

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 March 2019

Public Authority: Fareham Borough Council

Address: Civic Offices
Civic Way
Fareham
PO16 7AZ

Decision (including any steps ordered)

1. The complainant has requested recorded information from Fareham Borough Council relating to planning application P/16/0557/AO submitted by National Grid IFA2 Ltd. The Council has withheld some information from the complainant in reliance on section 40(2), 41 and 43 of the FOIA.
2. The Commissioner has decided that Fareham Borough Council is entitled to rely on section 40(2) of the FOIA to withhold the personal data of individuals which are contained in some of the emails, letters and attachments which have been disclosed to the complainant.
3. The Commissioner has also decided that the Council has properly applied the exemption provided by section 41 to withhold the draft IFA2 Interconnector Assessment Report and on section 43 to withhold various pieces of information where their disclosure would prejudice the Council's commercial interests.

Request and response

4. On 10 November 2016, the complainant wrote to Fareham Borough Council to ask to be provided with information which concerns planning

application P/16/0557/OA which was submitted by National Grid IFA2 Ltd.

5. The terms of the complainant's request are:

"Limiting this request to the period 1st July 2016 to date, I would be grateful if you would please supply a copy of:

1. all communications (a) made by FBC to NGIL and (b) received by FBC from NGIL, concerning, or bearing reference to, the decision [the Decision] to instruct Arcadis (whether by FBC and NGIL jointly or otherwise) to undertake an assessment and present the Report;
2. all communications made between councillors, officers and staff of FBC concerning, or bearing reference to, the Decision;
3. all notes and memoranda of all meetings and telephone discussions between FBC and NGIL, concerning, or bearing reference to, the Decision;
4. the instructions issued to Arcadis [the Instructions] to undertake an assessment and present the Report, together with any covering letter or other communication(s) issued to Arcadis relative to the Instructions;
5. all communications, and all notes and memoranda of all meetings and telephone discussions, between FBC and Arcadis and/or NGIL, in the period since the date of issue of the Instructions and up to the present time;
6. the Report and (whether or not a final edition of such Report has been issued by Arcadis) all and any draft versions of the Report as have to date been received by FBC, and please state on which date(s) each such document was received by FBC;
7. all communications, and all notes and memoranda of all meetings and telephone discussions, arising in the period from 1 September 2016 (inclusive) to date between all and any of the officers and staff and councillors of FBC and its consultants and agents – and which concern, or bear reference to
 1. the subject matter of the Instructions and/or
 2. all and any reports received by FBC from Arcadis and/or
 3. all communications between FBC and NGIL relative to the Instructions and to any reports received from Arcadis."

6. Then complainant made clear that his request, where it referenced NGIL and/or Arcadis, it included their respective consultants and agents. Where he made reference to 'communication' or 'communications' the complainant made clear that his request included "all letters and notes and memoranda, (whether conveyed electronically or otherwise), texts and emails, and together with all enclosures and attachments, but excludes simple acknowledgments of receipt of, and auto replies to, incoming communications".
7. On 23 November 2016, the Council wrote to the complainant seeking clarification of his request. The Council's email stated:

"Fareham Borough Council require further information in order to identify and locate the information you have asked for. Specially it would be useful to know in respect of question 5, please could you confirm that you are seeking communications relating to instructions in the Arcadis Commission only."
8. The complainant provided the following clarification the next day:

"No. Within question 5 of the FOI I am seeking all communications relating to instructions, and including the subject matter of the instructions, the Report and any interim report, and all and every draft version of the Report and any interim report."
9. On 14 December 2016, the complainant sent the Council an email in which he noted that the deadline for responding to his request had passed. The complainant informed the Council that he was aware that the Report by Arcadis had recently been posted on the Council's planning website, but apart from that particular document all other elements of his request remained to be answered.
10. On 16 December, the Council responded to the complainant's request. The Council advised the complainant that to comply with the request will exceed the appropriate cost limit under section 12 of the FOIA and therefore it was not obliged to comply with it. The Council provided the complainant with an estimate of the cost of complying with his request, which amounted to £600.
11. In complying with its duty to provide advice and assistance under section 16 of the FOIA, the Council advised the complainant that it had considered areas where he could narrow the scope of his request in respect of questions 1, 2, 3 and 4 if the date parameters were altered. However, the Council stated that it, "believes this will not detract from the volume of work required to collate the information for the other questions and would therefore not reduce the cost. The Council then

asked the complainant to pay £600 if he would like the Council to proceed with his request.

12. On 22 December 2016, the complainant wrote to the Council to object to the Council's response. The complainant informed the Council that he did not accept the time estimates provided in respect of each category of work involved in complying with his request and he stated his belief that the cost would be less than the appropriate limit under section 12 of the FOIA. The complainant also asked the Council to reconsider its position and if it would be prepared to provide the information without raising a charge for it.
13. In addition to the above the complainant asserted that the Council had failed in its duty to provide advice and assistance. The complainant said, "[the Council] would be able to tell me that I could narrow down my FOI request so as to limit the request to one for supply of a copy of the documents and information stated within item numbered 6 in my FOI request [...] which [the Council] would, quite clearly, be able to supply at a cost well under the Section 12 costs limit". For clarity, the complainant stated that his email constitutes his request for the information and documents requested in item 6 of his request to be supplied to him.
14. On 23 December, the Council informed the complainant that its officers would continue to search for the requested documentation and to keep a log of the time spent. The Council proposed to review the request in January and would keep the complainant informed of the time spent on his request in an attempt to keep work within the 18 hours limit. The Council also advised the complainant that the Arcadis report had been published on its website at:

<http://www.fareham.gov.uk/planning/ifa2.aspx> Interconnector Project (IFA2) Borough of Fareham.
15. On 13 January 2017, the Council wrote to the complainant to update him on its progress with his request. The Council confirmed that it held a draft copy of the Arcadis report and it advised the complainant that this was subject to a duty of confidentiality for which it was seeking the views of Arcadis and the National Grid.
16. The Council informed the complainant that it had carried out 12 hours of work on his request and it estimated a further four hours would be needed. The Council advised the complainant that consideration would be needed to determine whether any of the information is subject to the exemptions to disclosure provided by the FOIA.
17. The Council said that it had identified a further three persons who may hold information and that, for these persons to search retrieve and

collate the information, the Council estimated that it would take the compliance time to approximately 22 hours and therefore a charge would apply to the work over the 18 hours limit.

18. The complainant wrote to the Council on 17 January 2017, to make representations about his request following his receipt of the Council's previous email. The points raised by the complainant were centred on Question 6 of his request and whether confidentiality could be applied to any documents provided to the Council in respect of a matter of such importance to the public.
19. The Council wrote to the complainant on 19 January 2017. The Council's letter was a part-response to the complainant's request for information. The Council disclosed 18 documents to the complainant, all of which were redacted of information in reliance on exemptions provided by Part II of the FOIA; namely, sections 40(2), 43 and 41 – third party personal data, commercial interests and information provided in confidence.
20. The Council informed the complainant that it had waived payment of fees in respect of the work carried out to comply with his request. However, given the amount of work already undertaken, the Council advised the complainant that in order to carry out the remainder of the work, the complainant would be required to make a payment of £250.
21. On 18 March 2017, the complainant asked the Council to carry out an internal review of its handling of his request. The complainant's email set out his concerns regarding the Council's handling of his request, the amount of information which appears to have been omitted from its response and its application of the exemptions provided by sections 41 and 43 of the FOIA.
22. The complainant's request for internal review was acknowledged on 27 March 2017.
23. On 26 July 2017, the complainant asked the Council to escalate his complaint to 'Step 2' under Fareham Borough Council's complaints procedure. The complainant asserted that he had heard nothing about his complaint since the Council's acknowledgement of 27 March.
24. The Council acknowledged the complainant's email later the same day and explained the delay on the calling of a snap General Election as well as preparing for County Elections. The Council apologised for its 'administrative error and provided the complainant with a copy of its Stage 1 response, as it was drafted at that time.
25. On 26 September 2017, the complainant wrote to the Council to confirm his wish to have his complaint considered under Stage 2 of the Council's

complaints procedure. The complainant set out at length his complaint about the Council's handling of his request.

26. On 18 October 2017, the Council wrote to the complainant in response and conclusion to Stage 2 of its complaints procedure.

Scope of the case

27. The complainant contacted the Commissioner 14 December 2017 to complain about the way his request for information had been handled.
28. The complainant wrote to the Commissioner and complained that the Council had "failed to apply an appropriate procedure or to provide disclosure to the extent and as fully as appropriate".
29. The Commissioner therefore determined that the focus of her investigation would be to determine whether the Council has handled the complainant's request in accordance with the FOIA, and specifically, whether the Council is entitled to refuse the complainant's request in reliance on sections 40(2), 41 and 43 of the FOIA.

Background information

30. The term IFA2 refers to an electricity interconnector which will allow the transmission of electricity between France and the U.K. It is made up of more than 100 miles of undersea cables with a converter station at either end. The interconnector will be capable of exchanging 1,000MW of electricity, enough to power 1 million homes¹.

Reasons for decision

31. The Council's approach to complying with the complainant's request has required the Commissioner to determine the extent to which the Council holds recorded information falling within the scope of the request. To do this the Commissioner asked the Council a number of questions about the searches made to locate the information and questions about the

¹ <http://www.fareham.gov.uk/planning/ifa2.aspx>

possible deletion/destruction of information which might be relevant to the complainant's request.

32. The Council has provided the Commissioner with a detailed description of the process it followed on receipt of the complainant's request. The Council explained that: "When a FOI request is received, it is logged centrally using an Excel spreadsheet and the request is forwarded to the appropriate team in order for those officers to gather the information. In this instance, the officers searched email accounts to retrieve the requested communications, and also the Council's corporate filing system (via Windows Explorer) and SharePoint filing system to locate notes, memos and reports saved in the relevant project folders pertaining to the National Grid project."
33. Additionally, "...officers involved in the detailed work are part of that recovery of data because the frontline knowledge can more readily identify information which is within the scope of the request. Officers from the FOI team are available to provide assistance and guidance on how to ensure compliance with the request and to provide overview and challenge as appropriate".
34. Searches were conducted of the email accounts of the Council's Director of Finance and Resources, the project manager and the administration officer, together with the email accounts of the consultants employed for the project. These searches utilised the Microsoft Outlook search facility and used search terms to check the inbox, sent items, draft folder and any other folders connected to the inbox of each officer.
35. Searches were conducted of the Council's corporate filing system using the Windows Explorer search facility and using search terms to check relevant folders stored under the departmental project library. Paper-based records were searched by checking relevant project folders, however, in this case the Council had already established that all correspondence falling within the scope of the complainant's request was scanned and saved to the electronic corporate filing system. The search terms used were: National Grid, NGFL, IFA2, Interconnector and Arcadis.
36. The Council told the Commissioner that eight meetings had been held between the project's senior officers and FOI Information Manager to discuss the scope of the complainant's request and the search methods. This was substantiated through the Council's provision to the Commissioner of a timeline showing all the stages of work in response to the complainant's request.
37. The Council advised the Commissioner that individual officers are not permitted to store Council data on local or personal computers and

therefore the Council was able to assure her that all data related to the complainant's request is stored on the corporate filing system via Windows Explorer or within a library store using SharePoint.

38. In responding to the complainant's request, the Council instructed its IT team to carry out a full restore of all archived data containing which contained the search terms listed above. This task resulted in the identification of a number of documents which the Council had not previously disclosed to the complainant as they were stored in an open share folder system which had an automatic deletion date preceding the Council's receipt of the complainant's request.
39. The Council advised the Commissioner that performing a data restore is not its normal practice as this is resource intensive and expensive and would likely exceed the appropriate fees limit. Additionally, the Council said that it needs to have regard to whether a data restore is warranted on the grounds of proportionality, as previous restores have found no or very little material. In this case, the significant public interest in this project made it appropriate to undertake the data restore.
40. The Council advised the Commissioner that the small number of documents recovered from the data restore are, "for the most part, disclosable", although the Council believes that they add little if anything to the wider understanding or public interest in the matter of concern to the complainant.
41. The Council's comment above prompted the Commissioner to ask whether the Council had in fact disclosed to the complainant all of the information which he is entitled to receive under section 1 of the FOIA, which is not subject to its application of sections 40, 41 or 43. The Council responded to this enquiry on 25 February 2019 by informing the Commissioner that it had now done this.
42. The Council provided the Commissioner with an extract from its Records Retention Schedule which sets out the relevant criteria for the retention and disposal of council records. In this case however, the Council informed the Commissioner that no information has been deleted.
43. The information which is retained by the Council relates to the strategic landowner and property and planning functions of the Council. The majority of that information is held by the Council in respect of its statutory duties and discretionary powers.
44. The Council has assured the Commissioner that the project remains live and the information remains current.

Section 40(2) – personal data of third party individuals

45. Following the Commissioner's further enquiry of 17 January 2019, the re-reviewed its handling of the request and released further information to the complainant on 25 February 2019. The Council provided the complainant and the Commissioner with a schedule of documents which identify the where it has withheld information in reliance on section 40(2) of the FOIA. These documents are given the following reference numbers: 3, 4, 5, 6, 7, 9, 10,11, 12, 13, 14, 15, 16, 17, 19, 21, 21a, 22, 24, 25, 26, 27, 28, 32, 33, 34, 35, 36, 37, 38, 39, 40, and 41.
46. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester; and where the disclosure of that personal data would be in breach of any of the data protection principles.
47. The first step for the Commissioner to determine is whether the withheld information constitutes personal data.
48. Personal data is defined by section 1 of the Data Protection Act 1998 ("the DPA"). If the information is not personal data then the Council will not be able to rely on section 40.
49. Section 1 of the DPA defines personal data as:

"...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."
50. The Council has advised the Commissioner that, at the time of dealing with this request, it took the 'precautionary approach' of redacting all third party names, email addresses and telephone numbers.
51. The Council's position has now changed. The Council has informed the Commissioner that it is content to disclose its business contacts and the names, email addresses and telephone numbers of individuals where these details do not relate to private persons who have not given consent for them to be disclosed. The Council advised the Commissioner that it has now released this previously redacted personal data.
52. In reviewing this request the Council sought the views of the National Grid with regards to the release of some of the withheld information.

53. The National Grid responded to the Council's enquiry, requesting that the names and contact details of its staff are not disclosed. The National Grid advised the Council that its staff have an expectation of privacy and they do not consent to the release of their personal data.
54. The Council has provided the Commissioner with unredacted copies of documents containing the personal data it intends to withhold in reliance on section 40(2). The personal data which it intends to withhold from the complainant is identified by being struck-through.
55. The Commissioner has examined the documents where the Council has identified personal data which is subject to its current application of section 40(2). The Commissioner agrees with the Council that all of the identified information satisfies the definition of personal data which is provided by section 1 of the Data Protection Act 1998 ["the DPA"].
56. None of the personal data which the Council is withholding satisfies the definition of sensitive personal data which is provided by section 2 of the DPA.
57. The Council has advised the Commissioner that, taking account of the representations of the National Grid, it considers that releasing the names and contact numbers of specific staff within the National Grid, would contravene the first data protection principle.
58. The first data protection principle requires that –

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

 - (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
59. The Council acknowledges that its own emails carry a disclaimer which advises individuals that information may be subject to release under the FOIA. That said, the Council argues that it would be unfair to disclose the names and contact details of National Grid staff where the information is not in the public domain, where the individuals do not hold public-facing roles or where a clear expectation of privacy has been demonstrated.
60. The Commissioner has considered the personal data where the Council maintains its position that section 40(2) applies. She accepts the Council's position that disclosing the personal data of National Grid staff would be unfair to those persons and therefore it would be a contravention of the first data protection principle.

61. Notwithstanding her decision on whether disclosure would be unfair to National Grid staff, the Commissioner has also considered whether disclosure of their data could meet at least one of the conditions contained in Schedule 2 of the Data Protection Act 1998. In particular, the Commissioner has considered the sixth condition.
62. In order to satisfy the sixth condition of Schedule 2, disclosure must be *"necessary for the purposes of legitimate interests" of the third party or parties to whom the information is disclosed, and such disclosure must not be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the licensees.*
63. The Commissioner considers that disclosure of the personal data of National Grid staff is not necessary in order to meet the legitimate interest of the complainant.
64. The Commissioner has decided that disclosure of the information requested by the complainant would be unfair to National Grid staff and would not meet the requirement of condition 6 of the DPA. For these reasons, the Commissioner has decided that the Council has properly applied section 40(2) of the FOIA to the personal data of National Grid staff and it is therefore entitled to withhold that information.

Section 41 – information provided in confidence

65. The Council has provided the Commissioner with a Schedule of Documents which lists all of the documents it holds relevant to the complainant's request and identifies whether the information has been disclosed – either in full or in part, or whether the Council is applying one or more of the FOIA's exemptions to withhold information.
66. The Council's schedule indicates that it relies on section 41 of the FOIA to withhold a report by Arcadis for National Grid Interconnector Holdings, entitled 'IFA2 Interconnector Assessment (Stage 1). The email from Arcadis to the Council to which the report was attached, calls the report the Daedalus Safety Review Report' and it indicates the report is a draft issue dated 9 September 2016.
67. The second document containing information withheld in reliance on section 41 indicated on the Council's schedule as document 27. Document 27 is an email dated 18 October 2016 which contains a redacted paragraph.
68. Section 41(1) provides that –

“(a) Information is exempt information if it was obtained by the Public Authority from any other person (including another public authority)

and,

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

69. The IFA2 (Arcadis) Interconnector Assessment (Stage 1) Report and a paragraph contained in an email dated 18 October 2016. Both pieces of withheld information were provided to the Council by National Grid and Arcadis and therefore the first arm of the section 41 exemption is met.
70. The Council asserts that the information has the necessary quality of confidence because it was provided by National Grid and Arcadis for the purpose of confidential negotiations and strategic property dealings relating to an international infrastructure project which, at the time the complainant made his request, was in its early stages of development.

The IFA2 Interconnector Assessment Report

71. The Council has informed the Commissioner that the IFA2 Interconnector Assessment Report was supplied to the Council in draft form for review and comment. The email which accompanied the report contains a confidentiality statement making clear the confidential nature of the information supplied to the Council by National Grid and Arcadis.
72. This position was reinforced by Arcadis and National Grid when the Council advised them of its receipt of the complainant's request. Both of the suppliers of the report maintained the position that the information is sensitive and confidential and remains so.
73. Arcadis and National Grid have objected to the disclosure of the report and have stressed that it is clear from the nature of the information and the manner in which it was supplied, together with the clarification the Council sought after the request was received, disclosure would constitute a breach of an actionable obligation of confidence.
74. The Council referred the Commissioner to its letter to the complainant of 18 October 2017, which sets out its internal review decision. In that letter, the Council says, it has...

“...consulted Arcadis before responding to you [the complainant]...and Arcadis confirmed that they had provided the document in confidence and fully expected that to be maintained by the Council and would not have produced the document in that form had they not had the protection of that obligation and the common law supporting it. Arcadis constitutes a 'legal person' for the purposes of the law capable of

bringing a common law action for breach of confidence and made clear in their response to the Council that they considered it to apply.”

75. The Council made the assertion that it was entitled to reach its conclusion to withhold the draft report on the grounds that an action for a breach of confidence under the common law would likely succeed. The Council advised the complainant that it had considered whether a public interest defence argument could protect the Council if it was to disclose the draft report and that it had concluded this was not the case.
76. The Council’s FOI officer was satisfied that the public interest defence was not available to the Council. The officer took the view that, given the final report was to be published before the Committee considered it, and, on the basis that the final report contained the material information necessary for the decision to be made, publication of the draft report would only serve to detract from the Committee’s proper consideration rather than add to the public debate.
77. To properly engage section 41, disclosure of the requested information must give rise to a possible actionable breach of confidence. This requires the information to have the necessary quality of confidence. To meet this requirement, the information must be more than trivial and not be otherwise accessible; to have been communicated in circumstances which import an obligation of confidence and the disclosure of the information would need to cause detriment to at least one party.
78. Having examined the withheld Safety Review Report, the Commissioner is content that the requirements of section 41 are met: The information not is not publicly available, it has the necessary quality of confidence and it is subject to an obligation of confidence.
79. The Commissioner notes that the duty of confidence is not absolute. She recognises that information may be disclosed if disclosure is required by law and where there is a greater public interest in disclosing the information which overrides the duty of confidence.
80. When considering whether information should be disclosed, the Commissioner must consider that the disclosure is to the public at large and not just to the person who has requested it.
81. Generally, the Commissioner will give weight to the general principle that disclosure of information held by public authorities will achieve both accountability and transparency.
82. Such disclosures assist the public in understanding the basis and how public authorities make their decisions and carry out their functions. This

in turn fosters trust in public authorities and may also allow greater participation in the Council's decision making process.

83. In this case, the Council points out that the final IFA2 Interconnector Assessment Report was to be published before the Planning Committee was to make its decision. This report would contain all of the material considerations for the Committee to make its decision and therefore the publication of the draft report would not add to the public debate.

The Commissioner's decision

84. The Commissioner must afford significant weight to the disclosure of recorded information where it would result in greater transparency and accountability of the actions taken by public authorities. This is especially so where the recorded information relates the granting of public money.
85. Here the Commissioner is considering whether a draft report, supplied to the Council for review and comment on a confidential basis, should be disclosed under the provisions of the FOIA. The Commissioner cannot ignore the fact that the final report was to be published before the Planning Authority made its decision in this matter.
86. On balance, the Commissioner has decided that the duty of confidence owed to Arcadis and National Grid outweighs the public interest for disclosure of the draft report. The Commissioner has therefore decided that the Council is entitled to rely on section 41(1) of the FOIA to withhold the draft IFA2 Interconnector Assessment Report.

The withheld paragraph contained in an email of 18 October 2016

87. The withheld information contained in the email of 18 October 2016 summarises the contents of a second confidential report which was provided to the Council by QinetiQ – a multinational defence technology company.
88. When the Council received the complainant's request, both the paragraph and report were withheld in reliance on section 41(1).
89. Due to the passage of time, the QinetiQ report has now been published on the Planning Authority's planning portal.
90. The Council maintains its position that the redacted paragraph in this email remains subject to an application of section 41. The Council argues that the information contained in the redacted paragraph was obtained from a third party and that if it was to be released, would result in an actionable breach of confidence.

91. The Council asserts that the withheld information was provided in confidence, as was clearly stated at the time it was sent, and that it refers to pending discussions with the Ministry of Defence.
92. The Commissioner is informed that the discussions referred to above remain on-going and that there is potential for matters of national security to come into play in the future.
93. The Commissioner accepts the Council's position in respect of its application of section 41 to the withheld paragraph in the email of 18 October 2016: She is content that the withheld information engages this exemption and that the balance of the public interest favours its continued withholding.

Section 43 – commercial interests

94. The Council has advised the Commissioner that it seeks to rely on section 43(2) to withhold some of the contents of certain email correspondence and the contents of some meeting notes. These are identified by reference numbers 2, 15 and 37 on the Council's schedule of documents.
95. Section 43(2) provides an exemption from disclosure if the information would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
96. The Commissioner considers that three criteria must be met for the exemption to be engaged:
 - the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed, has to relate to the applicable interests within the relevant exemption;
 - the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - it is necessary to establish whether the level of likelihood of the prejudice being relied upon by the public authority is met. In other words, disclosure 'would or would be likely' to result in prejudice.

97. The term 'commercial interests' is not defined in the FOIA. In the Commissioner's guidance on section 43 (Freedom of Information Act Awareness Guidance No 5)² the Commissioner considers that:

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services".

98. The Commissioner must consider the prejudice that disclosure of the withheld information would cause in respect of the Council's commercial interests, and to any other party or parties that would be affected.

99. Section 43(2) has 2 limbs: They concern the probability of the prejudice occurring, should the withheld information be disclosed. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.

100. In this case, the Council has explained that it considers disclosure would prejudice the commercial interests of National grid, Arcadis, Solent Airport and those of the Council itself.

101. The Council points out that it is the strategic landowner and developer for the Business Park and Airport on which the IFA2 project is based. As such, the Council says it has commercial interests in maintaining the non-disclosure of information relating to the land deal, land pricings, best value calculations and terms and conditions of contract, agreements and leases.

102. The Council argues that, if the information was to be disclosed, it would be likely to prejudice its on-going negotiations with other occupants and prospective occupants of a site which is a major strategic development for economic growth within the Borough and wider Local Enterprise Zone.

103. To support its position, the Council says, "there are currently a very large number of hangars, commercial business properties and site

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https://ico.org.uk/media/fororganisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

acquisitions within the boundary of the site under negotiation and offer, and the release of the Council's negotiating position on price and terms it is willing to accept, will significantly undermine those and potentially damage the Council's ability to obtain best value for its land holdings".

104. The Council contacted each third party to identify what information they considered to relate to their commercial interests and to the prejudice of those interests. Following this consultation, the Council confirmed to the Commissioner that the identified commercial interests relate to the current and on-going negotiations associated with land deals for infrastructure in and around the IFA2 site and to international negotiations with third party governments and investors supporting the project.
105. The Commissioner has examined the information which the Council has withheld in reliance on section 43(2). On the grounds that she considers that the essence of commerce is trade or some form of commercial activity such as the sale or purchase of goods or services for profit, the Commissioner accepts that the withheld information engages this exemption. It is clear to the Commissioner that the withheld information concerns the Council's consideration of matters relating to the site of proposed Interconnector and to the negotiations of the contract between the Council and National Grid.
106. The Commissioner is content that the information being withheld in reliance on section 43 falls within the scope of the exemption on the grounds that it relates to the Council's commercial activity.
107. Section 43 is a qualified exemption and consequently the Authority's reliance on section 43 is subject to the Commissioner's consideration of the public interest.

The public interest

108. The Commissioner will always give significant weight to the public interest where disclosure of information provides accountability and transparency for decisions taken by public authorities, and where the decisions concern public expenditure and significant numbers of people.
109. In this case, disclosure of the withheld information concerns the disposal of Council-owned land. The Commissioner accepts that disclosure of the information requested by the complainant would allow the public to scrutinise the information and satisfy for themselves that publicly owned assets are being disposed of properly and that the Council is achieving value for money. The Commissioner acknowledges that disclosure is likely to provide a degree of accountability.

110. Weighed against these factors is the strong public interest in maintaining the confidentiality of commercially sensitive information which would allow the Council to achieve best value and to generate revenue. It would not be in the public interest for the Council to risk an operating deficit which would have to be borne by its council tax payers.
111. The Commissioner must recognise the public interest in withholding information which could significantly undermine the Council's negotiating position on price and terms it is willing to accept in respect of its land holdings, particularly those holdings at a major strategic development site. In the Commissioner's opinion, disclosing the withheld information would likely prejudice the Council's ability to achieve best value for its land holdings. It is not difficult for the Commissioner to conclude that disclosure of the withheld information would place the Council at a disadvantage to their competitors who are not subject to the same level of disclosure.

The Commissioner's decision

112. The Commissioner acknowledges the public interest factors of transparency and accountability. She considers these factors to have, to some extent been met through the disclosure of relevant information during the planning application process and through the disclosure of other information made in response to the complainant's request.
113. In this case the Commissioner considers that the weight of the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information. The Commissioner considers that disclosing the withheld information would likely diminish the Authority's ability to achieve best value for the future sale of its land holdings and it is the Commissioner's view that this would not be in the best interests of the Authority's council tax payers.
114. The Commissioner's decision is that the Authority has correctly applied the exemption provided by section 43(2) to the information contained in the documents identified at paragraph 94 above.

Right of appeal

115. 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

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

116. 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.

117. 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