

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 October 2018

Public Authority: East Lindsey District Council
Address: Tedder Hall
Manby Park
Manby Louth
Lincolnshire
LN11 8UP

Decision (including any steps ordered)

1. The complainant requested information from East Lindsey District Council (the Council) regarding rents charged for the Council's kiosks/retail units at Grand Parade Entrance to Tower Gardens, Skegness.
2. The Commissioner's decision is that the Council has cited section 43(2) (commercial interests) of the FOIA correctly when refusing the request. Therefore, the Commissioner does not require the Council to take any steps as a result of this decision.

Request and response

3. On 19 January 2018 the complainant wrote to the Council and requested information in the following terms:

"(i) Please tell me the rents charged for the ELDC kiosks/retail Units on either side of the Grand Parade Entrance to Tower Gardens, Skegness.

(ii) I would also like to know the business rates chargeable on each property."

4. On 19 January 2018 the Council acknowledged receipt of the request.
5. On 22 January 2018 the complainant wrote to the Council. He reiterated his request and clarified the information he required (*"for individual rents for four properties"*) and did not require.
6. On 14 February 2018 the Council provided its response. It advised that it did hold information falling within the scope of the request. The Council refused to release the information within the scope of part (i) of the request and applied the exemption under section 43(2) (commercial interests) of the FOIA. With regards to part two of the request, the Council provided the information for this.
7. On the same day, the complainant wrote to the Council and expressed his dissatisfaction with its response to his request.
8. On 7 March 2018 the Council provided its internal review outcome. The Council maintained its position that section 43(2) applied.

Scope of the case

9. The complainant contacted the Commissioner on 9 March 2018 to complain about the way his request for information had been handled.
10. During the investigation, the Council provided information for the total rent for the four kiosks in question, in a banding format to the complainant. The Council released the information (rents received for the kiosks) in brackets of £5,000. It provided the current annual rent received for each kiosks in a banding.
11. However, the complainant remained dissatisfied with the information provided by the Council (the banding figures) as he considered the banding to be *"only a very loose estimate and not the total amount"* which he had asked for. The complainant disputed the Council's reliance of section 43 of the FOIA and asked *"How can such information constitute... a trade secret orprejudice the commercial interests of any person...?"* The complainant subsequently requested a decision notice regarding the Council withholding the information.
12. The following analysis focuses on whether the exemption at section 43(2) of the FOIA was cited correctly.

Reasons for decision

Section 43(2) – prejudice to commercial interests

13. Section 43(2) of the FOIA states that information is exempt if its disclosure 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 therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
14. The Commissioner states in her Section 43 – Commercial Interests Guidance¹:

"A commercial interest relates to a person's ability to participate competitively in a commercial activity. The underlying aim may be to make a profit however it could also be to cover costs or to simply remain solvent."
15. The withheld information in this case is the rents charged for the kiosks/retail units at Grand Parade Entrance to Tower Gardens, Skegness. The Council considers that disclosure under the FOIA would prejudice the commercial interests of both the Council and the leaseholders of the kiosks.
16. The Council said that the information is exempt from disclosure as it would reveal the level of rent the Council has set for its commercial premises. This, it said, can be exploited by other providers of commercial premises, and potential end users, to the Council's detriment.
17. The Council argues the fact that negotiations had already taken place and that this had led to a reduction in the rents being received by the Council, evidences the point that its commercial interests have been prejudiced. The Council believes the exemption should be applied in order to protect its further commercial interests.

¹ <https://ico.org.uk/media/1178/commercial-interests-section-43-foia-guidance.pdf>

18. The Council has applied section 43(2) of the FOIA to the business rents charged on each property. The Commissioner considers the information is commercial in nature as it relates to the commercial activity of property rental.
19. Having determined that the information is commercial in nature the Commissioner has gone onto consider the prejudice which disclosure would or would be likely to cause and the relevant parties that would be affected.

The nature and likelihood of the prejudice occurring

20. The Council explained that *"the rents received are generally of a level commensurate with other similar businesses in the town and trade is seasonal. There have been negotiations with tenants concerning the amount of rent payable and some amounts have been varied according to their particular circumstances."*
21. The Council believes that if rents were to be revealed, this information could be used to re-negotiate an existing or future rent on either those kiosks or similar units nearby. The Council reported that some information (the rateable value) had already been disclosed to the complainant as part of the request. The Council maintains that disclosing the rental information alongside the rateable value would be prejudicial to its commercial activities as it would give a complete picture of the cost of a kiosk and could be used to negotiate a lower rent in the future.
22. The Council argued that disclosing the rents charged for the kiosks will have a likely impact on future negotiations. This may make the leaseholders of the kiosks/retail units want to take their business elsewhere.
23. The Commissioner's view is that there is a significant chance of prejudice occurring. She accepts that if the rental information was disclosed alongside the rateable value, this could prejudice the negotiating position of the Council when negotiating future leases on these properties. The Commissioner accepts that specifying the current rent would make it more difficult for the Council to negotiate higher rents than are charged currently with new tenants in future.
24. For these reasons, the Commissioner finds that prejudice to the commercial interests of the Council would be likely to occur through disclosure of the withheld information. Section 43(2) of the FOIA is, therefore engaged. The Commissioner has gone on to consider the public interest test in this case.

Public interest arguments in favour of disclosure

25. The Council recognises the public interest in openness and transparency when it is utilising public money, including promoting public understanding of the processes used by the Council in its commercial activities. The Council said that in the circumstances of this case, there is no wider policy issue or suspicion of wrongdoing to be considered.
26. The Commissioner's view is that there is a significant public interest in disclosure of information about how the Council collects funds and that this public interest applies to the information in question here. However, she notes that the Council has gone a significant way towards satisfying that public interest by disclosing information about the rents charged in bands of £5,000. This means that the public interest in disclosure of the specific information in question is of reduced weight.

Public interest argument in favour of maintaining the exemption

27. The Council has balanced the arguments in favour of disclosure against those arguments in favour of maintaining the exemption, specifically: competition and impact on other negotiations. It believes there is a public interest in allowing the Council to withhold information which would reduce its ability to negotiate or compete in a commercial environment if disclosed. The Council also considers an impact on other negotiations. The Council stated how important it is that leaseholders feel confident in the Council as a provider of accommodation to the area. It said that confidence may be eroded if commercial rents were to be disclosed.
28. The Council considers the public interest sits with it being able to compete in a competitive marketplace and in respecting the commercial interests of both the Council and leaseholders. The Council is of the view that maximising income whilst supporting local businesses is vital for the Council in continuing its work in promoting and ensuring the vibrancy of the area. The Council argues that the work it does for the local community is inherently in the public interest and it is essential that it is able to carry on that work in the most effective and efficient way possible.
29. The Commissioner has found above when concluding that the exemption is engaged that disclosure of the withheld information would be likely to prejudice the commercial interests of the public authority. There is a significant public interest in avoiding that outcome; enabling the Council to maximise its commercial interest is in the public interest as this assists it in the provision of public services. This is a valid factor in favour of maintenance of the exemption.

Balance of the public interest arguments

30. The Commissioner recognises there is a public interest in the disclosure of information which provides greater transparency in the spending of public money. In this case, disclosing the rents charged for the kiosks/retail units would give details of negotiations that have been undertaken with the leaseholders in recent years and which evidences the efforts and concessions made by the Council. However, the Commissioner also accepts that providing the requested information would also jeopardise the Council's ability to maximise the rent it can charge in future negotiations. Disclosing information which would put the Council at a disadvantage when negotiating rents for leaseholders would not be in the public interest.
31. There is significant public interest in not prejudicing the commercial interests of the Council, not only in securing best value for public money but also in ensuring that the Council can operate efficiently in its role by relying on the services of local businesses it has a relationship with and at a reasonable cost.
32. The Commissioner considers that the public interest in ensuring the Council is not put in a commercial disadvantage outweighs the public interest in disclosure. The Council was not, therefore, obliged to disclose the requested information.

Right of appeal

33. 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

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

34. 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.
35. 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

Ben Tomes
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