

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 August 2019

Public Authority: Birmingham City Council
Address: 6 Margaret Street
Birmingham
B3 3BU

Decision (including any steps ordered)

1. The complainant requested from Birmingham City Council (the Council) a feasibility study report concerning the Home of Metal project. The Council refused the request under section 43(2) (commercial interests) of the FOIA.
2. The Commissioner's decision is that the Council correctly cited section 43(2) of the FOIA. Therefore, the Commissioner does not require the Council to take any steps as a result of this decision.

Request and response

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

"Could you please forward a copy of a feasibility study undertaken by LaSalle for BCC and Capsule. The report was approved for funding by the Leader's Office (Albert Bore) on 8th October 2013 and the study was looking at the feasibility of establishing/developing a permanent home for the Home of Metal project. It was looking at establishing what would have been in effect a museum about Black Sabbath and Heavy Music in Birmingham.

I cannot find a copy of this report and I don't think it was ever made public despite it being financed by BCC."

4. On 26 November 2018 the Council responded and confirmed that it held the information requested. The Council also informed the complainant that the feasibility study was undertaken by another third party and it was not "LaSalle" as he had stated in his request. The Council withheld the information as it considered it exempt under section 43(2) (commercial interests) of the FOIA.
5. On 13 December 2018 the complainant asked for an internal review.
6. On 11 January 2019 following an internal review the Council maintained its original position to withhold the requested information under section 43(2).

Scope of the case

7. The complainant contacted the Commissioner on 23 January 2019 to complain about the refusal of his information request.
8. The withheld information is a feasibility study report for Capsule Events Limited ("Capsule") and the Council. Capsule are the organisation behind the Home of Metal project. This information encompasses the options for a next phase for Home of Metal in Birmingham, considerations regarding potential funding models and concepts concerning business planning.
9. During the course of the Commissioner's investigation, the Council stated that there were parts of the information that it no longer considered exempt under section 43(2) of the FOIA. In view of this, the Council was asked to disclose that information directly to the complainant, and did so.
10. The complainant responded to the information provided by the Council, which was a redacted copy of the feasibility study report. The complainant expressed his dissatisfaction with this information as he noted that a large majority of the report had been redacted and the parts that were not redacted, he argued, were mainly publicly available. He believed that the information he requested was not disclosed and therefore he considered that the Council's disclosure of the redacted sections of the report was "meaningless".
11. Having viewed the information that was disclosed, the Commissioner notes that the complainant was correct that a large majority of the content of the feasibility study continued to be withheld. The following analysis focuses on whether the exemption at section 43(2) of the FOIA was cited correctly in relation to the non-disclosed content of the feasibility study.

Reasons for decision

Section 43(2) – prejudice to commercial interests

12. 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 is, therefore, subject to the public interest test.
13. The exemption can be engaged on the basis that disclosing the information either “would” prejudice commercial interests, or the lower threshold that disclosure is only “likely” to prejudice those interests. The term “likely” is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice is more probable than not. For the Commissioner to accept that prejudice *would* result, she must be satisfied that this outcome is more likely than not.
14. Home of Metal is an arts and cultural project that celebrates and commemorates Heavy Metal music and its origins in Birmingham and the Black Country. The Commissioner notes that from 2011 to 2014 the Council was a project delivery partner in a range of exhibitions and events and that it was on this basis the Leader’s Office financed the feasibility study. She also understands that the Council is no longer a project delivery partner of the Home of Metal project.
15. The Commissioner considers that the withheld information is commercial in nature as it relates to an ongoing project concerning a feasibility study funded by the Council for a permanent Home of Metal museum in Birmingham.
16. 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 party or parties that would be affected.
17. The withheld information is a copy of a feasibility study undertaken for the Council and Capsule. The Council confirmed that they and Capsule are the parties whose commercial interests would, or would be likely to be prejudiced if the withheld information was disclosed. The Council also stated that Capsule had been consulted on the information request and had expressed concerns about commercial detriment if the requested information was disclosed.

18. The Council explained that the Home Of Metal is an ongoing project for Capsule and it considers the disclosure of this document to the world at large would give an unfair advantage to competitors of Capsule. It also provided evidence that there are competitors to the Home of Metal's plans. The Council said that a disclosure of sensitive commercial information which was provided to it by Home of Metal and that is reflected in the feasibility study could break the trust built up between the Council and its stakeholders.
19. The Council is of the view that Capsule would suffer significant prejudice to its commercial interests if the withheld information was disclosed, and that it is possible that Home Of Metal may fail as a long-term project. The Council said that this would have serious financial consequences for Capsule. It therefore considered that disclosure of the information requested *would* prejudice the commercial interests of Capsule.
20. The Council said that it considered the lower threshold to apply to its own commercial interests; *would be likely* to prejudice. It believed that *"the prospects of future partnership working of a similar nature would be likely to be impaired due to a lack of trust that the Council would protect the commercial interests of the third parties"*.
21. For Section 43(2) to be engaged three criteria must be met:
 - First, the actual harm which the Council alleges would be likely to occur if the withheld information was disclosed has to relate to commercial interests;
 - Secondly, the Council must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met.
22. With regards to the first criterion, the Commissioner accepts that the prejudice envisaged would be to the commercial interests of the parties concerned. Therefore, the Commissioner is satisfied that the first criterion is met. This is not to say that she agrees it will happen; simply that the criterion is met.
23. Regarding the second criterion, the Commissioner accepts that the reasoning of the Council concerns prejudice to commercial interests resulting from disclosure of the specific information requested.

24. Thirdly, the question here is whether the Commissioner agrees that disclosure *would be likely* to result to the commercial interests of the Council, and *would* result to the commercial interests of Capsule. In forming a conclusion here, the Commissioner has taken into account the reasoning from the Council and the content of the withheld information.
25. In terms of the Council's commercial interests, as noted above the Council has argued that prejudice would be likely to result as other stakeholders would be less likely to trust it to keep information supplied to it confidential. Whilst the Council did not go on to state clearly how this would result in likely prejudice to its commercial interests, on balance the Commissioner is willing to accept that a reluctance by third parties, including contractors, to work with the Council could impact on its ability to secure outsourced services on favourable terms.
26. As to whether the content of the withheld information suggests that there is a real and significant likelihood of its disclosure resulting in that outcome, the Commissioner notes that it does go into detail about the Home of Metal project and that Capsule did wish for it to remain confidential. Given these factors, the Commissioner accepts that disclosure of this information may result in other parties being less willing to do business with the Council. Her conclusion is, therefore, that disclosure of this information would be likely to result in prejudice to the commercial interests of the Council and so section 43(2) is engaged on this basis.
27. Turning to the commercial interests of Capsule, the reasoning for section 43(2) being engaged on this basis was set out in detail by Capsule when it was consulted on disclosure of the feasibility study by the Council. A particularly convincing point was that Capsule named other parties that were seeking to launch their own ventures to commemorate the music heritage of Birmingham and that these ventures would be in direct competition with the Home of Metal. It believed that disclosure of the detailed information in the feasibility study would assist these competitors to gain a commercial advantage.
28. Having viewed the withheld information and considered the arguments made, particularly those advanced by Capsule concerning its direct competitors, the Commissioner accepts that prejudice to the commercial interests of Capsule would be more likely than not to result through disclosure of the information in question. She therefore finds that disclosure of the information would result in prejudice to the commercial interests of Capsule and so section 43(2) is also engaged on this basis.

Public interest test

29. Having found that the exemption is engaged, the Commissioner has gone on to consider the public interest factors in favour of disclosing the withheld information and of maintaining the exemption.

Public interest arguments in favour of disclosing the withheld information

30. The Council stated that it strives to be open and transparent in all of its affairs, especially to show where and how public funds have been spent. In this case, contributing financially to the feasibility study.
31. The complainant said that an important and publicly funded report is not being made available for those who have an interest in this area. He argued that any financial information pertaining to Capsule could be redacted whilst still providing the report's main research, findings and recommendations. The complainant further argued that this was a report funded by local taxpayers money for an Arts Council National Portfolio Organisation, and therefore should be freely available to view.
32. The Commissioner recognises that there is a significant public interest in disclosure of information concerning how and where public funds have been spent and how this will impact on the area. She also acknowledges that the Council has no ongoing interest in this matter.

Public interest arguments in favour of maintaining the exemption

33. The Council said that there is a strong public interest in fostering confidence within the business community that commercially sensitive information will only be disclosed in compelling circumstances and that without this confidence, commercial activity may be seriously impeded. The Council argued "*requiring this particular company, but not any of its competitors, to disclose a feasibility study for an ongoing project would not be considered fair, and it is in the public interest to avoid this unfairness*". The Council is of the view that the public interest favours protecting Capsule from the financial disadvantage against its rivals and protecting the integrity of the Council as a source of public funding.
34. With regards to the Council's view that commercially sensitive information will only be disclosed in "*compelling circumstances*", the FOIA does not require "compelling" reasons to justify disclosure. Therefore, this statement from the Council is incorrect.

35. Although the Council had explained that it has no ongoing interest in this matter, it argued that the disclosure of the requested information would impair the Council's ability to conduct similar projects in the future if potential partners felt that early-stage planning documents could be released to competitors. It further argued that the disclosure of this information could damage the Council's commercial interests through loss of trade, which would not be in the public interest. The Council considers that on balance the public interest in maintaining the exemption outweighs that in disclosing the withheld information.
36. The Commissioner recognises that there is a public interest in preventing prejudice to the commercial interests of the Council. As the Council is publicly funded, disclosure in this case would be likely to prejudice the commercial interests of the Council and subsequently, would be likely to prejudice public funds. The validity of this factor is further highlighted by the well documented financial pressures in the local government sector. This is a valid public interest factor of significant weight in favour of maintaining the exemption.

Balance of the public interest arguments

37. The Commissioner recognises that there is a strong and legitimate public interest in the openness and transparency of public authorities with regard to their decision-making processes. In particular, there is a public interest in knowing more about the Home of Metal project given that its initial stages were publicly funded.
38. However the study is still being relied upon and the details and research retain commercial value and sensitivity. The Commissioner is satisfied that a disclosure of this information would undermine the funds spent researching the report and would remain of value to Capsule's competitors.
39. It is in the public interest to ensure that the Council is able to negotiate and deal with private organisations effectively and without commercial detriment to itself or the organisations it contracts with. Given the level of likelihood that harm would occur should the information be disclosed, the Commissioner has determined that the balance of public interest favours maintaining the exemption.
40. The Commissioner's conclusion is that the public interest in disclosure of the withheld information is outweighed by the public interest in maintaining the section 43(2) exemption. Therefore, the Council was not obliged to disclose the remainder of the requested information.

Right of appeal

41. 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@justice.gov.uk.

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

42. 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.
43. 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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