

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 24 June 2015

**Public Authority:** Bentley Parish Council  
**Address:** Bentley Old Hall  
Bentley  
Suffolk  
IP9 2LW

#### Decision (including any steps ordered)

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1. The complainant has asked Bentley Parish Council for a copy of a draft lease. The draft lease concerns a parcel of land which the Council intends to use for allotments with accompanying car parking.
2. The Commissioner's decision is that the Council is entitled to withhold the draft lease in reliance on section 43 of the FOIA, on the grounds that its disclosure would likely adversely affect its own commercial interests and those of the landowner.
3. The Commissioner does not require the public authority to take any further action in this matter.

#### Request and response

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1. On 14 January 2015, the complainant wrote to Bentley Parish Council ("the Council") and requested information in the following terms:

*"I now make request under the Freedom of Information Act for a copy of the allotments draft lease e-mailed that day."*

2. The council sent its response to the complainant on 26 January. The Council advised the complainant that it is refusing her request in reliance on the exemption to disclosure provided by section 41(1) of the FOIA.
3. The Council's refusal notice stated:

*"I have taken advice from the National Association of Local Council's Legal Department and the draft contract of the lease was offered to the Council in confidence by the landowner – it has not been agreed or concluded and the landowner has indicated that he does not wish the draft lease to be released to the public until agreed."*

4. The complainant wrote to the Council on 28 January to request that it carries out an internal review.
5. The Council completed its review following a discussion of this request in its meeting of 5 February. The Council sent its review to the complainant on 14 February.
6. On 1 April the Council advised the Commissioner that it was amending its position and on 7 April the Council sent the complainant an emended refusal notice confirming that it is now relying on sections 40(2), 41, and 43 of the FOIA.

### **Background to the request**

7. The draft lease which the complainant seeks, concerns the proposal to create allotments at Highfields, Bentley.
8. A survey was undertaken to determine if a demand existed within the parish for the provision of allotments. The survey indicated that a demand did exist and therefore the Parish Council carried out its legal responsibility to make appropriate provision by setting in motion the full planning application process.
9. Planning permission was required in order to provide access to the proposed allotments and for the creation of a car park.
10. Babergh District Council granted permission for the proposed development under application number B/13/01130/FUL.
11. The Parish Council determined not progress with the proposed development until the May 2015 elections had taken place.

### **Scope of the case**

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12. The complainant contacted the Commissioner on 12 February 2015 to complain about the Council's refusal to disclose a copy of the draft lease she had requested. This notice is the Commissioner's decision with regard to this complaint.

## Reasons for decision

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### **Section 43 – where disclosure would, or would be likely to, prejudice the commercial interests of any person**

13. Section 43 of the FOIA allows a public authority to refuse to disclose recorded information where the disclosure would, or would likely, prejudice the commercial interests of any person. This includes the commercial interests of the public authority itself.
14. The Council has confirmed to the Commissioner that it considers both its own commercial interests and those of the landowner would be prejudiced if the draft lease was to be disclosed.
15. The Council sent the Commissioner a copy of the draft lease which concerns the site of the proposed allotments. The lease is clearly marked as being 'Draft'. Part of the lease concerns the consideration which will be payable to the landlord over the period of the lease.
16. The lease contains sections describing Exemptions and Reservations, Covenants, Quiet Enjoyment, General Conditions and Power of Free Entry.
17. The Commissioner has noted that there are other forms of consideration attached to the lease, which, although they are quite standard, in his opinion, they constitute commercial information.
18. The Commissioner considers that the essence of commerce is trade or some form of commercial activity. This will generally involve the sale or purchase of goods or services for profit.
19. The Commissioner has considered the representations made by the Council. He has noted that the Council has followed the advice given to it by Sussex Associations of Local Councils ("SALC") and the National Association of Local Council ("NALC").
20. The Commissioner agrees with the advice given to the Council by SALC and NALC and he finds that the draft lease contains information which is commercial in nature. The Commissioner's position is strengthened somewhat, by his acceptance of the Council's assertion that the lease was drawn up with an expectation of confidentiality and further, the Council's assurance that the landowner has refused his permission for the lease to be disclosed until all negotiations have been completed.
21. The Commissioner finds that disclosure of the draft lease would adversely affect a legitimate economic interest of both the Council and the landowner. The Commissioner is satisfied disclosure of the draft

lease would be likely to hinder the landowner's and the Council's ability to secure the best commercial terms for the allotment site.

22. Taking a broader view, the Commissioner also accepts that releasing the information would be likely to hinder the Council's future commercial activity. This is because of the risk potential contractors could perceive in the Council being unable to keep confidential matters; where a contract is yet to be finalised and where it is commercially sensitive.
23. Such a negative view of the Council may well result in fewer commercial parties being attracted to the Council for financial activity. For this, and the reasons in the preceding paragraph, the Commissioner finds the exemption afforded by section 43 is engaged.
24. Reliance on section 43 is subject to consideration of the public interest test. This means that the draft lease can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure.

#### *The public interest*

##### *Arguments which favour disclosure of the minutes*

25. 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.
26. In this case disclosure of the draft lease would ensure complete transparency of the contract which the Council intends to enter into with the landowner and it would allow the public to judge whether the Council was achieving value for its money.
27. The information, should it be disclosed, could promote public debate and allow the Council's council tax payers to greater understand decisions which affect them.

##### *Arguments which favour withholding the minutes*

28. The draft lease and the negotiations which surround it, provide a confidential forum in which the terms of the Council's proposals come together. The draft lease is a starting point or a stage towards finalising the summative lease. The confidential nature of draft lease, given the stage the development is currently at, means that free and frank discussions can still occur.
29. Making the draft lease available to the public at this juncture would likely damage the relationship of trust which the Council has with the

particular landowner. A loss of this trust could potentially suppress the degree of frankness by which matters are discussed with this landlord in the future.

30. Disclosure of the draft lease could negatively impact on the Council's ability to make effective contracts and prevent it from securing best value for money on behalf of its council tax payers.

*The Commissioner conclusions*

31. Weight must always be given to the Council being transparent and accountable for its decisions. This is especially so where the expenditure of tax payers' money is concerned and where the decisions made affect significant numbers of the Council's residents.
32. The Commissioner considers that accountability will be properly achieved should the lease be disclosed in the future and when the Council is obliged to account for the money it is spending in relation to the completed contract in its annual accounts.
33. Ultimately the Commissioner has decided that the greatest weight has to be given to the detrimental effect that disclosure would likely have on the Council's commercial interests. The confidential nature of the draft minutes, at this particular point in time, cannot be dismissed: There is a clear expectation on the part of the landowner that the lease should not be disclosed at this stage. It is for this reason that the Commissioner has decided that the Council is entitled to withhold the draft lease in reliance of Section 43 of the FOIA.
34. In view of the Commissioner's conclusion above, he has not gone on to consider the Council's additional reliance on sections 40(2) AND 41 of the FOIA.

## Right of appeal

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35. 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)

36. 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.
37. 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**