

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 September 2015

Public Authority: London Legacy Development Corporation

Address: Level 10
1 Stratford Place
Montfichet Road
London
E20 1EJ

Decision (including any steps ordered)

1. The complainant has requested a copy of the Concession Agreement (the Agreement) between London Legacy Development Corporation (LLDC) and West Ham United Football Club (WHUFC) for the use of the London Olympic Stadium (the Olympic Stadium). The LLDC provided a redacted version of the Agreement, withholding information contained within the document under variously the 'law enforcement' (section 31(1)), 'health and safety' (section 38(1)), 'personal information' (section 40(2)) and 'commercial interests' (section 43) exemptions in FOIA. The Commissioner has only been asked to consider the commercial aspects of the tenancy agreement. The Commissioner's decision is that section 43(2) and the 'information provided in confidence' (section 41) exemption, which was introduced by WHUFC, are not engaged with regard to the specified elements of the Agreement. He therefore requires the LLDC to disclose this information to ensure compliance with the legislation.
2. The public authority must take these steps within 35 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

3. On 8 May 2014 the complainant contacted the LLDC and made the following request:

Please provide me with a document which sets out the full rental agreement with West Ham United FC for their tenancy of the Olympic Stadium.

4. The LLDC's initially replied on 28 May 2014 by informing the complainant that there would be a delay in providing its response to the request as it required additional time to consider the public interest in the disclosure of the information in question. The complainant wrote to the LLDC on 19 June 2015 to advise that he was only interested in the commercial aspects of the Agreement and was therefore prepared to accept the redaction of information in relation to the other areas of the document.
5. Following further correspondence with the LLDC about the delays attendant to the handling of the request, the complainant asked the LLDC on 8 July 2014 to carry out an internal review. This was completed and the outcome of the review provided by the LLDC to the complainant on 5 August 2014. Among other points, the reviewer concluded that the LLDC should provide the complainant with a revised deadline for a response, including an update on progress, for a response to his FOI request.
6. The LLDC's next contact with the complainant was on 21 August 2014, in which it provided a substantive response to the request and included a copy of the Agreement. Parts of the Agreement were however redacted on the basis that the information was exempt from disclosure under sections 31(1), 38(1), 40(2) and 43(2) of FOIA. Sections 31(1), 38(1) and 43(2) are qualified by the public interest test and the LLDC found that on balance the public interest favoured withholding the requested information.

Scope of the case

7. The complainant contacted the Commissioner on 30 September 2014 to complain about the LLDC's decision to withhold information contained in the Agreement.
8. In terms of the information needing to be analysed, the complainant has reiterated that his interests are confined to specific commercial aspects

of the Agreement. It is these aspects which form the focus of this decision notice.

Reasons for decision

Background

9. The Olympic Stadium is an iconic venue, which was originally built to accommodate 80,000 spectators watching Olympic events in the 2012 games. To secure the 'legacy' of the Olympic Stadium following the completion of the Olympic Games, authorities were required to decide how the site would be best used in the future. This decision-making process was complex and beset by challenges¹ but in March 2013 WHUFC was confirmed as tenants of the Stadium from 2016-17 in a deal that also ensured the use of the venue for athletics in the summer and other sporting events.
10. An extract of the press release issued on 22 March 2013 confirming this decision is included below:

The Mayor of London, Boris Johnson, and Newham Mayor, Sir Robin Wales, today announced that the long-term future of the iconic stadium on Queen Elizabeth Olympic Park is secure, with a deal with West Ham United Football Club that confirms the Premier League club as the Stadium's long-term anchor tenant.

West Ham United's 99 year concession commences in 2016 and secures a year round programme of sports and events in the venue. The Stadium hosted the Opening and Closing Ceremonies and some of the finest moments of the 2012 Olympic and Paralympic Games, and will now play host to the world's most watched football games.

West Ham United Football Club will move into the Stadium in summer 2016, after it is transformed into a UEFA Category 4 venue with 54,000 seats. Transformation works will include a new roof, corporate areas, toilets, concessions and retractable seating.

In addition to the funds to be provided by the Legacy Corporation for the adaptation works, West Ham will contribute £15 million, Newham Council will invest £40 million and the Government has agreed to

¹ <http://www.theguardian.com/sport/2015/jul/18/west-ham-london-olympic-stadium-timeline>

provide additional support of up to £25 million should it be required once the tenders are returned.

The deal will generate hundreds of new jobs, encourage many thousands of visitors to the local area and act as a catalyst for further economic investment and growth in the area. The proposed sale of Upton Park also provides further regeneration opportunities.²

11. The arrangement for WHUFC to use the stadium constructed using taxpayer funds is unique, with the closest comparator being Manchester City's use of the stadium built for the 2002 Commonwealth Games which was also financed by the public. As the BBC has recently reported, the difference is that WHUFC will allegedly not be covering all of the running costs of the stadium, unlike Manchester City which pay all of their overheads, on top of rent of about £4 million a year agreed with Manchester City Council. The BBC further explains that the City of Manchester Stadium was always designed with football in mind as the sole post-Commonwealth Games use for the venue. That meant it cost £42 million to convert, compared to the £272 bill that the Olympic Stadium's conversion has required.³

The withheld information

12. As referred to in the 'Scope of the case' section, the complainant has specified the categories of information that he requires to be disclosed where they are contained within the Agreement. These categories are listed below along with a summary of the LLDC's position in respect of these items:

1. *The structure and amount of the annual rental, including*
 - a. *reduction, in the event of relegation*
 - b. *extra rental based on team performance*
 - c. *inflation adjustment over the period of the tenancy*
 - d. *tenancy termination*

LLDC's position: information withheld under section 43(2) of FOIA.

² <https://www.london.gov.uk/media/mayor-press-releases/2013/03/olympic-stadiums-future-secured-in-historic-deal-between-mayors>

³ <http://www.bbc.co.uk/sport/0/football/33780720>

2. *Payment for overheads normally paid by clubs who own their own stadia, for example*

- a. *ticket sales and turnstile personnel*
- b. *security personnel*
- c. *police*

LLDC's position: information withheld under section 43(2), although LLDC was prepared to disclose that WHUFC's annual Usage Fee covers all match day costs associated with their use of the stadium.

3. *Match day revenue*

- a. *what % of ticket sales is kept by West Ham?*
- b. *what % of catering revenue is kept by West Ham?*
- c. *what % of 'hospitality' revenue is kept by West Ham?*

LLDC's position: information withheld under section 43(2), although LLDC was prepared to disclose that WHUFC retains all ticket sales revenues from its home matches held at the stadium.

4. *Capital cost of stadium conversion contributed by West Ham, and when the payment falls due.*

LLDC's position: WHUFC's payment of £15m towards the transformation works is already in the public domain. The date of payment is prior to the WHUFC's relocation to the stadium.

5. *Any other agreements which allow West Ham to earn revenue as a direct outcome of their tenancy (such as sponsorship of the stadium, naming rights, etc).*

LLDC's position: information outside the scope of the original information request. The LLDC did, however, clarify that the areas of the tenancy agreement that related to sponsorship and naming rights were being withheld under section under section 43(2) of FOIA.

6. *Any other costs which West Ham have to bear, not already covered above, which they would not bear if they were still at their current (owned) stadium.*

LLDC's position: information outside the scope of the original information request.

7. *Any clause which allows West Ham to have a veto over or other influence over other tenants of the stadium or one-off uses of the stadium.*

LLDC's position: provisions for WHUFC's use of the stadium, referred to under the defined term 'Overriding Priority Principle' and associated clauses, were disclosed in the version of the agreement supplied to the complainant. This states that the WHUFC has priority use of the stadium and WHUFC has rights to enforce this principle. Under the agreement, however, WHUFC does not have a veto over other uses/users of the stadium in addition to the Overriding Priority Principle.

13. The Commissioner considers below the information that LLDC has withheld under section 43(2) below. This includes the references to sponsorship and naming rights included in the agreement, information in respect of which the complainant has confirmed he is seeking.

Section 43(2) of FOIA – commercial interests

14. Section 43(2) of FOIA states that information is exempt information if its disclosure under the legislation would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). A commercial interest relates to a person's ability to participate competitively in a commercial activity, ie the purchase and sale of goods or services.
15. The construction of section 43(2) of FOIA means that a public authority is firstly required to consider the prejudice test. This test has three stages, each of which must be satisfied in order for the exemption to be engaged.
16. First, the harm that is envisaged would, or would be likely to, occur should relate to the applicable interest described in the exemption. Second, there is a causal relationship between the potential disclosure of the withheld information and the prejudice that the exemption is designed to protect against. Third, there is a real risk of prejudice arising through disclosure, with a public authority able to demonstrate that either disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. Section 43(2) is also qualified by the public interest test. This means that if the exemption is found to be engaged on the basis that each of the stages of the prejudice test are satisfied, a public authority must go on to assess the balance of the public interest in disclosure.
17. The Commissioner's analysis of the arguments presented in relation to the prejudice test follow.

1) Does the harm relate to the commercial interests of a party?

- The LLDC's position
18. The LLDC has argued that the withheld information (in whole or in part) contains commercially sensitive information which falls within section 43(2) of FOIA as the information relates to the LLDC's and WHUFC's sensitive commercial interests, such as financial models, sponsorship, brand partnerships and current procurement. In particular, the LLDC contends that disclosure would affect the LLDC's and, or WHUFC's ability to participate competitively in commercial activity, be effective in negotiations and successfully enter into transactions with other commercial entities.
- The Commissioner's position
19. With regard to the first stage of the prejudice test, the Commissioner accepts that the prejudice cited by the LLDC is applicable to the commercial interests exemption.

2) Is there a causal relationship between disclosure and the prejudice cited?

20. As stated, the LLDC considers that disclosure would affect both its own and WHUFC's commercial interests. The arguments advanced for the respective parties are outlined in turn.
- The commercial interests of the LLDC
21. With regard to the LLDC's commercial interests, it is argued that releasing information relating to the ongoing naming rights exercises would harm the LLDC's ability to achieve best value for money on this procurement and related negotiations. Disclosure would impact on the LLDC's ability to secure a naming rights partner; prejudice the stadium operator's ability to secure usage fees at a commercial rate and therefore reduce the stadium's commercial performance and future payments to the public sector; and in addition breach confidentiality agreements between LLDC and WHUFC, which WHUFC have stated they would consider an actionable breach of confidence and would sue for breach of confidence.
- The commercial interests of WHUFC
22. Where it is claimed that the commercial interests of a third party are at stake, the Commissioner does not consider it appropriate to take into account speculative arguments presented by a public authority regarding the nature and severity of any prejudice. Rather, any

arguments for the engagement of section 43(2) should accurately reflect the actual concerns of the third party.

23. The LLDC has consulted with WHUFC about the request and provided the Commissioner with a letter that expresses in some detail WHUFC's concerns regarding disclosure. The Commissioner has considered the letter in full but, for reference purposes, pulls out here some of what would appear to be the key points advanced by WHUFC.
24. WHUFC states that the Agreement is a unique agreement, in that no other Premier League football club has or will relocate to the Olympic Stadium. New ground has therefore been broken, which in WHUFC's view amplifies the sensitivity of the commercial terms which were agreed. WHUFC also highlights that no other football club's tenure at its home stadium is subject to such scrutiny.
25. To place the issue in context, WHUFC reminds us that its rights as a concessionaire of the Olympic Stadium were secured following a competitive tender administered by the LLDC. The letting followed a rigorous procurement process undertaken over several years, which was tested in the courts upon application for judicial review and WHUFC states that the process was open and transparent. The tendering process was, however, conducted in confidence insofar as the tender was based on confidential information provided by the WHUFC and it was understood that the information should remain confidential. WHUFC argues that it would not have bid to use the Olympic Stadium without enforceable provisions regarding confidentiality.
26. With regard to the withheld information, WHUFC stresses that it operates in a highly competitive sector of the economy and argues that there is an obvious and clear risk that details of WHUFC's utilisation of the Olympic Stadium would be used against it in sensitive negotiations relating to the transfer of players and the commercial brand partnerships and sponsorship. Third parties, armed with this knowledge, would be able to reverse engineer the financial circumstances relating to WHUFC and to adjust their own payment demands accordingly.
27. WHUFC considers that FOIA was not intended to be used as a way of challenging the awards of contracts under a procurement process but suggests instead that the correct form for such challenges is the courts. It states that guidance to FOIA includes various examples of information which may have the potential to damage commercial interests, in respect of which the following apply in this situation:
 - Information relating to the preparation of a competitive bid.

- Information about the financial and business viability of a company.
 - Information provided to a public authority in respect of an application for a licence or as a requirement of a licence condition or under a regulatory regime.
 - Strategic business plans.
 - Marketing plans.
28. WHUFC, the letter explains, is deeply concerned that disclosure of the commercially confidential and sensitive information will inevitably have an adverse impact on the stadium partnership.
29. In WHUFC's view the timing of the request is also a critical consideration, with disclosure in the circumstances having the very real potential to damage the perception of WHUFC in relation to the stadium. This, WHUFC contests, would ultimately affect the club's ability to sell tickets and prejudice WHUFC's negotiating position with customers and suppliers alike.
- The Commissioner's position
30. In his initial correspondence to the LLDC, the Commissioner suggested the exceptional circumstances that led to WHUFC having an option to relocate potentially weakened the ability of competitors to use the information in other situations. Both the LLDC and WHUFC, however, consider that it is precisely the opposite which is true.
31. The LLDC argues that the 'uniqueness' of the deal means any release of the commercial terms of the deal would bring greater harm to the parties, in particular WHUFC. It explains that the vast majority of football clubs of similar size to WHUFC own and operate their own stadiums, covering all costs and retaining all revenues generated, and keep such information confidential. It is of value to competitors because knowing a football club's actual and projected operating costs and revenues would mean that rivals would have an insight into that club's ability to compete for players and sponsorship deals.
32. This position is similarly reinforced by WHUFC. It states that WHUFC is competing with other Premier League clubs to attract the best sponsors and commercial brand partners to support its commercial ventures. WHUFC operates in a market in which there are comparatively few competitors and which is scrutinised by the media to a much greater extent than many business sectors.

33. Where a public authority and private partner engage with each other in some capacity in relation to a proposed project, the public authority is likely to hold a significant amount of information in relation both to the project itself and the private partner's business. The Commissioner recognises that information relating to this engagement may be commercially sensitive in certain situations.
34. The Commissioner has previously issued a decision notice on the LLDC's refusal to disclose particular information concerning the bid of Tottenham Hotspur Football Club (THFC) to use the Olympic Stadium (FS50524514, 28 July 2014)⁴. The LLDC refused to disclose the information under sections 41 (information provided in confidence), 40(2) (third party of personal data) and 43(2) (prejudice to commercial interests). The Commissioner upheld the application of section 41 and was not therefore required to consider the application of section 43(2) of FOIA. Pertinently, however, the Commissioner found that the information formed part of THFC's business model and that disclosure of this information would harm the interests of the confider, namely THFC.
35. The information considered in FS50524514, which relates to a tender proposal, is of course different from the Agreement information, which follows the selection of WHUFC's tender and confirms the arrangements regarding the use of the Olympic Stadium. The question for the Commissioner is therefore whether a link can still be made between the information and the prejudice cited. In his view, it cannot.
36. The arguments underpinning both the LLDC's and WHUFC's position is that disclosure would reveal elements of a business strategy which could be exploited by competitors. The Commissioner acknowledges that the Agreement includes specific details of the terms on which WHUFC can use the Olympic Stadium and the obligations placed on WHUFC based on its performance. The Commissioner also accepts that at the time the request contracts relating to some of the services provided by the Stadium had still to be negotiated.
37. In the Commissioner's view, however, both the LLDC's and WHUFC's submissions fail to demonstrate the specific way that the information could be exploited by a competitor and, or how disclosure would place either party at a commercial disadvantage. In coming to this view, the Commissioner does not dispute that WHUFC operates in a highly competitive field. Yet, the Commissioner also considers that the terms of

⁴ https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1010644/fs_50524514.pdf

the Agreement that have been requested do not drill down to the specific business model adopted by WHUFC. Although other Premiership clubs would not be subject to the same level of scrutiny, the Commissioner has found that WHUFC has not shown a direct link between the terms of the Agreement that are actually being withheld and the prejudice cited. Equally, the Commissioner considers that the LLDC's arguments fail for this same reason.

38. The Commissioner acknowledges the LLDC's concern that WHUFC may sue for breach of confidence if WHUFC considered that disclosure breached the confidentiality agreements between the parties. The Commissioner also considers, however, that WHUFC would have known that it would have been subject to FOIA when the Agreement was signed. The Commissioner's general approach to confidentiality clauses or contracts in public sector contracts is set out in his guidance⁵:

In short, the Commissioner recognises that, while a public authority cannot contract out of its FOIA obligations, there is a place for confidentiality clauses where they serve to identify information that may be exempt. This is not to say that the information referred to in such a clause would automatically attract an exemption. The information would still have to be reviewed in light of all the circumstances existing at the time a request was received in order to decide whether or not it could be withheld. The clause would at least help identify occasions when the contractor should be consulted.

However, a confidentiality clause which provides a false sense of security that information can be withheld when it is in fact not covered by an exemption in the Act, will only damage relationships if a public authority decides to release information at a later date.

39. The Commissioner considers that the same approach should be adopted here and, consequently, does not accept that the existence of a confidentiality agreement necessarily demonstrates that the exemption is engaged.
40. The Commissioner has therefore decided that the prejudice test in section 43(2) has not been met. As the exemption is not engaged, the Commissioner has not had to go on to consider the public interest in disclosure.

⁵ https://ico.org.uk/media/for-organisations/documents/1185/awareness_guidance_5_annexe_v3_07_03_08.pdf

Section 41 – information provided in confidence

41. The LLDC has not specifically cited section 41 as a ground for withholding the requested information, which means the Commissioner is not obliged to consider whether it would apply. However, the Commissioner also notes that the WHUFC did refer to the use of the exemption in its submissions and he therefore considers it is appropriate to refer to the application as part of this notice.
42. Section 41 sets out an exemption to disclosure where the requested information was provided to a public authority in confidence. Information will be covered by section 41 if:
- it was obtained by the authority from any other person,
 - its disclosure would constitute a breach of confidence,
 - a legal person could bring a court action for that breach of confidence, and
 - that court action would be likely to succeed.
43. With regard to the application of section 41, WHUFC has argued among other points that the redactions relate to information which is clearly commercial in nature, which relates to WHUFC's respective business interests and is subject to confidentiality enforceable by law. For his part, the Commissioner does not share WHUFC's view that section 41 could apply.
44. The Commissioner considers that the Agreement effectively represents a contract between the E20 Stadium Partnership (the LLDC and London Newham Council) and WHUFC in relation to the use of the Olympic Stadium. In his guidance⁶ on section 41, the Commissioner specifically addresses the relationship between the exemption and information relating to contracts.
45. He says in the guidance that the '17. [...] *contents of a contract between a public authority and a third party generally won't be information obtained from another person.* 18. *This is because the terms of the contract will have been mutually agreed by the respective parties, rather than provided by one party to another.*' The Commissioner goes on to qualify this statement, however, by saying that '19. [...] *in some cases a*

⁶ <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

contract will contain technical information, given to the authority by the other party to the contract, in addition to the mutually agreed terms and obligations. [...] 20. Where technical information is included, it may, depending on the circumstances of the case, constitute information obtained by the authority from another person.'

46. The Commissioner appreciates there may be technical information contained within the Agreement that may legitimately be classified as information provided to the LLDC by WHUFC. However, he also considers that the disputed information constitutes mutually agreed terms and therefore section 41 of FOIA does not apply.

Right of appeal

47. 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

48. 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.
49. 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

Rachael Cragg
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF