



Neutral citation number: [2025] UKFTT 00780 (GRC)

Case Reference: FT/EA/2024/0274

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

**Decided without a hearing
Decision given on: 27 June 2025**

Before

**JUDGE STEPHEN ROPER
MEMBER ANNE CHAFER
MEMBER DAVID COOK**

Between

MONMOUTHSHIRE COUNTY COUNCIL

Appellant

and

**(1) THE INFORMATION COMMISSIONER
(2) JANET TREHARNE OAKLEY**

Respondents

Decision: The appeal is Allowed in part

Substituted Decision Notice:

The Tribunal's Decision Notice in case reference FT/EA/2024/0274, set out below, is substituted for the Information Commissioner's Decision Notice reference IC-284171-V9S7, dated 24 June 2024, with regard to the request for information made to Monmouthshire County Council by Janet Oakley dated 30 December 2023.

Substituted Decision Notice

1. Monmouthshire County Council (the "Council") is not entitled to rely on section 44(1)(a) of the Freedom of Information Act 2000 (the "Act") in respect of the information it withheld in reliance on that section.
2. The Council is not entitled to rely on section 41(1) of the Act to withhold any information within the scope of that request.
3. The Council is entitled to rely on section 43(2) of the Act to withhold the following parts of the report to its Investment Committee dated 22 January 2019 relating to the proposed purchase of Newport Leisure Park:

- a. the paragraph of text below the diagram, Figure 1, on page 11 of that report;
 - b. paragraph 6.1 of that report (on pages 15-16); and
 - c. page 24 (Annex 2) of that report (except for the column headings in the table on that page).
4. The Council is not required to take any further steps.

REASONS

Preliminary matters

1. In this decision, we use the following terms to denote the meanings shown:

Council:	Monmouthshire County Council (the Appellant).
Commissioner:	The Information Commissioner (the First Respondent).
Decision Notice:	The Decision Notice of the Commissioner dated 24 June 2024, reference IC-284171-V9S7, relating to the Request.
Duty to Disclose:	The duty of a public authority to communicate requested information which it holds, pursuant to section 1(1)(b) (set out in paragraph 22).
Disputed Information:	The aspects of the Report sought to be withheld by the Council, as specified in paragraph 35.
FOIA:	The Freedom of Information Act 2000.
LGA:	The Local Government Act 1972.
NDA:	The non-disclosure agreement between the Council and Otium as set out in a letter from the Council's agents (Alder King) to Otium dated 7 December 2018.
Otium:	Otium Real Estate Limited.
Property:	Newport Leisure Park (Spytty Park Road, Newport).
Public Interest Test:	The test, pursuant to section 2(2)(b) (set out in paragraph 25), as to whether, in all the circumstances of the case, the public interest in maintaining the exemption to the Duty to Disclose outweighs the public interest in disclosing the information.
Report:	The report dated 22 January 2019 falling within the scope of the Request, as referred to in paragraph 33.
Request:	The request for information made to the Council by the Requestor dated 30 December 2023, as set out in paragraph 5.

Requestor: Janet Oakley (the Second Respondent).

Withheld Information: The aspects of the information within the scope of the Request which were withheld by the Council prior to the issue of the Decision Notice.

2. Unless the context otherwise requires (or as otherwise expressly stated), references in this decision:
 - a. to numbered paragraphs are references to paragraphs of this decision so numbered;
 - b. to any section are references to the applicable section of FOIA.

Introduction

3. This was an appeal against the Decision Notice, which (in summary) concluded that section 44 (prohibitions on disclosure) was not engaged in respect of the Request and required the Council to disclose the information which it had withheld in reliance on that section. The Commissioner also decided that the Council does not hold any additional information within the scope of the Request.
4. We considered whether it was necessary for us to provide a closed decision. We concluded that it would not be necessary, on the basis that the reasoning behind this decision can be sufficiently understood without us needing to refer to the specific details of, or disclose any sensitive aspects of, the material in the closed bundle.

Background to the Appeal

The Request

5. On 30 December 2023, the Requestor contacted the Council via the 'whatdotheyknow' website and requested information in the following terms, relating to the Council's decision to purchase the Property from Otium:

"1. Please could you send me the committee decision documents, discussion, (including those present, their designations and the voting etc) or direct me to them on the MCC site, when the decision by the council was taken to buy the above park.

I do not need the exact financial amounts as the cost £21m has been stated,

2. The most up to date audit of how much the purchase has now cost the council."
6. The Council responded on 17 January 2024. It stated that some reports were publicly available on its website and provided the relevant links. The Council also stated that some documents were discussed in closed sessions of meetings and that any documents held were exempt under Schedule 12A of the LGA. Consequently, the Council refused to disclose that information, in reliance on section 44(1)(a).
7. On 17 January 2024, the Requestor requested an internal review in respect of the handling of the Request. She stated that no information had been provided on voting by officers and employees, or the latest audit.
8. The Council provided the outcome of its internal review on 23 January 2024, upholding its previous position.

9. The Requestor contacted the Commissioner on the same date to complain about the Council's response to the Request. The Commissioner subsequently issued the Decision Notice.

The Decision Notice

10. In the Decision Notice, the Commissioner decided that:
 - a. section 44(1)(a) was not engaged with respect to the Withheld Information; and
 - b. the Council had sufficiently explained why it does not hold information relating to voting or audits concerning the acquisition of the Property.
11. The Decision Notice concluded that the Council had incorrectly relied on section 44 as its basis for refusing to disclose the Withheld Information, because (in essence) the relevant statutory provision in the LGA permitted the Council to exclude it from publication but did not impose a statutory prohibition from disclosure pursuant to FOIA.
12. The Decision Notice required the Council to disclose the Withheld Information.

The appeal

The grounds of appeal

13. In its grounds of appeal, the Council stated that it accepted the Commissioner's conclusion in the Decision Notice with regard to section 44.
14. The Council sought instead to rely on two exemptions which it had previously not cited; section 41(1) (information provided in confidence) and section 43(2) (commercial interests). The Council accordingly invited the Tribunal to redetermine the matter afresh. The Council submitted that the Disputed Information was exempt from disclosure in reliance on those two exemptions and that the Decision Notice requiring the Council to disclose all of the Withheld Information should be set aside.

The Tribunal's powers and role

15. The powers of the Tribunal in determining the appeal are set out in section 58, as follows:

"(1) If on an appeal under section 57 the Tribunal considers –

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may Review any finding of fact on which the notice in question was based."

16. In summary, therefore, the Tribunal's remit for the purposes of the appeal was to consider whether the Decision Notice was in accordance with the law. In reaching its

decision, the Tribunal may review any findings of fact on which the Decision Notice was based and the Tribunal may come to a different decision regarding those facts. Essentially, the Tribunal is empowered to undertake a ‘full merits review’ of the appeal before it (so far as the Decision Notice is concerned).

Mode of hearing

17. The parties consented to the appeal being determined by the Tribunal without an oral hearing.
18. The Tribunal considered that the appeal was suitable for determination on the papers in accordance with Rule 32 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 and was satisfied that it was fair and just to conduct the appeal in this way.

The evidence and submissions

19. The Tribunal read and took account of an open bundle of evidence and pleadings, as well as a closed bundle. The closed bundle contained:
 - a. the Commissioner’s closed response to the appeal, which addressed specific items of the Withheld Information and the submissions of the Commissioner regarding the exemptions being relied by the Council in the appeal;
 - b. an unredacted version of the witness statement which had been redacted in the open bundle (see paragraph 20); and
 - c. the unredacted aspects of the Withheld Information which had been redacted in the open bundle.
20. The open bundle included a witness statement on behalf of the Council. The witness's statement was given in their capacity as the Council’s Acting Head of Landlord Services. It is not necessary for us to identify this witness personally in this decision - therefore we merely refer to them as “the witness” and we mean no disrespect to them in doing so. As mentioned, aspects of the witness’s statement were redacted in the open bundle but unredacted in the closed bundle.
21. All of the contents of the bundles were taken into account, even if not directly referred to in this decision.

The relevant statutory framework¹ and legal principles

General principles

22. Section 1(1) provides individuals with a general right of access to information held by public authorities. It provides:

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the

¹ We acknowledge the Practice Direction dated 4 June 2024 (<https://www.judiciary.uk/guidance-and-resources/practice-direction-from-the-senior-president-of-tribunals-reasons-for-decisions/>) and particularly paragraph 9, which refers to the First-tier Tribunal not needing to specifically refer to relevant authorities. We include references to the applicable legislative framework, to provide relevant context, but have accordingly not set out details of the applicable case law.

description specified in the request, and

(b) if that is the case, to have that information communicated to him."

23. In essence, under section 1(1), a person who has requested information from a public authority is entitled to be informed in writing whether it holds that information. If the public authority does hold the requested information, that person is entitled to have that information communicated to them. However, those entitlements are subject to the other provisions of FOIA, including some exemptions and qualifications which may apply even if the requested information is held by the public authority. Section 1(2) provides:

"Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

24. Accordingly, section 1(1) does not provide an unconditional right to be told whether or not a public authority holds any information, nor an unconditional right of access to any information which a public authority does hold. The rights contained in that section are subject to certain other provisions of FOIA, including section 2.

25. Section 2(2) addresses potential exemptions to the Duty to Disclose. That section provides:

"In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

26. The effect of the above is that some exemptions which are set out in Part II of FOIA are absolute and some are subject to the Public Interest Test. Section 2(3) explicitly lists which of those exemptions are absolute (and, pursuant to that section, no other exclusions are absolute). So far as relevant for the purposes of the appeal (see paragraph 31), section 41 is included in that list but section 43 is not.

27. Accordingly, in summary:

- a. the relevant exemption to the Duty to Disclose in section 41 is an absolute exemption;
- b. the relevant exemption to the Duty to Disclose in section 43 is subject to the Public Interest Test.

Section 41 – information provided in confidence

28. Section 41(1) provides:

"Information is exempt information if–

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”.

Section 43(2) – commercial interests

29. Section 43(2) provides:

“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).”.

Discussion and findings

Scope of the appeal

30. As mentioned earlier, the Council accepted the Commissioner’s findings in the Decision Notice regarding section 44. It did not appeal against any of the conclusions underlying the Decision Notice and accordingly the application of section 44 was not within the scope of the appeal. The Requestor also did not challenge, within the appeal, the Decision Notice’s findings that the Council does not hold any further information within the scope of the Request.
31. Therefore the relevant issues which we needed to determine were whether the Council could rely on section 41(1) and/or section 43(2) to refuse to disclose the Disputed Information.

Reliance on new exemptions

32. As we have noted, the potential application of section 41(1) or section 43(2) was not relied on by the Council in response to the Request or during the Commissioner’s investigation under section 50, but only raised by the Council during the appeal proceedings. Case law has established that a public authority is entitled to rely on new exemptions in an appeal before the First-tier Tribunal. This is so even if those exemptions have not been raised by the public authority at an earlier stage, whether in its response to a request for information under FOIA, any subsequent review of that response or in its subsequent dealings with the Commissioner when he is investigating a complaint relating to that request.

Nature and scope of the Disputed Information

33. The Council’s grounds of appeal explained that the Withheld Information comprised a report to its Investment Committee dated 22 January 2019. It described the Report as follows:

“It sets out the due diligence surrounding the then-proposed (and subsequently completed) acquisition of Newport Leisure Centre, including financial details about tenancy information and market data relevant to those tenancies. The Report also contained details of financial information relation to and provided by Otium in confidential terms...”.

34. During the course of the appeal, the Council stated that certain aspects of the Report could be disclosed. It explained that it could disclose those aspects which were no longer commercially sensitive or otherwise did not give rise to the prejudicial consequences relevant to the exemptions being relied on by it in the appeal.

35. The Council's position (confirmed also by the witness statement) was that all of the Report could be disclosed, except for:
- a. page 11 of the Report (which we understood to mean the paragraph of text below the diagram, Figure 1, on that page, as only that paragraph had been redacted in the open bundle);
 - b. paragraph 6.1 of the Report (on pages 15-16); and
 - c. page 24 (Annex 2) of the Report (which we understood to mean all of the text except for the column headings in the table on that page, as those headings were not redacted in the open bundle).
36. The Council's position was that it could withhold the Disputed Information pursuant to section 41(1) and section 43(2). We address each of those exemptions below.

Section 41(1)

37. The witness stated that the Disputed Information was confidential information obtained by the Council from Otium and comprised details of the tenancies in respect of the Property, including details of rental values, lease expiry dates and break clauses.
38. The Council argued that the Disputed Information:
- a. has the necessary quality of confidence on the basis that it was Otium's internal information about Otium's business planning and that its disclosure would undermine Otium's "*competitive and commercial edge*"; and
 - b. was provided to the Council in circumstances imposing an obligation of confidence - specifically, under the terms of the NDA (which was included in the open bundle).
39. The Commissioner submitted that it was not entirely clear that all of the Disputed Information was obtained from a third party. However, the witness confirmed in their statement that all of it was provided by Otium and related to the tenancies which the Council was taking over from Otium when the Council purchased the Property. We accept the witness's evidence on this point.
40. The Council's position was that disclosure of the Disputed Information (otherwise than under FOIA) would be actionable by Otium as a breach of confidence, which is the relevant requirement under the second limb of section 41 (section 41(1)(b)).
41. The Council also argued that such an action would be likely to succeed and that Otium would be likely to establish that public disclosure of the Disputed Information caused it unwarranted detriment. The Council also considered that a public interest defence to any such action for breach of confidence would be "highly unlikely" to succeed, on the basis that the public interest in the disclosure of the Disputed Information was wholly insufficient to outweigh the duty of confidence which the Council owed to Otium.
42. The Commissioner considered that the Council's arguments with respect to the engagement and application of section 41(1) were limited and generic in nature (albeit his submissions preceded the witness's statement). The Commissioner did not accept that section 41(1) was engaged in respect of the Disputed Information (except for one

aspect of it, specified in his closed submissions).

43. The Council stated, in its reply to the Commissioner's response to the appeal, that the Commissioner did not challenge the Council's reliance on the NDA. The Council submitted that the NDA was a sufficient basis in law for Otium to bring an action for breach of confidence and to succeed with that action.
44. We accept that the NDA evidences an agreement between the Council and Otium regarding confidentiality of information pertaining to the Property. The 'Transaction' which was the subject of (and defined in) the NDA was the proposed purchase of the Property by the Council from Otium. It actually referred to Alder King as the prospective purchaser, but we also accept that Alder King was acting as the Council's agent.
45. Our inspection of the NDA, however, revealed that it contained the following clause (paragraph number 4.2 of the NDA):

"Notwithstanding the termination of discussions between the parties in relation to the Transaction pursuant to paragraph 4.1, the obligations of each party shall continue for a period of 2 years from the termination of this letter agreement."
46. The parties to the NDA had, therefore, agreed that the obligations of confidentiality contained in it would only last for two years from the date of its termination. Paragraph 4.1 of the NDA (referred to in paragraph 4.2 of the NDA) required the Council to notify Otium immediately if the Council decided not to proceed with the purchase of the Property.
47. Whilst the provisions of the NDA were not entirely clear regarding its termination, we consider that it was evident that termination of it would take effect from the date of acquisition of the Property (in the absence of any earlier cessation of discussions relating to the proposed acquisition). In this regard, we do not accept the views of the witness (in paragraph 25 of their statement) that the NDA *"is not limited by date"* and that the obligations in it *"still continue to bind the Council"*.
48. The witness gave evidence that the Council acquired the Property from Otium in March 2019. Consequently, by the time of the Council's notice of appeal, dated 19 July 2024 (when it first cited section 41(1) in respect of the Request), more than two years had passed since the acquisition of the Property. Even at the time of the Council's response to the Request, more than two years had passed since the acquisition of the Property.
49. Accordingly, we find that the restrictions on confidentiality contained in the NDA had expired by the date of the Council's appeal. It follows that we do not accept the Council's arguments regarding the NDA giving rise to an actionable breach of confidence for the purposes of section 41(1).
50. We therefore find that section 41(1) is not engaged in respect of the Disputed Information.

Section 43(2) and the associated Public Interest Test

51. The Council argued that the Disputed Information, if disclosed, would provide valuable insights to those with whom the Council may enter into negotiations about the relevant property units, regarding the Council's financial thinking (and that of

Otium). It submitted that if the Council were to renegotiate tenancy arrangements: *“those insights would help current/prospective tenants by strengthening their ability to press for commercial terms that are better for them and thus worse for the Council”*. The Council accordingly argued that this would prejudice the Council’s ability to secure the best commercial terms for itself (and therefore the “public purse”). The Council therefore contended that this was sufficient to engage section 43(2), on the basis that disclosure of the Disputed Information would give rise to a *“very significant and weighty chance of real, actual or substantial prejudice to its commercial interests”*.

52. The Council also argued, further or alternatively, that if the Council were to put any of the relevant commercial units up for sale, the detailed information relating to rentals in the Report would also provide valuable insights to prospective purchasers, *“strengthening their ability to press for prices that are better for them and thus worse for the Council”*. The Council stated that this was because capital value estimates are calculated using information about rentals such as those contained in the Disputed Information. Accordingly, the Council contended that this adverse effect on its ability to secure the best price would prejudice its commercial interests and the “public purse” and that this was sufficient to engage section 43(2).
53. The Council’s arguments were supported by the witness who gave evidence along similar lines regarding the nature and effect of the prejudice in question.
54. As with section 41(1), the Commissioner considered that the Council’s arguments with respect to the engagement and application of section 43(2) were limited and generic in nature. However, again the Commissioner accepted in his closed submissions that section 43(2) was engaged in respect of one aspect of the Disputed Information.
55. The Commissioner’s open submissions focussed mainly on issues relating to the alleged prejudice to the interests of Otium, although the Council stated that its arguments in respect of section 43(2) were mainly related to prejudice to the Council’s interests (as we have outlined).
56. The witness explained that the purpose of the Council's acquisition of the Property was to make a commercial return. They stated that this can be achieved through rental income from the commercial tenants or by selling some or all of the site. The witness’s view was that, as the Property comprises a set of commercial properties, those negotiating with the Council (prospective tenants or commercial property companies) are likely to have the motivation and ability to analyse relevant information to help them negotiate better terms for them, therefore translating into a worse commercial outcome for the Council.
57. The witness provided some illustrative examples in support of their views but, in essence, the concern expressed was that the disclosure of the Disputed Information would harm the Council's ability to secure the best terms for itself, either in prospective tenancies (with new or existing tenants) or with prospective purchasers.
58. The Council’s position was also that the passage of time since the date of the Report (January 2019) had not eliminated or substantively reduced the risk of the prejudice which it asserted. The Commissioner considered that the Council had not explained or evidenced why this was the case, with the Commissioner referring to the fact that the Report is dated 22 January 2019 and therefore the Disputed Information was almost five years old at the time of the Request (30 December 2023).

59. The witness addressed that point in their statement. They stated that the Disputed Information remains commercially sensitive, as much of the tenancy information remains valid. They therefore considered that the harms which they had outlined would still apply.
60. We accept the witness's evidence in respect of the matters we have referred to. We consider that there is a real and significant risk that the Disputed Information, if disclosed, would be used by third parties to negotiate better terms for themselves, to the detriment of the Council.
61. We therefore find that section 43(2) is engaged in respect of the Disputed Information, on the basis that disclosure of the Disputed Information would be likely to prejudice the commercial interests of the Council.
62. Turning to the Public Interest Test, the Council argued that the public interest favoured maintaining the exemption. The Council's position was, in summary, that there was limited public interest in disclosure of the Disputed Information and that the public interest in maintaining the exemption, so as to avoid the risk of harm to its commercial interests, was much weightier.
63. The Council submitted that there was no material public interest in the details of the tenancy arrangements for the Property and that, in contrast, it would be strongly contrary to the public interest to expose the Council to the prejudicial consequences it had outlined.
64. Whilst the Council acknowledged that there was public interest in scrutiny and transparency in respect of its purchase and use of the Property, it considered that these were already adequately served, including through the Council's scrutiny and decision-making at the time and by ongoing transparency and scrutiny via annual reports. These points were supported by the witness in their statement, who also addressed the public interest arguments regarding the potential harms relating to the potential disclosure of the Disputed Information.
65. The Commissioner disputed the Council's position that there was limited public interest in disclosure of the Disputed Information. The Commissioner considered that there was a significant public interest in disclosure of information which increases transparency and accountability concerning the decision-making process around the acquisition of the Property.
66. Case law has established that we need to assess the Public Interest Test at the time of the Council's refusal of the Request. Accordingly, we cannot take into account the factors referred to by the Council and the witness regarding ongoing (future) scrutiny and reports.
67. However, we accept the witness's evidence (and related evidence in the open bundle) that there has been considerable disclosure of information which serves the public interest in transparency and accountability regarding the Council's purchase of the Property, given the Council's process for scrutiny and approval of the decision to proceed with the purchase.
68. It is also important to take into account the nature of the Disputed Information. It may be helpful to reiterate that the Disputed Information relates to the details of the tenancy arrangements for the Property and, in particular, covers what the tenants pay in rent

and any break clauses in their tenancy agreements. As we have noted, the Commissioner referred to the public interest in transparency and accountability concerning the decision-making process around the acquisition of the Property. However, the Disputed Information does not pertain to that decision-making process, but rather covers details of the tenancies in respect of the Property. Whilst we acknowledge that there is public interest in transparency, which would be served by disclosure of the Disputed Information, we see little other benefit in such disclosure. We also see little value in that degree of transparency, given what the Disputed Information comprises. We agree with the Council that there is limited public interest to be served by disclosure of the Disputed Information, given its contents (and taking into account what other information is already in the public domain). In contrast, the disclosure of the Disputed Information would be likely to cause the prejudice we have referred to in respect of the engagement of section 43(2).

69. In our view, considering all the circumstances of the case, the prejudice which would be likely to be caused by disclosure of the Disputed Information heavily outweighs the public interest in disclosure of it.
70. For the above reasons, we find that section 43(2) is engaged in respect of the Disputed Information and that the public interest favours maintaining the exemption.

Final conclusions

71. For all of the reasons we have given, we find that:
- a. the Council is not entitled to rely on section 41(1) to refuse to disclose the Disputed Information;
 - b. the Council is entitled to rely on section 43(2) to refuse to disclose the Disputed Information; and
 - c. the Decision Notice involved an error of law (on the basis that exemptions other than under section 44 can be relied on by the Council in respect of the Disputed Information).
72. We therefore allow the appeal and we make the Substituted Decision Notice as set out above.

Signed: Stephen Roper
Judge of the First-tier Tribunal

Date: 25 June 2025