

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 May 2017

**Public Authority:** Suffolk Coastal District Council

**Address:** East Suffolk House  
Station Road  
Melton  
Woodbridge  
IP12 1RT

#### Decision (including any steps ordered)

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1. The complainant has requested the costs incurred by Suffolk Coastal District Council (the council) in the course of terminating a contract with a third party contractor.
2. The council provided some information but refused to provide the remainder under section 43(2) 'commercial interests' of the FOIA.
3. The Commissioner's decision is that section 43(2) is not engaged in the specific circumstances of this case.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the withheld information.
5. 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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6. On 31 March 2016, the complainant wrote to the council and requested information in the following terms:

*"Some months ago I raised question with you as to the costs incurred by SCDC in claim made by [named third party contractor] for the termination of there contract. At that time you advised the matter was subject to investigation by Audit team. Are you now in position where you can advise costs incurred?"*

7. The council responded on 28 April 2016. It stated that the costs incurred by the council in relation to the termination of the contract with the third party contractor could be broken down into:

- I. The sums paid to the third party contractor in order to terminate the contract.
- II. The sums incurred by the council in relation to the termination.

8. The council explained that it was not able to disclose the recorded information held in relation to the sum paid to the third party contractor. The council confirmed that the contract had been discharged and any disputes arising under it had been settled.

9. The council confirmed that it was withholding the information under section 36 'prejudice to the effective conduct of public affairs', section 42(1) 'legal professional privilege' and section 43(2) 'commercial interests'.

10. The council confirmed that it considered that the public interest lay in maintaining the exemptions.

11. The complainant requested an internal review on 16 May 2016.

12. Following an internal review the council wrote to the complainant on 4 July 2016. It stated that it was maintaining its reliance on section 43(2) regarding the sum paid to the third party contractor and it considered that the public interest favoured maintaining the exemption.

13. The council stated that its reliance on section 36, section 42(1) and section 43(2) regarding the sum incurred by the council in relation to the termination of the contract may have been correct at the time of its original response. However, it provided the information as it considered that, at the time of the internal review, the exemptions were no longer relevant.

## Appropriate legislation

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14. During the course of the investigation, the council explained to the Commissioner that it considered that, as the information was in the context of a project to redevelop and regenerate an area of land, the request should be considered under the Environmental Information Regulations 2004 (EIR).
15. The Commissioner considers that, while the contract may have been for land regeneration, the nature of the requested information is financial and does not fall within the definition of "environmental information" provided at regulation 2 of the EIR.

## Scope of the case

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16. The complainant contacted the Commissioner on 12 July 2016 to complain about the way his request for information has been handled.
17. The Commissioner considers the scope of this investigation to be whether the council is entitled to rely on section 43(2) in relation to the withheld information.

## Reasons for decision

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18. Section 43(2) of the FOIA states that:

*"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interest of any person (including the public authority holding it)".*

19. The Commissioner has issued guidance on the interpretation of section 43(2)<sup>1</sup>. The Commissioner's guidance sets out that a commercial

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1178/awareness\\_guidance\\_5\\_v3\\_07\\_03\\_08.pdf](https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf)

[https://ico.org.uk/media/for-organisations/documents/1185/awareness\\_guidance\\_5\\_annexe\\_v3\\_07\\_03\\_08.pdf](https://ico.org.uk/media/for-organisations/documents/1185/awareness_guidance_5_annexe_v3_07_03_08.pdf)

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

20. There is a distinction to be drawn between commercial interests and financial interests. While it is possible that prejudice to the financial interests of a public authority may affect its commercial interests, this will not always be the case.
21. The Commissioner acknowledges that there may be circumstances where the release of information held by a public authority could damage a company's reputation or the confidence that customers, suppliers or investors may have in a company. It may be that releasing such information has a significant effect on revenue or threatens its ability to obtain supplied or secure finance. In these circumstances, the commercial interest exemption may be engaged. However, it should be noted that there is no exemption for embarrassment, only where there is a real risk of such harm being caused could the exemption be engaged.
22. While the "prejudice" that may be caused by disclosure may not be substantial, nor should it be completely trivial. As for likelihood, while prejudice need not be certain, there must be a significant risk rather than the remote possibility of prejudice.
23. The council explained to the Commissioner that it considered the requested information was exempt under section 43(2) as it would be likely to prejudice the council's commercial interest.
24. The council provided the Commissioner with detailed submissions which explain why it considers section 43(2) of the FOIA is engaged and the public interest favours maintaining the exemption.
25. The council's submission and the Commissioner's consideration of the case are set out in the confidential annex to this decision. The confidential annex will be provided to the council only.
26. The Commissioner understands that it may be frustrating for the complainant to not be able to view the council's submission. However, the submissions are based on confidential information not included within the scope of the request and will, therefore, not be included in the decision notice.
27. For the reasons set out in the confidential annexe, the Commissioner considers that the exemption provided for at section 43(2) is not engaged.
28. As the exemption is not engaged, the Commissioner has not gone on to consider the public interest test.

29. The Commissioner requires the council to disclose the information within the timeframe set out at paragraph 5.

## Right of appeal

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30. 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)

31. 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.
32. 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 .....

**Alun Johnson**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**