

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 March 2016

Public Authority: Brighton & Hove City Council
Address: Kings House
Grand Avenue
Hove
BN3 2LS

Decision (including any steps ordered)

1. The complainant has requested information relating to the Brighton i360. Brighton & Hove City Council withheld the information under the exemptions for information provided in confidence (section 41) and prejudice to commercial interests (section 43(2)).
2. The Commissioner's decision is that Brighton & Hove City Council has failed to demonstrate that the exemptions in section 41 and section 43(2) are engaged.
3. The Commissioner requires the public authority to disclose the withheld information.
4. 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.

Background

5. The British Airways i360 (the "i360") is an observation tower being constructed on the seafront of Brighton, near to the West Pier. The "i" in the title stands for independence and innovation.

6. The projected cost of the tower is £46 million, with £36 million being funded by a Public Works Loan Board (PWLB) loan through Brighton & Hove City Council. The i360 is scheduled to open in Summer 2016.

Request and response

7. On 15 September 2015, the complainant wrote to Brighton & Hove City Council (the "council") and requested information in the following terms (the Commissioner's numbering):

"Brighton i360 rental agreement

(1) Please supply me with a document that sets out the full rental agreement between the council and the operators of the Brighton i360 for the tenancy of the site.

(2) Please supply the complete and unredacted Brighton i360 business review carried out by D&J International Consulting.

8. The council responded on 14 October 2015 and confirmed that it did not hold the information specified in part 1 of the request.
9. In relation to part 2 of the request, the council issued a further response on 23 October 2015. In this response it directed the complainant to its website where some of the information was published. In doing this it cited section 21 of the FOIA (information accessible to the applicant by other means). It withheld some other information under the exemptions for information provided in confidence (section 41) and prejudice to commercial interests (section 43(2)).
10. Following an internal review the council wrote to the complainant on 24 December 2015. It stated that it was maintaining its position.

Scope of the case

11. Following the internal review, the complainant contacted the Commissioner on 25 December 2015 to complain about the way their request for information had been handled.
12. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly withheld the information in part 2 of the request.

Reasons for decision

Section 43(2) – commercial interests

13. Section 43(2) of the FOIA provides an exemption from disclosure of information which 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.
14. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43. This comments that:
15. *"...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."*¹
16. The Commissioner is satisfied that the information relates to a commercial interest. However, it will only fall within the scope of the exemption if its disclosure would, or would be likely to prejudice a commercial interest. The Commissioner has gone on to consider the nature of the prejudice which the council has argued that disclosure would create.
17. Having viewed the withheld information the Commissioner notes that it contains financial information, detailed rationale for pricing policies, projections for customer numbers, profit projections and the detail of its staffing and other overhead costs relating to the Company.
18. The Commissioner is satisfied that the information relates to a commercial interest, namely that of the Company. However, it will only fall within the scope of the exemption if its disclosure would, or would be likely to prejudice a commercial interest. The Commissioner has gone on to consider the nature of the prejudice which the council has argued that disclosure would create.

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http://www.ico.gov.uk/for_organisations/guidance_index/~//media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

The Nature of the Prejudice

19. In investigating complaints which involve a consideration of prejudice arguments, the Commissioner considers that the relevant test is not a weak test, and a public authority must be able to point to prejudice which is "real, actual or of substance" and to show some causal link between the potential disclosure and the prejudice. As long as the prejudice is real and not trivial, its severity is not relevant to engaging the exemption – this will be factored in at the public interest test stage.
20. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.
21. In this case the council has argued that disclosure of the information *would* prejudice the commercial interests of the Company. It has also stated that disclosure could or *would be likely to* prejudice its own commercial interests.

Prejudice to the Company

22. In its refusal notice the council stated:

"The financial information is current, remains commercially important, and is not widely known. The visitor attractions market is highly competitive and the Brighton i-360 will be competing with other attractions. The detailed rationale of its pricing policies, its projections for customer numbers, profit projections and the detail of its staffing and other overhead costs set out in the withheld information would be of considerable value to the Company's competitors, none of whom are in the position of having to make such information available to the public."

23. The council further clarified that the Company is currently engaged, and will be engaged in the future, in negotiating contracts with sponsors, concession operators, suppliers and other third parties. It has stated that the withheld material contains detailed projections as to the terms on which the Company hopes to conclude these contracts.
24. The council has argued that these projections would be of great value to those with whom the Company is or will be negotiating, and will affect the terms on which it can conclude them.

25. In accordance with the code of practice issued under section 45 of the FOIA (the "Code"), the council consulted with the Company as the third party which might be affected by the request².
26. The council has provided the Commissioner with a copy of the Company's submissions in this regard. The Company clarifies that, although the information in question dates from 2014, it was prepared in the knowledge that the i360 would not open until 2016 and that it contains projections and expectations of future circumstances.
27. What is not apparent from either the council's or the Company's submissions is exactly who represents the putative competition in this matter or how disclosure of the information would specifically result in prejudice to the Company.
28. In its submissions, the Company acknowledges that it is the case that there are no directly competitive attractions in the immediate area, however, it considers that the i360 will be in competition with many other visitor attractions. The argument presented is that members of the public will have a limited budget and have to make decisions on how this is spent. The Company has suggested that this will involve reaching a decision as to whether to visit other local attractions such as the Royal Pavillion or Sea-Life Centre or attractions further afield, such as the London Eye. The Company has argued that these are all visitor attractions with whom it competes and who would welcome insights into its business plans and strategies.
29. The Commissioner understands the anecdotal truism that, with limited budgets, families will be unable to visit all available attractions. However, he does not see the relationship between the decision to be made by such families and the withheld information. It is not immediately obvious that a company's business plan will be one of the factors that forms part of this decision making process.
30. In any event, whilst it is the case that competing attractions may well be interested in accessing a rival's business plan, this does not automatically mean that prejudice would result. Having considered the Company's submissions, the Commissioner is not convinced that the

² The Code is published online here:
<http://webarchive.nationalarchives.gov.uk/20150730125042/http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

specific nature of any prejudice resulting from disclosure has been adequately defined. The Commissioner also has concerns that, where some form of prejudice is ascribed, the specific withheld information identified does not appear to provide the level of detail needed to generate such prejudice.

31. For example, the Commissioner notes that the Company has argued that the disclosure of some of the information would prejudice its negotiations with commercial third parties. It has stated that providing such parties with a benchmark of its position would make it almost certainly impossible for it to achieve a better negotiation outcome. However, the Commissioner understands that any process of negotiation will involve benchmarks or starting points which can move either way – this is the nature of negotiation.
32. The Commissioner notes that other arguments provided by the Company in relation to more specific elements of the withheld information are largely generic in nature, stating that the information would be of use to competitors and would reveal something about the Company's position. The Commissioner considers that these potential outcomes in themselves do not constitute or necessarily lead to prejudice to the Company's commercial interests.
33. Having considered the withheld information and the arguments presented the Commissioner considers that it has not been shown that disclosure of the information would result in prejudice to the Company's commercial interests. He has, therefore, concluded that the exemption is not engaged in this respect. He has gone on to consider whether disclosure of the information would be likely to result in prejudice to the council's commercial interests.

Prejudice to the council's commercial interests

34. The council has argued that, as it is the major loan funder for the i360, to the extent that the Company's commercial interests are prejudiced by release of the information, the ability of the Company to fund its repayments to the council may in turn be put at risk.
35. The Commissioner has found that, in relation to the Company's commercial interests, the level of prejudice ascribed to the release of the information has not been sufficiently demonstrated. Although the council is relying on the lower evidential limb of the exemption, namely that disclosure would be likely to result in prejudice, the Commissioner has not been provided with sufficient evidence or arguments which demonstrate the link between disclosure and harm to the council's commercial interests as loan provider. In the same way that it is not self-evident that prejudice would be caused to the Company's

commercial interests, he considers that the council has not made an argument that there would be likely to be a resulting prejudice to its own interests.

36. In its internal review response, the council also suggested that disclosure of the information might deter future business partners from seeking assistance and make it harder for it to find potential business partners to assist with economic regeneration.
37. The Commissioner has not been provided with any evidence or compelling reason to believe that businesses would be deterred from seeking potentially lucrative partnerships with public authorities by such a disclosure. It is arguable that it is *only* public authorities (or at least they are one of a very small pool of possibilities) which are in a position to provide businesses with loans of such magnitude so it is simply not plausible to believe that potential business partners would deny themselves such an opportunity.
38. Having considered the relevant arguments the Commissioner has concluded that the council has failed to demonstrate that disclosure would be likely to result in prejudice to its own commercial interests.
39. As he has found that the exemption is not engaged the Commissioner has not gone on to consider the public interest test.

Section 41 – Information Provided in Confidence

40. The council has withheld Part 6 of the Brighton i360 business review (the "Review") under section 41.
41. Section 41(1) of the FOIA states that information is exempt from disclosure 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."

Was the information obtained by the council from any other person?

42. The council has confirmed that the information was created by D & J International Consulting and provided to the council by Brighton i360 Limited (the "Company"). The Commissioner is, therefore, satisfied that the information was obtained by the council from another person.

Does the information have the necessary quality of confidence?

43. For the information to have the necessary quality of confidence it must not be trivial and otherwise available to the public. Information which is of a trivial nature or already available to the public cannot be regarded as having the necessary quality of confidence.
44. Having viewed the withheld information the Commissioner notes that it contains financial information, detailed rationale for pricing policies, projections for customer numbers, profit projections and the detail of its staffing and other overhead costs relating to the Company. The Commissioner is satisfied that the information is not trivial and that it has not been made available to the public. For these reasons the Commissioner finds that the information has the necessary quality of confidence.

Was the withheld information imparted in circumstances importing an obligation of confidence?

45. The council has confirmed that the information was provided as part of the i360 funding bid, that it was presented to the council in confidence and that that confidence has not subsequently been waived.
46. Having viewed the withheld information and had sight of correspondence between the Company and the council the Commissioner is satisfied that the information was provided to the council on the explicit understanding that it attracted an obligation of confidence.

Would an unauthorised use of the withheld information cause detriment to the confider and result in an actionable breach of confidence?

47. Having considered whether the information in this case was imparted in circumstances giving rise to a duty of confidence and had the necessary quality of confidence, the Commissioner has gone on to consider whether unauthorised disclosure could cause detriment to the confider.
48. The council has provided the Commissioner with correspondence from the Company which explains that the withheld information is comprised of data which was supplied by third party consultants, appointed to research and report on the visitor attraction market place and to verify, or otherwise its internal assumptions. It clarified that this work was then reviewed by D & J Consulting and developed into the withheld information.
49. The Company explained to the council that the work carried out on its behalf was undertaken under a duty of confidence and on the basis that any advice or conclusions were not to be used in relation to other projects. Disclosure of the information, it has argued, would result in

“embarrassment” and would impact on its relation with consultants, resulting in difficulty in obtaining future advice.

50. The Commissioner’s guidance has set out that, for commercial information, an authority will be expected to put forward an explicit case for detriment. Usually the detriment to the confider in such cases will be a detriment to the confider’s commercial interests³.
51. In this instance, the Commissioner has already decided that, in relation to its content, disclosure of the information would not result in sufficient prejudice to the commercial interests of the Company. As regards the potential, in principle “embarrassment” which disclosure might cause in terms of the relationship between the Company and D & J Consulting, the Commissioner is not convinced that this constitutes a specific detriment in commercial terms. Furthermore, it has not been explained why it would be more difficult for the Company to engage consultants in the future to carry out comparable research work.
52. The Commissioner notes that the same conditions in relation to confidentiality were imposed on the council and the Company in respect of the Review, however, parts 1-5 of the Review have been published on the council’s website⁴. It has not been explained why the published sections of the Report have been, apparently, excluded from the conditions which are being applied to the withheld section. The Commissioner has not been made aware of any consequences that the publication of the majority of the Review has resulted in embarrassment or detriment to the Company.
53. As it has not been explained why the withheld section of the Review attracts a heightened level of protection and the Commissioner has discounted the commercial prejudice aspect under section 43(2), the Commissioner is assuming that the same conditions apply and that it is, therefore, not plausible that disclosure of the withheld section of the Report would result in the described detriment.

³ The Commissioner’s guidance is published here: <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

⁴ [http://present.brighton-hove.gov.uk/Published/C00000689/M00005195/AI00037806/\\$Enc.%20%20for%20Brighton%20i360.docx.pdf](http://present.brighton-hove.gov.uk/Published/C00000689/M00005195/AI00037806/$Enc.%20%20for%20Brighton%20i360.docx.pdf)

54. The Commissioner has not been provided with specific arguments which explain how disclosure of the information would affect the confiders' interests in this matter. He considers that the claimed detriment has not been demonstrated sufficiently and therefore the test of confidence fails on this limb and section 41 does not apply.
55. The Commissioner has decided that there was an obligation of confidence, that the information had the necessary quality of confidence, albeit weak, but the detriment limb of the confidence test has not been demonstrated and therefore it has not been shown that there would be an actionable claim for breach of confidence and the exemption at section 41 does not apply.

Other matters

56. The Code of Practice issued under section 45 of the FOIA (the "Code") contains recommendations as to good practice in relation to the handling of complaints or "internal reviews".
57. Paragraph 39 of the Code advises that internal review procedures should be *"...as clear and simple as possible. They should encourage a prompt determination of the complaint."*⁵
58. The Commissioner echoes the recommendations of the Code and considers that internal reviews should ordinarily be completed within 20 working days of the date of receipt of a complaint (40 working days in exceptional cases).
59. In this case the complainant asked the council to conduct a review of its handling of the request on 23 October 2015. The council sent its review outcome on 24 December 2015, over 40 working days later. The Commissioner has, therefore, concluded that, in this instance, the council failed to follow the good practice set out in the Code. The Commissioner expects that the council's future handling of requests and internal reviews will conform to the Code and will follow the advice set out in his published guidance.

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<http://webarchive.nationalarchives.gov.uk/20150730125042/http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

Right of appeal

60. 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

61. 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.
62. 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

Andrew White
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