

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 19 June 2014

**Public Authority:** Oxfordshire County Council

**Address:** County Hall, New Road  
Oxford OX1 1ND

### Decision (including any steps ordered)

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1. The complainant has requested information relating to a contract Oxfordshire County Council has with a broadband provider.
2. The Commissioner's decision is that Oxfordshire County Council (OCC) has correctly applied section 43(2) to part of the withheld information.
3. The Commissioner requires the public authority to disclose the information it has already identified can be disclosed, if it has not already done so.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

### Request and response

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5. On 12 August 2013, the complainant wrote to OCC and requested information in the following terms:

*"Under the Freedom of Information act (FOI) I would be grateful if you could provide me with a soft copy of the full contract between BT and OCC, along with any supporting documentation relating to the proposed solution and coverage."*

6. Following an acknowledgement of the request by OCC the complainant responded and clarified:

*"The supporting documentation is important because we wish to*

*understand in detail the technical basis for decisions by BT, and for that we shall need the technical data required to decide on final "solution and coverage". This numeric technical information is likely to be necessarily at the cabinet level (roadside not government!)."*

7. Following an extension to consider the public interest OCC responded on 3 October 2013. It confirmed that the information was held and that the majority was being disclosed via a web link. However, it refused to provide the remainder citing section 43(2) as its basis for doing so.
8. Following an internal review OCC wrote to the complainant on 22 November 2013 and maintained its original position.
9. The complainant responded on 4 December 2014 and stated, amongst other things; *"At the most basic level, the public interest for disclosure of SFBB information by postcode is:*
  - i. *Know whether SFBB will be provided to them;*
  - ii. *Know what date this will occur;*
  - iii. *Know how to challenge the SFBB decision parameters if they feel a mistake has been made.*

*I will refer to this subset of the redacted information as 'the Postcode Information'.*

*The data concerned for 1 & 2 above is therefore columns J, K & L in the Reference Data Worksheet of Schedule 3.1, Appendix 1 Speed and Coverage Template. I don't know where the information for Item 3 above is held."*

10. OCC directed the complainant to the Commissioner.
11. The Commissioner contacted OCC to advise he had received this complaint. OCC attempted to resolve the complaint informally and provided further information in April 2014. However, the complainant contended that this further publication still did not answer his request.
12. During the course of the Commissioner's investigation OCC decided to disclose some of the previously withheld information relating to the speed and coverage template.
13. In its response to the Commissioner, OCC also relied upon the late application of section 41.

## **Scope of the case**

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14. The complainant contacted the Commissioner on 13 January 2014 to complain about the way his request for information had been handled.
15. The Commissioner considers the scope of this case to be to determine if OCC has correctly applied section 43(2) and section 41 to the withheld information. The Commissioner will also consider the complainant's concern that the web link was only available for a limited time.
16. The complainant has also raised concerns about how OCC applied the FOIA. The matters raised are detailed in an Annex at the end of the decision notice together with the Commissioner's views.

## **Background**

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17. OCC had hoped to resolve the complaint informally mindful that the complainant's primary focus had been on the speed and coverage data and taking into account that OCC was planning to publish such data via a public website, searchable at seven-digit postcode level. A map detailed the date scheduled for commencement of works for phase 1 & 2 (of six phases). As additional phases are surveyed and scheduled ('locked down') for delivery, the map will be updated to reflect the scheduled date for commencing works. OCC was also mindful that the Public Accounts Select Committee had itself recommended that such speed and coverage mapping be published by public authorities and so it was hoped that this would assist the requester.
18. It explained to the Commissioner that, for the avoidance of doubt, most of the information within the contract was previously released. However, some information was partially withheld Those elements withheld were:
  - Terms and Conditions – specific information in clauses 57.2.2, 57.2.3 & 57.3.2
  - Schedule 1 – Definitions – the definition of the premises cap
  - Schedule 3.1, Appendix 1 – Speed Coverage Template (only columns J, K and L of the 'Reference Data' tab)
  - Schedule 3.1, Appendix 2 – Wholesale Access Product completed template
  - Schedule 3.1, Appendix 3 – Solution Component Template
  - Schedule 3.1, Appendix 4 – Reference Supplier Solution
  - Schedule 3.1, Appendix 5, Part B – Compliance Matrix

- Schedule 4.1, Appendix 2 –Project Plan
  - Schedule 4.1, Appendix 4 – Test Strategy
  - Schedule 4.3 – Relief Events (Appendix 1)
  - Schedule 5.1 – Milestone Payments and Claims Procedure (financial claw back calculation at paragraph 10.3)
  - Schedule 5.1, Appendix 3 – Survey Assumptions
  - Schedule 5.3, Appendix 1 – Project Model
19. In reviewing this matter, OCC stated it has reconsidered each of the previously withheld elements. The conclusions are therefore based on a fresh consideration of the request rather than a restatement or explanation of its previous responses.
20. OCC has decided to disclose some of the previously withheld information relating to the speed and coverage template.
21. For the remainder, OCC continues to maintain that the withheld elements should remain undisclosed. OCC has also been mindful of the *current* as well as the *former* context. This includes awareness of the consideration given by the Public Accounts Select Committee. It also includes very recent publication by it on its website showing (searchable at 7-digit postcode level) speed and coverage data. OCC has also been mindful that, when it previously considered the request, BT was still in a competitive bidding process in relation to a number of counties' first round of BDUK funding. Although the first round has now been completed, BDUK has announced a second round of funding which will involve a new round of competitive tenders.

## **Reasons for decision**

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22. With regard to the Speed and Coverage Template, OCC had previously withheld columns J, K, and L of the Reference Data tab in their entirety under Section 43(2).
23. OCC had argued that the information if released would provide information about the specific time and location of any broadband solution. Releasing information that allows competitors to accurately identify the specific locations or specific time period BT would be implementing broadband upgrades would allow competitors to pre-empt and undercut BT's commercial activity that they have committed to as

part of the contract. Releasing this information would therefore prejudice the commercial activity of BT.

24. OCC used the threshold 'would prejudice' given that BT had not, at that point, won each of the local authority contracts and many of the phases of the project were not rolled-out. However, OCC no longer considers it appropriate to withhold all of the information contained in those columns at this time – hence its planned publication, which went live in April 2014, of a Postcode Checker Map, at <http://www.betterbroadbandoxfordshire.org.uk/when-and-where>
25. OCC has, until now, considered it inappropriate, for the reasons explained above, to provide the data in columns J, K and L. In light of the publication on the website, however, it resolves to provide the complainant with a revised copy of the Speed and Coverage Template with columns J, K, and L of the Reference Data Tab only redacted insofar as the data contained therein relates to phases 3-11 of the rollout.
26. As each further phase is locked down for delivery with dates provided for works to begin, the data contained in columns J, K, and L would be available for release subsequently. Effectively, the maps available on the council's website will provide the coverage data for superfast broadband for all phases, as well as the dates for works to begin for locked down phases (currently phases 1 and 2) and will be the mechanism for publishing data about the remaining phases up to and including phase 6 once the data is confirmed. This information will be published once BT have completed (locked down) their detailed survey work for the relevant phase and have delivered their detailed roll out proposal to the Council.
27. Whilst present on the spreadsheet, it should be noted that Phases 7 to 11 are not contractually committed phases. They represent optional additional phases that OCC can, at its option, activate up to August 2014 if funding becomes available. OCC stated it may alternatively decide to run a new procurement process for any additional coverage. It is in this context that the speed and coverage template information in relation to phases 7-11 is not being disclosed.
28. OCC stated that the website also fulfils the level and manner of 'public interest' publication that is envisaged (and indeed encouraged) by the Public Accounts Select Committee. Because the website now, as expected, includes information contained in the Speed and Coverage Template, it is appropriate to disclose that same information in the form of the Speed and Coverage template itself. OCC therefore intends to communicate this information to the complainant.
29. The Commissioner accepts OCC's intention to publish this information.

### **Section 43 commercial interests**

30. Section 43(2) of FOIA sets out an exemption from the right to know if release of the information is likely to prejudice the commercial interests of any person, including those of the public authority holding the information.
31. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers that three criteria must be met.
- First, 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.
  - Secondly, 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.
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather, there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.
32. Currently, the withheld information comprises of:
- Terms and Conditions – figures in clauses 57.2.2, 57.2.3 and 57.3.2
  - Schedule 1 – definitions: figure for 'premises cap'
  - Schedule 3.1, appendix 1 – speed and coverage template (J, K, L of the Reference Data tab for phases 3-11)
  - Schedule 3.1, appendix 3 – solution component template
  - Schedule 3.1, appendix 5 Part B – compliance matrix
  - Schedule 4.3, appendix 1 – relief events
  - Schedule 5.1, paragraph 10.3 – milestone claims clawback
  - Schedule 5.1, appendix 3 – survey assumptions

- Schedule 5.3, appendix 1 – project model
33. In addition to fulfilling the same level and kind of prejudice, the Council considers that disclosure of the following would also be likely to create commercial prejudice because the information would reveal the details of BT's operational delivery model more widely than the superfast broadband project and therefore give competitors a commercial advantage to the detriment of BT:
- Schedule 3.1, appendix 2 – wholesale access product template
  - Schedule 3.1, appendix 4 – reference supplier solution
  - Schedule 4.1, appendix 2 – project plan
  - Schedule 4.1, appendix 4 – test strategy

*Applicable interests*

34. When identifying the applicable interests, the Commissioner must consider whether the prejudice claimed is to the interest stated.
35. In correspondence with the Commissioner, OCC confirmed that it considers that disclosure of the information withheld by virtue of section 43(2) would be likely to be prejudicial to the commercial interests of BT and itself. However, OCC did not present any arguments with regard to prejudice to itself, so the Commissioner has focussed only on the alleged prejudice to BT.
36. In the Commissioner's view, 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. The Commissioner recognises that companies compete by offering something different from their rivals. For example, that difference may be the price at which goods or services can be delivered.
37. The Commissioner is satisfied that, in the context of the request in this case, the information relates to a commercial interest. He is also satisfied that the commercial activity involved, the provision of broadband, is conducted in a competitive environment.
38. During the course of the Commissioner's investigation, OCC confirmed that it had consulted with the relevant third party and provided the Commissioner with evidence in support of its submissions.

*Nature of the prejudice*

39. The Commissioner considers that the prejudice test is not a weak test, and that a public authority must be able to point to prejudice which is

'real, actual or of substance' and to show some causal link between the potential disclosure of specific withheld information and the prejudice.

40. The Commissioner's view is that the use of the term 'prejudice' is important to consider in the context of the exemption at section 43. It implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way.
41. Secondly, there must be what the *Hogan*<sup>1</sup> Tribunal called a 'causal link' between the disclosure and the prejudice claimed. The authority must be able to show how the disclosure of the specific information requested would, or would be likely to, lead to the prejudice claimed.
42. With respect to the nature of the prejudice to BT, OCC told the Commissioner it considered that disclosure of the withheld information would be likely to prejudice the commercial interests of BT in providing competitors with information about their commercial thresholds and business solutions, giving competitors an unfair advantage in on-going, imminent and future procurements.
43. With regard to the three-limb test for engaging a prejudice based exemption the Commissioner is satisfied that, in relation to the arguments identified by OCC, the first limb is met. The nature of the harm envisaged, and the prejudice to the commercial interests of BT, clearly relate to the interests which section 43(2) is designed to protect.
44. In respect of the second and third limbs of the prejudice test, the Commissioner considers that disclosure could offer the current supplier's competitors an opportunity to analyse the current contracts more precisely and gain business advantage to the detriment of OCC itself and BT. OCC confirmed its view that the prejudice identified 'would be likely to' arise.
45. The Commissioner is satisfied that there is a causal link between disclosure of the requested information and the prejudice identified, that it can correctly be described as real, actual or of substance, and that it

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<http://www.informationtribunal.gov.uk/DBFiles/Decision/i42/MrCMHoganandOxfordCityCouncilvInfoComm17Oct06.pdf>

would be likely to arise.

*Is the exemption engaged?*

46. In determining whether or not the effect of disclosure in this case would be detrimental or damaging in some way to the commercial interests of BT, the Commissioner has considered the nature and likelihood of harm that would be caused.
47. The Commissioner considers it important that, in claiming the section 43 exemption on the basis of prejudice to the commercial interests of a third party, the public authority must have evidence that this does in fact represent or reflect the view of the third party.
48. The Commissioner has had the opportunity to consider the representations BT made to OCC on the subject of disclosure. He is not only satisfied that OCC consulted with the third party likely to be affected by any disclosure but also that OCC has reflected its views in its submissions to him.
49. In the Commissioner's view, the level of competition within an industry can affect whether the release of information will harm someone's commercial interests.
50. In this case, the Commissioner accepts that disclosure of the disputed information could harm BT's ability to operate in a competitive market. It follows that the Commissioner finds the exemption engaged.

*The public interest test*

51. Having established that the section 43 exemption is engaged the Commissioner must go on to consider the public interest test as set out in section 2(2)(b) of FOIA.

**Public interest arguments in favour of disclosing the requested information**

52. The superfast broadband project is a high-profile local and national initiative which has attracted public subsidy and which affects communities and potential commercial opportunities.
53. The Public Accounts Select Committee has issued recommendations about the extent of publicity appropriate to speed and coverage data as regards broadband projects.

54. The Council recognises that disclosure of procurement information to members of the public creates transparency in its business practices and that there is a strong presumption in favour of disclosure. In addition, potential bidders are aware that working with a local authority will mean certain information is made available to the public at different stages of the procurement.
55. The contract is now well within phase and BT has so far won each of the contracts for superfast broadband across the country and is, therefore, a "quasi-monopoly" whose commercial interests it would be difficult to prejudice.
56. The complainant has made the following points:
- That residents will be able to plan their broadband procurement, knowing whether and when the BDUK SFBB facility will, or will not, apply to them. The benefit of knowing will affect most Oxfordshire residents. This is very much the "wider public interest" specifically identified in the public interest test guidance.
  - Members of the Oxfordshire internet supply industry, and further afield, will be able to plan their activities more efficiently, creating jobs and economic growth in the region. This could benefit an estimated six to twelve Oxfordshire firms, perhaps involving 100-200 jobs.
  - As a result of a more efficient internet supply industry in Oxfordshire, OCC will have more viable competitors in future contracts, driving down costs. Potentially this benefits all Oxfordshire rate payers.
  - Isolated rural communities were intended to be a priority under the BDUK programme. Giving notice to those communities to be bypassed under the current plans creates the opportunity for the smaller industrial firms to start work now; and help achieve the Government's aim earlier. This is thought to involve about 5,000 unknown premises, not known because the information is withheld. Again this is very much the "wider public interest" identified in the guidance.
  - BT also acknowledged that there is a public interest in openness and transparency in relation to the efficient spending of public funds.

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

57. The superfast broadband project is still ongoing and outstanding phases still remain to be allocated: a commercial context therefore continues to exist.

58. The information if released would provide information about the specific time and location of any broadband solution. Releasing information that allows competitors to identify the specific locations or specific time periods that BT would be implementing broadband upgrades would allow competitors to pre-empt and undercut BT's commercial activity.
59. Disclosure of information about how BT carry out their business would reveal the assumptions and constraints that determine how BT carry out their commercial activity and would undermine confidence in the market place for the delivery of superfast broadband.
60. Disclosure of information such as the proposed BT infrastructure, the technological specifications of the hardware they would implement, and the arrangement and lay out of the proposed network modifications would be likely to enable competitors to use or copy their technology and infrastructure arrangements and so secure an unfair advantage when competing against BT in the marketplace. It is in the public interest that the second stage rollout is not jeopardised through the occurrence of unfair competition.
61. OCC considered, on balance, that the factors against disclosure outweigh those in favour. OCC further considered that, whilst interested individuals might understandably desire even greater transparency, the wider public interest is met through the disclosure of the majority of the contract (already released) and through the publication of the website dedicated to the display of speed and coverage data to seven-digit postcode level in relation to phases 1-6 as each of these phases is finalised. This also fulfils the Public Accounts Select Committee's recommendations as to its preferred method of public disclosure (as evidenced by its request for this approach to be consistently achieved and co-ordinated by the Department for Culture, Media and Sport). Having regard to all of the above factors, OCC, therefore, considered that the public interest is best served by maintaining the exemptions.
62. BT also presented the following arguments with regard to the public interest in favour of maintaining the exemption:
  - OCC has disclosed the majority of the contract by releasing a redacted version of the document to the public. BT considers that the public interest in the document lies only in the wider detail of the contract rather than in the detailed financial and operational information. Accordingly, BT believes that the public interest in disclosure has been satisfied by the release of the redacted version of the contract;
  - The disclosure of detailed financial and operational deployment information (which is based on modelled assumptions and subject to survey) in a non-controlled way is likely to create expectations/

reliance of the public and/or CPs that would not be in the public interest.

Based on BT's extensive experience serving around 19 million premises in the UK with fibre broadband, BT knows that both individuals and businesses make economic and financial decision (for example buying and selling houses) based on the availability of high speed broadband internet.

Accordingly, it is vital that public expectations are maintained at a realistic level. Staged deployment information has been and continues to be publically released at appropriate times on the [www.betterbroadbandoxfordshire.org.uk](http://www.betterbroadbandoxfordshire.org.uk) website and via press releases. Outline maps of the deployment have also been published by OCC on the website.

- The parties intend to continue to release more staged deployment information at regular points over the life of the programme when the release of such information is appropriate given the particular phase of the project and when such information is more certain and accurate. The practice of releasing staged deployment information has proved over time to be the best way to manage public expectation in relation to projects of this nature (not limited to publically funded network infrastructure projects) and is a practice BT uses in its own commercial network deployment;
- If key suppliers of services to local authorities (such as BT) are required to disclose commercially sensitive and/or confidential information to the public, this will impair the local authority's ability to engage in a fair and effective procurement exercise in the future. The risk of disclosure will mean that key suppliers are less willing to disclose confidential information to local authorities as part of future procurement exercises and OCC's ability to obtain "good value" from private sector suppliers would be materially impaired. The public interest is not best served by limiting the amount of confidential information that key suppliers such as BT are willing to share with local authorities because of this risk of disclosure.

### **Balance of the public interest**

63. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. The presumption is in favour of disclosure and there will be occasions where information is released even though it is a trade secret or is likely to prejudice someone's commercial interest.

64. There is a presumption running through the FOIA that openness is, in itself, to be regarded as something which is in the public interest. In that respect, the Commissioner acknowledges that, in providing the complainant with a substantial amount of information within the scope of his request, the Council has gone some way to address the public interest.
65. The Commissioner recognises that there is a public interest inherent in prejudice-based exemptions, in avoiding the harm specified in the exemption – in this case harm to the commercial interests of BT. He recognises that there is a strong public interest in not disclosing information which would be likely to commercially disadvantage private companies or disclosing information which could negatively impact on OCC's future tendering process. Having found the exemption engaged, he must take into account that there is automatically some public interest in maintaining it.
66. In all the circumstances of the case, the Commissioner considers that it would not be in the public interest to disclose the withheld information. It follows that OCC is entitled to rely on the exemption at section 43(2) as a basis for withholding it.
67. As he has found that section 43(2) is engaged the Commissioner has not gone on to consider the application of section 41.

## Right of appeal

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68. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

69. 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.
70. 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 .....**

**Pamela Clements**  
**Group Manager**  
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