

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

### **Decision notice**

**Date:** 27 April 2015

**Public Authority:** Cornwall Development Company Ltd

**Address:** Pydar House  
Pydar Street  
Truro  
Cornwall  
TR1 1EA

#### **Decision (including any steps ordered)**

---

1. The complainant has requested the percentage take-up of superfast broadband in Cornwall. Cornwall Development Company Ltd withheld the information under the exemptions for prejudice to commercial interests (section 43(2)), information provided in confidence (section 41) and prohibitions on disclosure (section 44).
2. The Commissioner's decision is that Cornwall Development Company Ltd failed to demonstrate that the exemptions in section 41, section 43(2) and section 44 are engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the requested information to the complainant.
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.

## Background

---

5. "Superfast Cornwall" is a partnership project between the European Union (EU), British Telecommunications PLC (BT), Cornwall Council and Cornwall Development Company (CDC) to deliver superfast broadband in Cornwall.
6. CDC has explained that the roll-out of broadband is part-funded by the European Convergence Programme (2007-2013) with an overall outline budget of £132 million, split approximately between BT (£80 million), EU Convergence (£50 million) and Cornwall Council (£2 million).
7. CDC is an economic development company wholly owned by Cornwall Council; as such, it constitutes a public authority in its own right.

## Request and response

---

8. On 30 October 2014, the complainant wrote to CDC and requested information in the following terms:  
  
*"I would like to know quarter by quarter since the first green cabinets went live, the percentage take-up of superfast broadband where green cabinets (or Exchange Only lines) have been upgraded with fibre-optic cable as part of the BDUK-funded rural broadband project. In your reply please include the end dates of each quarter."*
9. CGC responded on 25 November 2014. It stated that it was withholding the information under the exemption for prejudice to commercial interests, citing section 43(2) of the FOIA.
10. Following an internal review CDC wrote to the complainant on 23 December 2014. It stated that it was maintaining its original position.

## Scope of the case

---

11. On 23 December 2014 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
12. During the course of the Commissioner's investigation CDC confirmed that it wished to apply additional exemptions to withhold the requested information, namely those for information provided in confidence (section 41) and prohibitions on disclosure (section 44).

13. The Commissioner confirmed with the complainant that his investigation would consider whether CDC had correctly applied exemptions to withhold the information.

## Reasons for decision

---

### Section 43(2) – prejudice to commercial interests

14. Section 43(2) provides an exemption from disclosure for information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is therefore subject to the public interest test.
15. The withheld information consists of a percentage breakdown (by quarter) of the rate of take-up of superfast broadband between 2011 and 2014. CDC has argued that disclosure of the information would prejudice the commercial interests of BT.
16. In considering its response to the request, CDC, in accordance with the Code of Practice issued under section 45 of the FOIA, consulted with and sought the views of BT. In reaching his decision about the application of this exemption, the Commissioner has considered the arguments put forward by CDC, BT and the complainant.

### Nature of the prejudice

17. In this instance, CDC has stated that prejudice *would* occur. The exemption distinguishes between 2 different levels of likelihood of any ascribed prejudice occurring.
18. “Would be likely” to occur means that there must be more than a hypothetical or remote possibility of prejudice occurring; there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%. “Would occur” means ‘more probable than not’; in other words, there is a more than 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so.
19. The Commissioner has considered whether CDC has correctly identified a link between harm to BT’s commercial interests and disclosure of the specific information.
20. CDC has stated that disclosure of the information would have the effect of prejudicing the commercial interests of BT. It has argued that the extensive level of collated data is not available anywhere else in the

industry and that it is internationally unique as there is no deployment with comparable longevity anywhere else in the world.

21. CDC has stated that a competitor that builds telecommunications networks would find this take-up information extremely useful when creating a business for a potential build of their own as it would considerably de-risk their business plan. CDC has stated that this would result in detriment to BT's commercial interest when competing in the same potential markets as those competitors, who would have access to the information compiled by BT at BT's risk and cost, free of any risk and costs of their own.
22. The Commissioner acknowledges the general principle that information about a company's performance in a given area might benefit a competitor which is, for example, budgeting for a contract bid to perform the same function. Knowledge of the levels of expenditure required might, in such scenarios, assist a competitor in averting unnecessary outlays which may have been incurred by the company from which the information is derived. However, it is not clear that percentage uptake of broadband in these specific circumstances can be transferred to general levels of expenditure which a company might need to budget for. In the absence of any arguments from CDC which clarify this relationship, the Commissioner has concluded that it has failed to demonstrate that disclosure of the information would have the impact ascribed.
23. In this case, the Commissioner notes that the contract between BT and CDC was signed in October 2010 and is scheduled to run until December 2025. As mentioned above, the Commissioner does not consider that CDC has sufficiently explained the benefits the information would provide to BT's competitors. Moreover, whilst CDC has identified possible competitors in Cornwall and other rural areas, it has not evidenced why the prejudice it claims would arise is more likely than not to occur.
24. CDC has suggested that disclosure of the information may also impact BT's decision to bid for future contracts. It has also argued that dissuading BT and other companies from bidding for contracts would affect the price that it achieves for contracts and projects and thus prejudice its own commercial interests. On the basis of the submissions provided in this regard, the Commissioner is not persuaded that disclosure of the information would deter BT or other companies from engaging with long term, potentially lucrative public contracts. CDC has not provided any evidence to support this contention or demonstrate why it is more probable than not.

25. The Commissioner is mindful that requests for comparable information regarding broadband take-up statistics have been made to other authorities and that these have resulted in information being disclosed<sup>1</sup>. He asked CDC to explain how the withheld information differs to the information provided in such disclosures and to clarify why disclosure would be damaging to BT's interests.
26. CDC has explained that it is aware that other authorities have released similar take-up data, however, it has argued that the data released in those instances is not comparable. CDC has stated that the withheld information consists of an "extensive level of collated data" which is "significantly more developed than any other data in the industry".
27. Having considered CDC's explanation, the Commissioner notes that the information is distinguished from comparable disclosures because it represents a longer period of quarterly returns. However, the Commissioner considers that CDC has not done enough to explain how competitors would benefit from the information, nor why any resulting prejudice to BT's commercial interests would be more probable than not. He accepts that one authority's decision (or the decision of a number of authorities) to disclose a category of information is not binding upon other authorities; however, where information is similar in nature, the justification for withholding it and the special circumstances which apply must be clear and distinct.
28. Having considered CDC's arguments and viewed the withheld information the Commissioner remains unconvinced that disclosure of the information would have any adverse effects on its own or BT's commercial interests. The Commissioner does not consider that the arguments provided link the specific withheld information to specific effects which would *more probably than not* occur. He accepts that the information would likely be of interest to competitors but he does not consider that CDC has adequately explained how, in this context, this would translate into prejudicial effects to BT's commercial interests.
29. As the Commissioner has determined that CDC has failed to demonstrate that prejudice would occur he has concluded that the exemption is not engaged. He has not, therefore, gone on to consider the public interest.

#### **Section 41 – information provided in confidence**

30. Section 41(1) of the FOIA provides that information is exempt from disclosure if it was obtained by the public authority from any other

---

<sup>1</sup> See, for example, this response from Gloucestershire County Council:  
[https://www.whatdotheyknow.com/request/rural\\_broadband\\_take\\_up\\_5#outgoing-406336](https://www.whatdotheyknow.com/request/rural_broadband_take_up_5#outgoing-406336)

person and the disclosure by the public authority would constitute an actionable breach of confidence.

### **Was the information obtained from another person?**

31. The first step is for the Commissioner to consider whether the information was obtained by CDC from any other person in order to satisfy the requirements of section 41(1)(a).
32. The withheld information consists of a percentage breakdown (by quarter) of the rate of take-up of superfast broadband between 2011 and 2014. CDC has confirmed that the information was provided to it by BT.
33. 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**

34. 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:

*"... 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..."*

35. 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*

36. 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.

37. 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."*

38. CDC has stated that the withheld information has always been marked "commercially confidential" when provided by BT. Whilst CDC has acknowledged that this, in itself, does not automatically render information non-disclosable under the FOIA, it maintains that the information was provided with the understanding that it would not be distributed more widely. In light of this and, having applied the "reasonable person" test, the Commissioner accepts that the information was provided in circumstances imparting an obligation of confidence.

#### *Necessary quality of confidence*

39. Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.
40. In view of the nature of the withheld information, which shows the progress of the implementation of broadband rollout, the Commissioner is satisfied that it is not trivial in nature.
41. However, as stated above, this alone is not sufficient to indicate that the material has the necessary 'quality of confidence'. The Commissioner has therefore also considered whether the information is otherwise accessible.
42. Given the submissions provided by CDC it is clear to the Commissioner that the information is not otherwise accessible. He, therefore, accepts that the information has the necessary quality of confidence.

#### *Detriment to confider*

43. 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 has gone on to consider whether unauthorised disclosure would cause detriment to the confider.
44. CDC has stated that, had BT believed that the information would be made public, it would not have been provided. It has confirmed that BT has made it clear that they would regard the release of the information

as an actionable breach of confidence. CDC has further stated that, if the information were to be disclosed, BT would no longer provide the information to CDC, which could significantly harm the delivery of the roll-out of superfast broadband and BT's willingness to provide support for future work of this nature. CDC has argued that disclosure would result in BT seriously reconsidering its ongoing relationship and bids for future contracts.

45. The Commissioner notes the unwillingness of both CDC and BT to disclose the information. However, this in itself is not sufficient to demonstrate that the exemption is engaged: relevant supporting arguments which demonstrate the specific detriment which disclosure would cause are required. As the Commissioner found in relation to section 43, above, CDC has not provided sufficient arguments to show why disclosure of the information would be detrimental to the confider, i.e., how a competitor would use this specific information to their advantage and or why any detriment to BT would be more probable than not.
46. In view of this the Commissioner considers that the claimed detriment has not been demonstrated sufficiently and therefore the test of confidence fails on this limb. The Commissioner has decided that there was an obligation of confidence, that the information had the necessary quality of confidence but the detriment limb of the confidence test has not been demonstrated and therefore it has not been shown that there would be an actionable claim for breach of confidence and the exemption at section 41 does not apply.

#### **Section 44 – prohibitions on disclosure**

47. Section 44(1)(a) of the FOIA provides an exemption in cases where the disclosure of information is prohibited "...by or under any enactment."
48. CDC has argued that "...by virtue of the Undertakings given by BT to Ofcom under section 154 of the Enterprise Act 2002, they are prohibited from releasing data of the nature requested under this FOI unless the same information were to be released by other providers on an equivalent basis." CDC has argued, after BT, that disclosure of the information via the FOIA may be an attempt to extract information outside of a framework agreed with Ofcom.
49. The Commissioner has studied section 154 of the Enterprise Act 2002 and the Undertakings referred to by CDC<sup>2</sup>. It is clear to him that, whilst

---

<sup>2</sup> <http://www.legislation.gov.uk/ukpga/2002/40/section/154>



they may indeed preclude BT from taking certain actions, they have no bearing whatsoever on CDC, the responsible public authority under the FOIA.

50. In light of this he has concluded that section 154 of the Enterprise Act 2002 does not constitute a statutory prohibition on disclosure, as defined by section 44 of the FOIA. The exemption is, therefore, not engaged.

## Right of appeal

---

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

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

52. 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.
53. 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 .....**

**Jo Pedder**  
**Policy Delivery Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**