

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 September 2024

Public Authority: Oxfordshire County Council
Address: County Hall
New Road
Oxford
OX1 1ND

Decision (including any steps ordered)

1. The complainant requested information relating to Non-Disclosure Agreements (“NDAs”). Oxfordshire County Council (the “Council”) disclosed some information but withheld the standard wording of NDAs under the exemption for prejudice to commercial interests (section 43).
2. The Commissioner’s decision is that the Council has failed to demonstrate that the exemption in section 43(2) is engaged.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclosure the requested NDA standard text to the complainant.
4. The public authority must take these steps within 30 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

5. On 8 January 2024 the complainant wrote to Oxfordshire County Council (the "Council") and requested the following information:

"Would you be kind enough to confirm whether or not any non disclosure agreements (NDAs) have been signed between OCC officers and East West Rail please? If so, could you disclose:

The number of staff who have signed them;

The dates when these were signed;

Whether a corporate NDA has been signed between OCC and EWR; and

Provide the standard text of these NDAs (redacted to remove identifying information)"
6. The Council responded on 5 February 2024 and answered the first 3 parts of the request. It refused to provide the requested standard text of Non-Disclosure Agreements ("NDAs"), citing the exemption for commercial interests (section 43(2)).
7. On 15 February 2024 the complainant asked the Council to carry out an internal review. The Council provided its review response on 10 May 2024. This confirmed that it was maintaining its original position.

Scope of the case

8. On 10 May 2024 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner has considered whether the Council was entitled to withhold the requested NDA standard text.

Reasons for decision

Section 43 – commercial interests

10. Section 43(2) of the FOIA states:

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

The Council's position

11. The Council has stated that it considers that disclosure of the standard text used in NDAs relating to East West Rail ("EWR") would prejudice the commercial interests of both EWR and the Council.
12. The Council has explained that information and discussions shared between EWR and the Council necessitated a NDA for confidentiality. The Council has stated that disclosing information associated with this to the public would have been premature and would prejudice any further formal engagement.
13. The Council has explained that both parties to the NDA between the Council and EWR consider it to be a confidential document.
14. The Council has confirmed that it does hold some template NDAs which are developed according to the circumstances of each case and that it would be prejudicial to its commercial interests to release them.
15. The Council considers that disclosure would affect its ability to negotiate future NDAs as the information would give potential NDA signatories an idea of the requirements the Council was prepared to accept. An outcome of this might be that additional restrictions which the Council may introduce in a specific NDA would be resisted.
16. The Council has also suggested that parties who have signed NDAs with the Council in the past may question why their NDAs were more onerous.

The Commissioner's position

17. In order to apply section 43(2), an authority must be able to show that the disclosure of the information would, or would be likely to, prejudice or harm its commercial interests, or those of an individual, a company or any other legal entity. In conducting this test, an authority needs to identify what the harm is and why it may occur as a result of disclosure.
18. An authority must also decide the likelihood of prejudice arising on the facts of each case.
19. In this case the Council has stated that disclosure would result in prejudice to its own commercial interests and those of EWR. This is the higher threshold of likelihood which means that it needs to be show that, if information is disclosed, it is more probable than not that the harm identified would occur (ie there is a more than 50% chance of disclosure causing the prejudice, although it is not absolutely certain that it would do so).

Does the identified harm relate to commercial interests?

EWR's interests

20. In relation to the putative prejudice to EWR's commercial interests the Council confirmed that it consulted with EWR and sought its views on this matter. However, the evidence provided to the Commissioner is limited to confirming a view that the NDA itself is confidential and expressing a preference that it not be disclosed.
21. The Commissioner's guidance confirms:

"....having a confidentiality clause in place does not guarantee that information will not be disclosed under FOIA, and you should be wary of attempts to impose a blanket confidentiality clause on all the information contained in a contract. If a request asks for a copy of a contract, the whole contract needs reviewing. If the information in it is not commercially sensitive, a confidentiality clause won't prevent its disclosure."¹
22. In short, that information is considered to be "confidential" does not in itself identify a commercial interest or specific harm to a commercial interest. In this case the Commissioner does not consider that the withheld information directly identifies specific commercial information but is, rather, concerned with the arrangements for the handling of such information.
23. On the basis of the evidence provided, therefore, the Commissioner does not consider that it has been shown that disclosure would result in prejudice to EWR's commercial interests.

The Council's interests

24. The Council has argued that disclosure of the standard text used in NDAs would result in prejudice to its own commercial interests.
25. The Council has explained that the purpose of the NDA is provide protective confidentiality for discussions between the two parties in relation to discussions/information associated with commercial negotiations.

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

26. The discussions themselves and information shared between the two parties are not the subject of this request. However, the Commissioner understands the rationale for NDAs in this context and appreciates that disclosing information during negotiations can undermine the process and result in commercial harm.
27. The Council considers that disclosing the standard text of its NDAs with EWR would inhibit its ability to negotiate future NDAs with other parties. The reasoning being that placing the information in the public domain would allow potential signatories of NDAs to view this example of NDA wording, compare its content to (a less favourably worded) proposed NDA they are being asked to sign and make demands for changes to be made.
28. The Commissioner can conceive of a scenario where a party being asked to sign more restrictive NDA might object and make reference to the more favourable conditions reflected in the disclosed standard text. Following the Council's narrative, this would impact on the Council's ability to negotiate future NDAs which, in turn would impact on its ability to conduct negotiations on the commercial factors to which an NDA relates.
29. However, the Commissioner is not convinced that the information contained within the NDA can itself actually be considered to be commercial information. NDAs are distanced from the commercial discussions and information which they are designed to protect. That the request identifies "standard wording" also confirms that, whilst NDAs might compile standard wording in different ways, the information itself does not identify or relate to a specific party and, crucially, does not identify commercial information specific to any party.
30. The Commissioner accepts that, conceivably, disclosure of NDA standard wording might provide the impetus for a prospective NDA signatory to engage in further discussion about the content of their own NDA with the Council.
31. However, the nature of standard wording is such that it might not be directly applicable in all scenarios so discussions around the appropriateness of wording would seem to be inherent to the process. In short, NDAs simply provide a framework within which discussions

relating to commercial matters can take place, without themselves having any commercial content².

32. The Commissioner considers that a case might be made that disclosure may result in some disruption to Council negotiations or other processes but he does not accept that these are specifically commercial in nature and, in any event, he has concluded that the Council has failed to make such a case.
33. Having considered the facts of this case the Commissioner has concluded that the Council has failed to show that that disclosing the withheld information would directly result in prejudice to any party's commercial interests. As he does not consider that the exemption is engaged he has not gone on to consider the public interest test.

² The Commissioner also notes that there numerous templates and standard wording for NDAs available online which prospective NDA signatories could also review and use in any bargaining process. See, for example: <https://www.gov.uk/government/publications/non-disclosure-agreements>

Other matters

34. Although they do not form part of this notice the Commissioner would like to note the following matters of concern.

Section 45 code of practice – internal reviews

35. The code of practice issued under section 45 of the FOIA (the “Code”) sets out recommended practice for authorities handling requests for information³.

36. In relation to the carrying out of internal reviews, paragraph 5.4 of the Code states:

“Requests for internal review should be acknowledged and the applicant informed of the target date for responding. This should normally be within 20 working days of receipt.”

37. In this case the complainant requested an internal review on 15 February 2024 and the Council provided its review response on 10 May 2024.

38. The Commissioner considers that, in this case, the Council’s internal review failed to meet the recommended timeframe set within the Code. In future he expects the Council to handle internal reviews in accordance with the Code.

³ The Code is available online here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Right of appeal

39. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

40. 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.
41. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Christopher Williams
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