully defended the claim or injunction, it would not recover all its costs from BT. Typically the council may only be able to recover around 70% of its total costs. If BT's claim or injunction was successful, the council may have to pay a proportion of BT's legal

³ <http://www.connectingdevonandsomerset.co.uk/where-and-when/>

costs, such costs determined by the relevant judge. There is a risk that these costs may be indemnity costs as:

- there is a clear breach of the CDS contract by the council;
- the council were put on notice of potential claims;
- BT did not provide the comfort that the council sought in relation to releasing the information requested by the complainant;
- BT clearly advised disclosing such information would be an actionable breach of confidence; and
- BT confirmed that the information requested is, in BT's view, exempt from disclosure under section 41 of the FOIA.

The effective conduct of the council and BT's affairs and the interests of all residents of Devon and Somerset is best served by the information being published in a planned, measured and managed way within the control of the Programme (i.e. not publishing this information now or to let publication be driven by other individual requests). This ensures the fair treatment of all areas within the Programme. It is not sensible or fair to the whole of Devon and Somerset to release the information requested now with all other areas of Devon and Somerset needing to wait for the Programme to release the information regarding their areas in due course. By releasing the information to the complainant, he may obtain a possible advantage by obtaining the information prior to publication (e.g. purchasing property). It is a balanced and reasonable decision, and the right decision, to manage the availability of the information by planning and controlling its publication in the manner the council proposes so that complete and reliable information is released as planned (rather than disclosing potentially misleading information regarding areas covered by the Programme on an ad-hoc and irregular basis).

Disclosure of the requested information would likely impact on the value of taxpayer's money and prejudice its ability to secure best value under the Programme. BT has already confirmed such release would adversely damage the Programme's relationship with BT, impact upon the other live projects and may deter BT from contracting with other public sector entities.

Release of the areas not covered by the Programme may result in not insignificant attention and lobbying being focussed on the circa 10% of Devon and Somerset that will fall outside the Programme. This is not in the public interest of the circa 90% of Devon and Somerset covered by the Programme.

Our focus is on delivering the Programme. If we acceded to this request, it may encourage others to make similar requests. Such

requests and/or a claim or injunction from BT would clearly impact the implementation timetable and take the focus away from successful delivery. For the aforementioned reasons, it is not reasonable to release piecemeal information. The council's proposed approach means everyone would see the information at the same time when the information is more certain.

The timing of the disclosure would not be in the public interest. Time wise, the Programme is one of the most advanced in the UK. There are over 40 BDUK approved broadband projects in England alone and nearly 50 in the UK. If the council are mandated to disclose the requested information, BT are unlikely to disclose equivalent information to other contracting authorities who are implementing after the Programme and BT may be less willing to approach superfast broadband projects in an open and frank manner. This is not in the commercial and operational interests of the Programme or such other contracting authorities whose project status with BDUK is 'in delivery'.

We intend to be open and transparent regarding the requested information within the next 6 months, when such information is more certain, accurate and reliable. Surely this is in the public interest. As highlighted above, staged deployment information has been publically released by CDS on the website at appropriate times which is the best way to manage public expectation in relation to projects of this nature.

Accountability for the spending of public money has been achieved via a number of ways:

- a) BDUK used the competitive dialogue procedure to appoint suppliers to the national framework;
- b) following a procurement exercise using the most economically advantageous tender criteria, BT were appointed to supply the superfast broadband services for the Programme using a Call Off Contract under the BDUK Framework Agreement;
- c) the National Audit Office have audited BDUK. Therefore there is clear accountability for the overall national project. BDUK regularly reviews and meets with the Programme for compliance;
- d) the CDS contract includes audit provisions to the extent that BT were willing to accept them during negotiations (CDS contract clause 36);
- e) as the Programme is paid via grant based funding, BT can only claim eligible expenditure and such claims are only accepted and paid when BT evidence their expenditure through invoices, timesheets etc;
- f) the National Audit Office may yet audit individual projects such as the Programme. This would satisfy any remaining concerns regarding accountability;

g) the Public Accounts Committee's interest in the national programme has assisted to demonstrate accountability.

The high profile nature of the national superfast broadband project makes it reliant on retaining the trust and support of the public to secure effective delivery. As advised above, this may be prejudiced by disclosing inaccurate information.

Combpyne Rousdon is not being charged for the provision of superfast broadband infrastructure in their parish, but rather is receiving the direct benefits of the Programme.

The following public interest arguments advanced in *Varec v Belgium* C-450/06, 14 February 2008 apply in that:

- Contract award procedures (at both national and local level) can only work properly where there is a relationship of trust between the contracting authorities and participating economic operators, so that operators do not fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to them. As advised above, other procuring authorities may not receive the same details if their commercially sensitive information, brand and share price may be compromised; and
- The protection of business secrets is a general principle of European law and the maintenance of fair competition in contract award procedures is an important public interest. In addition, Article 8 of the European Convention on Human Rights, provides additional protection for the rights of a tenderer which has provided confidential information (this paragraph reflects the Department of Health and the Information Commissioner (EA/2008/0018) ruling paragraph 70).

36. As stated earlier, the Commissioner recognises the wider public interest in preserving the principle of confidentiality. He also considers there is a strong public interest in ensuring the BDUK initiative operates effectively. The Commissioner accepts that if information provided in confidence is disclosed, this would undermine the council's confidentiality obligations and could undermine the BDUK initiative.
37. The Commissioner also acknowledges there is a public interest in avoiding detriment to the commercial interests of the confider; in this case, BT.
38. The Commissioner accepts that there is a general public interest in transparency in relation to the performance and practice of public authorities and in knowing the specific information in this case. However, he considers that this has to be weighed against the potential damage which disclosure in any particular instance might cause to an

authority's ability to carry out its role. Where authorities rely on the cooperation of third parties in order to carry out functions and where this is facilitated by a climate of trust and the sharing of information in a confidential context, there are strong public interest grounds in not doing damage to this dynamic.

39. The Commissioner acknowledges that the CDS website is reviewed and updated regularly in order to provide new and helpful information to the public.
40. On the basis of submissions received from the council, the Commissioner is satisfied that BT has not provided consent for the requested information to be disclosed and has seen no evidence of illegality, misconduct or gross immorality which would warrant the disclosure of the information or which could form the basis of a public interest defence against breach of confidentiality. He therefore considers that the public interest in maintaining the duty of confidence outweighs the public interest in disclosure in this case and that the council were correct to withhold in this case under section 41 of the FOIA.

Right of appeal

41. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

42. 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.
43. 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
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