

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 June 2019

Public Authority: Surrey County Council
Address: County Hall
Penrhyn Road
Kingston on Thames
Surrey
KT1 2DN

Decision (including any steps ordered)

1. The complainant has requested information about a parking scheme from Surrey County Council ("SCC"). SCC refused to provide the requested information on the basis of the exemptions at sections 22(1)(information intended for future publication) and 43(2)(commercial interests) of the FOIA. It also refused to comply with one part of the request on the basis that it was not valid under the terms of section 8 (request for information) of the FOIA.
2. The Commissioner's decision is that, where cited, SCC has correctly applied sections 22(1) and 43(2) of the FOIA in its response to the request. She also finds that it was correct to find that one part of the request was not valid.
3. SCC breached section 10(1) of the FOIA by failing to respond to the request within the statutory time limit. No steps are required.

Background

4. Further information about the implementation of car parking schemes which relate to this request can be found online in the "Surrey Countryside Estate Partnership Business Plan 2018/19"¹.

Request and response

5. On 30 October 2018 the complainant wrote to SCC and requested information in the following terms:

"1. What are the expected figures in your business plan for Newlands Corner for total revenue, expenditure and net revenue? You have published your figures for the other 5 sites at Chobham, Whitmoor, Rodborough, Ockham and Norbury Park which show your expected total revenue is £448k pa, expenditure is £247k pa and net revenue is £201k pa for those sites.

2. I have been asking Surrey County Council and yourself for these figures for Newlands Corner for over 2 years but you told me they were still in draft. How can this be possible when you approved public expenditure at Newlands Corner of £122k for the parking charge scheme, on top of the £78k you had already spent?

3. What is the actual total revenue, expenditure and net revenue for all 6 sites for the first 3 months of operation? Please only take account of one quarter of the annual season ticket income.

Under this request, I also request

4. A split of the expenditure in question 1 into its main components including amortisation of investment debt (and the number of years this is spread over), VAT, cost of operating the parking scheme, and payment to Albury Estate.

5. A split of the figures in question 3 between Newlands Corner and the rest of the Surrey Countryside Estate".

6. On 2 January 2019 SCC responded. It refused to provide the information at parts (1) and (4) on the basis of section 43(2) (commercial interests)

¹ https://www.surreycc.gov.uk/__data/assets/pdf_file/0004/160078/SCC-and-SWT-Partnership-Business-Plan-March2018.pdf

of the FOIA, and parts (2), (3) and (5) on the basis of section 22 (information intended for future publication).

7. Following an internal review, SCC wrote to the complainant on 19 January 2019. It maintained its position, albeit reference was made to a 'misunderstanding' in respect of its response to part (2) whereby it advised that it did not now consider the request to be a valid request for recorded information.

Scope of the case

8. The complainant contacted the Commissioner on 22 February 2019 to complain about the way her request for information had been handled. She advised as follows:

"I believe the refusal to be a political decision, motivated by a badly managed failing project on which large sums of money have been wasted (£200,000 at Newlands Corner, and £332,000 for the other 5 sites)".

9. The Commissioner will consider timeliness, whether part (2) is a request for recorded information, and whether SCC is entitled to rely on the exemptions cited as a basis for refusing to provide the withheld information.
10. The Commissioner has viewed the withheld information in this case.

Reasons for decision

Section 10 – time for compliance

11. Section 10(1) of FOIA provides that a public authority should comply with section 1(1) within 20 working days. Section 1(1)(a) initially requires a public authority in receipt of a request to confirm whether it holds the requested information.
12. The request was submitted on 30 October 2018 and the complainant did not receive a response, which confirmed that SCC was in possession of the relevant information, until 2 January 2019. The Commissioner therefore finds that SCC has breached section 10(1) by failing to comply with section 1(1)(a) within the statutory time period.

13. The Commissioner uses intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft "Openness by design"² strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"³.

Section 8 – request for information

14. SCC has advised that it does not consider part (2) of the request to be a valid request for recorded information.

15. Section 8 of the FOIA states:

"(1) In this Act any reference to a "request for information" is a reference to such a request which-
(a) is in writing,
(b) states the name of the applicant and an address for correspondence, and
(c) describes the information requested".

16. In this case, the complainant made her request in writing, stated her name and has given an address for correspondence. Therefore the requirements of section 8(1)(a) and (b) were satisfied.
17. The Commissioner considers that a request will meet the requirements of section 8(1)(c) as long as it contains a sufficient description of the information required. Each request has to be judged on its individual merits as to whether there were sufficient indicators provided to enable the information requested to be adequately described for the purposes of section 8. As long as a request attempts to describe the information it is likely to meet the requirements of section 8(1)(c) as it is always open to the public authority to seek further clarification to identify the information.
18. SCC initially refused part (2) of the request under the exemption at section 22(1). However, following its internal review, it revised its position saying:

"This is not recorded information and therefore is outside the remit of the Freedom of Information Act 2000".

² <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

³ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

19. In correspondence with the Commissioner it advised:

"We took number (2) not to be a request for recorded information but a request for us to comment on our previous non-disclosure of the items requested in part (1) (ie create information) as well as being a comment by the requester and therefore outside the remit of the Act".

20. The complainant has not provided any comments regarding SCC's interpretation of this part of her request.

The Commissioner's view

21. In her guidance⁴ for organisations on what they should do when they receive a request, the Commissioner states:

"Any genuine attempt to describe the information will be enough to trigger the Act, even if the description is unclear, or you think it is too broad or unreasonable in some way....

This is not a hard test to satisfy. Almost anything in writing which asks for information will count as a request under the Act. The Act contains other provisions to deal with requests which are too broad, unclear or unreasonable".

22. The Commissioner has considered the wording of this part of the request. As the complainant has not provided any specific arguments she is unable to take these into consideration, albeit she recognises that this position was only introduced at internal review stage.

23. The Commissioner agrees that part (2) of the request is phrased as a question designed to obtain an explanation as to why figures are still in draft, as opposed to the actual figures themselves which are caught by part (1) of the request (which will be dealt with separately). On this basis the Commissioner agrees with SCC that to respond to part (2) would require it to create information and give a qualified opinion.

24. It follows that she finds that part (2) of the request is not valid for the purpose of the FOIA and SCC was not required to respond to it under the FOIA.

⁴ <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/receiving-a-request/>

Section 22 - information intended for future publication

25. This has been cited in respect of parts (3) and (5) of the request.
26. Section 22(1) of the FOIA states that information is exempt if –
- a) The information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
 - b) The information was already held with a view to such publication at the time when the request for information was made, and
 - c) It is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph a).
27. It is important to note that while a public authority must hold the information with a view to its publication at the time of the request, the exemption does not require a set publication date to be in place. The date of publication does not need to be definite for the exemption to apply.
28. SCC has confirmed to the Commissioner that there was a settled intention to publish the information prior to the complainant's request being received. It advised that this can be evidenced, to some extent, by references to Facebook posts which the complainant has herself made, these posts pre-dating her request. The Commissioner notes that when requesting an internal review the complainant also included the following quote taken from an interview between two Councillors on 29 October 2018 and subsequently placed online:
- "Once we've had a good period of time, perhaps another 6-9 months, of these operating, I'm quite happy to publish all of the figures exactly of what money we've got in and exactly what money we've spent because I think residents have a right to know that. There's no good me doing that at the moment it needs a period of time, because we've still got two car parks Whitham and Salt Box (sic) still not got charging in because of problems with the link with 4G and we've also got a number of car parks or meters not currently working. We need a period of time where we get no vandalism and we can then judge exactly what the total net revenue is going to be and I will share that once we've had a longer period time operating".*
29. On this basis, SCC believes that it can evidence that its intention to publish pre-dated this request, which was made the following day. It added that its understanding is that:

"... there does not have to be a set date as such – our published intention is that the figures requested would be published after the first year of operation and the intention is to publish the figures in September. It is likely that some operation costs are not known for the first three months as they will be invoiced at the end of the year".

30. The Commissioner also notes that when requesting an internal review the complainant refers to earlier requests she has made saying:

"Could you please inform me exactly when (with documentary support) SCC first said that it would publish the financial information relating to the car parking charges after a year of operation of the charges? I am aware that while my most recent enquiry for this may have been made after such a date and may be exempt, other enquiries were made at a very early stage".

31. Whilst there may be no evidence to support SCC's position in respect of any earlier correspondence between the parties (which the Commissioner has not sought to ascertain), for the purposes of this decision notice the Commissioner is only considering this current request. Any earlier requests and responses which may have been made have not been taken into account.
32. On this basis, the Commissioner is satisfied that, at the time of the request, SCC did have a settled intention to publish the requested information, a position which the complainant would not actually seem to dispute.
33. However, before concluding that the exemption is engaged, the Commissioner must consider whether it is reasonable in all the circumstances that the information should be withheld until it is published.
34. With regard to this, SCC has advised the Commissioner:

"We consider it is reasonable in order to obtain a true picture of the cost and benefits of charging for parking in respect of the Commons car parks to allow the scheme to run for the full year before prematurely publishing the figures. There have been a number of unforeseen costs including more than one case of vandalism (requiring the replacement of the parking meters) which have incurred additional costs not to mention boycotting of the car parks by some protesters at the outset which are likely to have distorted the initial figures.

Both the Council and SWT [Surrey Wildlife Trust] are legally required to publish annual reports which are required to be

audited. It is understood that SWT's annual audited accounts would be due for publication in October 2019 and the Council's audited Statement of Account for the previous financial year is usually published in September of the following year.

The Council's view is that it is reasonable in all the circumstances that the information should be published in line with its normal practice and procedure when the accounts have been audited and are accurate rather than in a piecemeal fashion when not all the expenditure is known. The Council will be in a position then to fully supply the information requested so far as it exists".

35. The Commissioner accepts that releasing this information in line with its current practices, ie annually, following the audit of SCC's accounts, seems a reasonable approach to take. She is therefore satisfied with the application of section 22 of the FOIA.

Public interest test

36. Section 22 is subject to the public interest test. Therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

37. In favour of disclosure SCC has recognised that this would promote transparency in the accountability of public monies.
38. It has also argued that it would:

"Contribute to understanding of and participation in the public debate of issues of the day i.e. would potentially allow a more informed debate of the issues".

Public interest arguments in favour of maintaining the exemption

39. Against disclosure SCC has argued that, from the beginning of the project, it would publish the financial information relating to the car parking charges after a year of operation of the charges. It advised that the publication will include the figures requested and that:

"A years' worth of figures will provide an accurate picture of the project".

Conclusion

40. SCC has previously explained to the complainant:

"The information held at the date of the request was the income from the parking meters at each of the car parks on the commons managed by SWT since the charges came into operation in July 2018. Currently this information is held by SWT rather than the Council but will be held on behalf of the Council. Much of the projected expenditure for the Project is chargeable on an annual basis and relates to the provision of services to all the car parks in their entirety rather than costed by individual specific car parks. Any split of such expenditure would require a subjective decision which has not been made rather than a simple computation".

41. The Commissioner acknowledges SCC's position in that the complainant is requesting costs for a project which has only been running for a short while and that any available data will be inaccurate and not reflective of a longer time period - for example, SCC has referred to vandalism and potential other costs arising over the first year which may not have been anticipated. She accepts that, at the time of the request, charging had only been ongoing for approximately three months and, as recognised by the Councillors in the Facebook quote referred to above, it was considered that a further six to nine months of data would be needed prior to any publication.
42. The Commissioner agrees with the complainant that publication of data involving substantial amounts of public money is very much in the public interest. However, such publication after a very short time period is likely to be misleading and inaccurate as only limited information is available. The Commissioner also notes that SCC intends to publish when the parking scheme has been operating for a longer time period.
43. Taking the above arguments into consideration, the Commissioner agrees with SCC that it is reasonable for the figures requested to be made available in line with its usual practices, ie following audit, rather than in a piecemeal fashion. She therefore finds the public interest balances in favour of maintaining the exemption.

Section 43 – commercial interests

44. This has been cited in respect of parts (1) and (4) of the request. It covers the expected figures in SCC's business plan for Newlands Corner carpark for total revenue, expenditure and net revenue and a split of this expenditure into its main components. Newlands Corner is part of the Albury Estate.
45. Section 43(2) of the FOIA says that information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
46. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met. First, the actual harm that the public

authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.

47. Second, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice that is alleged must be real, actual or of substance.
48. Third, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – eg disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk.
49. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
50. SCC is relying on the lower level of likelihood of prejudice in this case, ie that disclosure *would be likely to* prejudice its commercial interests. In relation to this lower threshold, there must be a real and significant risk of prejudice occurring.
51. Section 43(2) is subject to the public interest test.
52. The term 'commercial interests' is not defined in the FOIA. In the Commissioner's guidance on section 43 (Freedom of Information Act Awareness Guidance No 5)⁵ the Commissioner considers that:

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services".
53. The Commissioner must consider the prejudice that disclosure of the withheld information would cause in respect of the Council's commercial interests, and to any other party or parties that would be affected.
54. In responding to the complainant, SCC advised her that:

⁵https://ico.org.uk/media/fororganisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

"The Council do not own the land and access to Newlands Corner is by agreement with the Albury Estate and therefore it is necessary for the Estate to agree to the proposals regarding the car park which were not covered by existing agreements between the Council and the Estate.

Although, the negotiations are well advanced and the heads of terms settled subject to contract, the agreement which will be in the form of a lease had not yet been completed at the request. It is still incomplete at the date of this review.

It is considered that disclosure at this stage would be likely to prejudice the completion itself of the Lease and thereby prejudice the Council's commercial interests as it would lead to abortive public expenditure which would not be in the public interest".

55. SCC has further explained to the Commissioner:

"Newlands Corner is different to the other Commons upon which charges have been introduced. The Council owns the other Commons which are managed by SWT on its behalf. The Council does not own the land which is part of the Albury Estate which is owned by a family trust belonging to the Duke of Northumberland.

The public do not have a legal right to drive over the land or park on it. Such rights can only be granted by the owner of the land. The Council has an access agreement with the owner which allows the public to access the land. It does not currently cover the parking proposals and it has been necessary to negotiate terms for the parking to proceed and for charges to be levied which negotiations have taken some time.

The figures in the business plan formed the basis of the negotiations and part of the negotiated terms was the share of the parking charges to be passed onto the Albury Estate and how it was to be calculated.

The works have been carried out and the parking proposals have been introduced but only on the basis of a revocable licence from the Albury Estate. The heads of terms have been settled for the final agreements but neither party has entered into a legally enforceable agreement to implement them and they are still 'subject to contract'.

Based on previous experience and the difficulties of the negotiations we consider that if we published the figures at this stage it would be likely to prejudice the completion of the final agreements. The Albury Estate have made it clear to us that they do not want the

details published at this stage and they could still withdraw from the agreed terms leaving the Council with potential abortive costs and the cost of further negotiations.

This would not be in the public interest as it could lead to additional expenditure of public monies”.

56. SCC advised the Commissioner that, whilst it does not have anything in writing, the Albury Estate didn't want the agreement to be made public and that the commercial sensitivity would apply to both the Albury Estate and the Council. It further explained:

"The Council may well have to make similar agreements with other landowners and would not want the basis of those to be in the public domain while we are in discussion as it is a negotiated agreement. Likewise the Albury Estate also makes these agreements all the time and would not want to see the details in public as it could affect other negotiations.

We accept that the actual payments will be public once agreed as it is public money”.

57. The Commissioner has first considered whether the harm that SCC alleges would be likely to occur if the withheld information was disclosed relates to the commercial interests of any party. SCC's response above clearly outlines that it believes its own and a third party's commercial interests would be likely to be prejudiced were the information disclosed.
58. Again, based on the submission above, as negotiations were ongoing at the time of the request (and remain ongoing), the Commissioner is further satisfied that there is a causal relationship between disclosure of the information being withheld and prejudice to those commercial interests which is real, actual and of substance. The Commissioner is therefore satisfied that SCC has demonstrated that the exemption is engaged.
59. SCC is relying on the lower level of likelihood of prejudice in this case, ie disclosure *would be likely to* prejudice its commercial interests. In relation to this lower threshold, there must be a real and significant risk of prejudice occurring.

Public interest test

60. Section 43 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.

Arguments in favour of disclosure

61. SCC has recognised that there should be transparency in the accountability of public monies and that commercial activities should be conducted in an open, transparent and honest way.

Arguments in favour of maintaining the exemption

62. SCC has argued that the negotiations for the lease of the car park are being finalised and disclosure at this stage could affect the successful conclusion of those negotiations. It has added that such discussions are considered by both parties to be commercially sensitive and confidential.
63. SCC has also argued that disclosure would adversely affect the legitimate economic interest of the council in that early disclosure could lead to a less "financially successful" conclusion to those negotiations.

The Commissioner's view

64. The Commissioner notes that, at the time of the request, and during her investigation, negotiations remain ongoing in respect of the terms being negotiated with the Albury Estate. Whilst the complainant may not agree that this can be the case as they have been ongoing for some time, the Commissioner is advised to the contrary.
65. It is therefore clear to the Commissioner that there is a real risk of harm to any formal agreement being reached between the parties were the information requested to be released prematurely. The agreement is clearly subject to change and remains at risk of failing if terms which have not been formally agreed are disclosed prematurely. However, once the terms have been agreed, then this harm may diminish.
66. In conclusion, whilst the Commissioner accepts that disclosure of the withheld information could further inform the public debate in question, she is satisfied that such a benefit is outweighed by the public interest in withholding the information given that negotiations are ongoing and the monies requested will be published in due course.

Right of appeal

67. 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

68. 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.
69. 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

Carolyn Howes
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