

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 August 2017

Public Authority: Burton Joyce Parish Council
Address: Parish Office
Library Building
Meadow Lane
Burton Joyce
Nottingham
NG14 5EX

Decision (including any steps ordered)

1. The complainant has requested information from Burton Joyce Parish Council (the council) regarding the 3G artificial pitch at The Poplars Sports Ground. The council provided some information but withheld the remainder on the basis that it was commercially sensitive and therefore section 43 applied.
2. The Commissioner's decision is that the council has failed to engage section 43.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant.
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.

Request and response

5. On 29 April 2016 the complainant made the following request for information:

"To support our consideration of the BJPC decisions on the development of the Poplars and access to facilities we would be grateful if you could provide the following information:

- 1. The business case for the 3G pitch and the application made to the Football Foundation*
 - 2. The basic and enhanced proposals presented to BJPC (referred to in minutes)*
 - 3. The non-recurrent and recurrent budgets for the 3G pitch development for 14/15, 15/16 and 16/17 this ought to be in the business case or the proposals submitted to BJPC together with details of cost pressures (n/r and r) that have resulted from the fencing of the Poplars.*
 - 4. Details of Phases 2 and 3 of the development of sporting facilities in Burton Joyce*
 - 5. A copy of the Partnership Agreement between BJPC and BJFC (referred to in minutes) and other clubs."*
6. On 2 May 2016, the council acknowledged the request and confirmed it would be considered under the FOIA. It then responded on 8 June 2016 providing some information but withholding the remainder on the basis that it was commercially sensitive.
 7. The complainant expressed dissatisfaction with the response in his correspondence with the council on 13, 27 and 30 June 2016.
 8. The complainant contacted the Commissioner on 11 August 2016 to complain that he had not received a response to his internal review. The Commissioner asked the council to conduct a formal internal review of its response to the FOIA request. The council provided the outcome of its review to the complainant on 17 October 2016 in which it upheld its original position, formally confirming that the redacted information in the business case and the partnership agreement were being withheld under section 43 of the FOIA as the information was commercially sensitive and the public interest was in maintaining the exemption.

Scope of the case

9. The complainant contacted the Commissioner on 15 December 2016 to complain about the council's response to his request for information. He was concerned about the council's decision to redact financial information from the business plan and to withhold the partnership agreement between the council and Burton Joyce Football Club (BJFC).

10. The Commissioner considers the scope of this investigation to be to determine whether the council was entitled to rely on section 43 to withhold the financial information within the business plan and also the partnership agreement with BJFC. The Commissioner will also record any relevant procedural breaches of the FOIA.

Reasons for decision

11. The withheld information in this case consists of predicted and estimated income and expenditure from the 3G pitch between 2014 and 2020, contained within the business plan. It also includes the partnership agreement between BJFC as referred to in the minutes of the October 2015 Parish Council Meeting.

Section 43(2) – Commercial interests

12. 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.

13. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered her guidance on the application of section 43. This states 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."*¹

14. In this instance the council has applied section 43(2) the predicted and estimated income and expenditure for the 3G pitch between 2014 and 2020, contained within the business plan. It has also applied it to the partnership agreement between BJFC as referred to in the minutes of the October 2015 Parish Council Meeting. For the avoidance of doubt, the council has explained that although it has contracts with other clubs regarding the use of the Poplars, these are not in the form of a partnership agreement. This only exists between the council and BJFC.

¹ https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

15. The Commissioner considers that this information relates to the commercial activity of tariffs for using the 3G pitch and also a financial agreement for use of the pitch and therefore the requested information does fall within the remit of section 43(2) FOIA.
16. In order for the exemption to be engaged it is necessary for it to be demonstrated that disclosure of information would result in some identifiable commercial prejudice which would or would be likely to be affect one or more parties.
17. The ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; i.e. either prejudice 'would' occur or prejudice 'would be likely to' occur.
18. With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)* confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk'.
19. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner (EA/2005/0026 & 0030)* commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge'.

The council's position

20. In this case the council stated that it primarily would be seriously affected by disclosure of the information, followed by the residents, sports users and club members, and BJFC. It went on to confirm that disclosure of this information would have a prejudicial effect on the operations of the facility.
21. The Commissioner needs to consider how any prejudice to commercial interests would be caused by the disclosure of the withheld information. This includes consideration of whether the prejudice claimed is "real, actual or of substance" and whether there is a causal link between disclosure and the prejudice occurring.
22. The council has argued that disclosure of the withheld information would be prejudicial due to commercial competition within the locality. There are two other 3G pitches within 1.5 miles of the Poplars, one of which is established, and the other is under construction. Further to this there is a larger scale facility within 10 minutes' drive of Burton Joyce. The council states that all of these facilities operate commercially, and the

majority of the customers of the Poplars had used these other facilities prior to the installation of the 3G pitch at Poplars. The council considers these other venues to be a significant competition to the Poplars in terms of similarity of venue, surface, close geographical proximity and pricing structure. It considers that these businesses would consider the Poplars to be a major competitor, and would benefit from access to an itemised list of customers, prices charged to them and frequency of use.

23. The council has further explained that as the facility has been running for over a year now, it can confirm that the Poplars has generated income above the anticipated target. Therefore, it is concerned that the redacted information could be used by competitors to entice customers away. There is particular concern that the Poplars' main customer, BJFC would leave, as it accounts for around 75% of the income. The council has confirmed that councillors are in no doubt that the facility would close in this situation as the council has other costs to support, including loans which existed prior to the 3G project. The council has advised that as it is a small parish council with a small turnover, it does not have the reserves of larger councils to be able to weather such a large drop in income. It states that the loss of revenue if BJFC and other clubs left the Poplars would therefore have a profound effect on the council, and would almost certainly result in the closure of the Poplars.
24. The council stated that there are multiple tariffs and booking rates on the 3G pitch dependent on team, time of year, time of day, frequency of booking and targets for assisted growth. The general pitch fee is published on the website, but the withheld information consists of the contract rates with various parties, and these are not publically available. The council accepts that there is information concerning hire rates and booking terms available within the minutes of the Poplars Sports Grounds committee for October, November and December 2015.
25. It has also stated that it has disclosed the end totals within the projected income and costs tables in the Business Case. The table headings were disclosed and indicate that the withheld information consists of the number of clubs/teams, pitch cost, number of weeks. The council is concerned that release of any of these figures would enable the complainant to work out the other values and would effectively disclose all of the withheld information. The council has suggested that inputting the values contained within the minutes would not necessarily disclose the remaining withheld information which is based on best guesses and estimates.
26. In terms of assessing the severity of the impact of the release of the requested information (customer detail, price paid, frequency of use) to a local competitor, the council has argued that a reasonable person would state the following:

- The risk of losing the business to a competitor was high
- The risk to the viability of the original supplier is likely to be severe
- The competitor has no lawful right to see such information
- The exchange is anti-competitive.

The council therefore finds that disclosure of the requested information would have a prejudicial effect on the operations of the Poplars to the significant detriment of the council and the village as a whole.

27. The council has also suggested that the information in question could be considered to be a trade secret. It states that it considers the definition of a trade secret to be open ended, and it has determined that the lifeblood of a commercial trading company is its customer contact base, its pricing or charging structure, and the frequency of customer use. On this basis, the council argues that the withheld information is a trade secret as the data is valuable and its release to a competitor "*could be catastrophic for survival*". In this context, the council considers that it is not necessary to consider the harm resulting from the release of the information as section 43(1) is class based.
28. The council has explained that the information withheld from the Business plan is duplicated within the partnership agreement with BJFC, and therefore the above arguments also apply to this information. It has also considered whether the disclosure of the information would have a prejudicial impact on BJFC.
29. The Commissioner's section 43 guidance states the following:
- "It is important to note that in claiming the exemption on the basis of prejudice to the commercial interests of a third party, the public authority must have evidence that this does in fact represent or reflect the view of the third party. The public authority cannot speculate in this respect; the prejudice must be based on evidence provided by the third party, whether during the time for compliance with a specific request or as a result of prior consultation. This approach has been confirmed by the Information Tribunal²."*
30. The Commissioner therefore expects that the council would consult with the relevant third party if it is claiming that disclosure would prejudice

² Derry City Council v Information Commissioner (EA/2006/0014; 11 December 2006)

the interests of that third party. The council confirmed that it has consulted with the chairman of BJFC who has stated that the club objects to the disclosure of the withheld information. He has said that he considers that the release of the commercially sensitive information would be a breach of confidence and has the ability to damage both the club's and the council's ability to operate. BJFC has significant concerns that releasing the information is likely to affect the operational viability of the Poplars. BJFC is also concerned that release of the data would increase competition from other football clubs for use of the poplars by enabling them to offer to pay higher rates than BJFC currently pay. There are two other large football clubs nearby.

31. The council has also sought the views of other third party organisations whose information is not included in the redacted information, but who also have hire agreements with the council for use of other areas of the Poplars. Burton Joyce Archery Club considers that release of the information would be prejudicial to its and to the council's commercial interests. Burton Joyce Cricket Club chairman stated that he had an expectation of privacy and that disclosure of the information would be damaging to the club. The council has also stated that the chairman inferred that release of the information was likely to seriously damage future relations between the club and the council. The chairman of Burton Joyce Lawn Bowls Club gave his view that disclosure would be damaging for his club as there is a premium on grounds at the moment, and others would be in a position to negotiate a counter proposal.
32. The council has confirmed that all the clubs with which the council has a contract for use of the Poplars have refused disclosure of the withheld information. The council notes that only BJFC has a 'partnership agreement' as specified in the complainant's request, however it has sought the views of the other clubs as the council's relationship with them and their members is vital within their rural community.

The Commissioner's position

33. In the first instance, the Commissioner has considered the council's position that the requested information is a trade secret as referred to in section 43(1).
34. Section 43(1) of FOIA provides that information is exempt information if it constitutes a trade secret. There is no statutory definition of a "trade secret" but the Commissioner will follow the Information Tribunal's preferred view of the meaning of trade secret as outlined in the case of *Department of Health v Information Commissioner* at paragraph 50. The Tribunal referred to *the Lansing Linde V Kerr [1991]WLR 251, Staughton LJ* Court of Appeal case.

35. It is generally accepted that, for information to constitute a trade secret it must fulfil the following criteria: -
- it must be information used in a trade or business
 - it must be information which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret
 - the owner must limit the dissemination of the information, or at least, not encourage or permit widespread publication
36. The council has argued that information on a commercial entity's customer contact base, its pricing or charging structure, and the frequency of customer use is its lifeblood, and is therefore a trade secret.
37. It is the Commissioner's view that a trade secret implies that the information is more restricted than information that is commercially sensitive. It involves something technical, unique and achieved with a great deal of difficulty and investment. Although the Commissioner notes the council's arguments in this regard, she is not convinced that the withheld information has the highest level of secrecy which the term 'trade secret' would appear to merit. Therefore she is not satisfied that section 43(1) of the FOIA would apply.
38. The Commissioner has therefore gone on to consider the council's application of section 43(2) to the withheld information. She has considered the council's arguments as to whether disclosure of the information meets the higher burden of *would prejudice* the commercial interests of the council. In doing so she has had regard to the information the council has made public relating to the hire rates of the 3G pitch. In addition to rates discussed in the October to December 2015 meeting minutes for the Poplar Sports Ground Committee, section 4.7 of the Business case contains the provisional pricing policy for hire of the 3G pitch. This includes discounted rates for weekday daytime hire, and separate published rates for Burton Joyce Primary School daytime rate. The council has argued that because it has been transparent about a considerable part of its business case, including publishing some of the anticipated rates, and the final line; publishing the withheld information would not add much additional understanding of the financial viability of the 3G pitch. Despite this, the Commissioner considers that the degree of information that is already publicly available weakens the argument that disclosure *would prejudice* its commercial interests.
39. The Commissioner has further considered the harm envisioned by the council from the release of the information. The thrust of the council's argument is that the withheld information would be used by other sports

facilities to offer lower hire prices and better terms to entice away BJFC, as the Poplars' main income stream, which would result in the likely closure of the Poplars. The Commissioner has considered the reality of this claim, and the likelihood of BJFC choosing to leave the Poplars on the offer of better rates. The Business case explains that BJFC approached the council with the idea to extend the Poplars, and also undertook to move up from FA Chartered Standard Status to FA Community Standard Status to help drive the application for funding forward. This shows that BJFC is strongly committed to the Poplars and the 3G pitch.

40. In addition to this, the Business case states *"The lack of winter training facility with floodlights is a serious shortfall to BJFC as it splits up the club to two venues during the average week. It struggles to transport and organize training from multiple venues changing at short notice. It is a constant battle to locate quality all weather facilities on a secure basis and to adapt to rapid changing weather conditions."* This demonstrates to the Commissioner that the decision to use the Poplars for its training facility is based on much more than simply the charges for pitch hire. Further to this, the business case confirms that the facilities available at the neighbouring sports centres are not to FA standard as the Poplars' 3G pitch is, a factor which is more important now that BJFC have achieved Community Standard Status.
41. Based on these facts, the Commissioner is not convinced that simply by offering a cheaper hire rate, that the other facilities would be able to entice BJFC away from the Poplars. It is clear that the decision to train and play at the Poplars is more than financial. To support this point, the chairman of BJFC has informed the council that he is concerned that other clubs may seek to use the facilities at the Poplars and may offer to pay more for the privilege. It is clear that he has no intention of moving his club away to another venue or venues and return to the situation prior to the installation of the 3G pitch, where his teams were split across venues, ad hoc arrangements had to be made due to weather conditions and his teams had to travel greater distances to their training. The Business case suggests that up to 50% of BJFC members can now walk to training.
42. The Commissioner therefore does not accept that disclosure of the withheld information *would prejudice* the commercial interests of the council as she is not convinced by the council's arguments that release of the information would enable other artificial pitch facilities to entice BJFC away. Therefore, the likelihood of the Poplars facing closure is significantly diminished, to the point where the Commissioner does not agree that the withheld information represents such a threat. The Commissioner therefore finds that section 43 is not engaged with respect to the council's own interests.

43. She has therefore gone on to consider the council's position that disclosure of the withheld information also *would prejudice* the commercial interests of third parties, primarily in this case, BJFC. BJFC's key concern is that release of the information would likely increase competition from other football clubs for use of the Poplars by enabling them to offer to pay higher rates than BJFC currently pay. It states that there are two other large football clubs nearby. The Commissioner notes that the Business plan states that other football clubs were approached for business, and that four local teams had at that time expressed an interest in having either regular slots or events at the Poplars. However, it is important to note that the Business case states that these would be selected after BJFC had prioritised its booking.
44. It is clear to the Commissioner that the relationship between BJFC and the council is key to the success of the Poplars, and indeed, it seems that the 3G pitch would not have been installed without BJFC's involvement. BJFC accounts for a large proportion of the Poplars' custom, and around 75% of its income. The relationship could be described as symbiotic, and the Commissioner is unable to see that the council would renege on its agreement to give BJFC preferential booking terms in favour of another team or club. The council needs BJFC to continue as the main customer of the Poplars, and in turn BJFC needs the council as it requires the use of the FA standard 3G pitch, not only for its ongoing needs, but also to meet its development needs in the coming years in accordance with the Football Foundation's grant.
45. The Commissioner again does not accept that the harm envisioned by BJFC from disclosure of the information is likely. She therefore does not agree that disclosure of the withheld information *would prejudice* the commercial interests of BJFC.
46. In conclusion, the Commissioner finds that the council has failed to engage section 43(2) to the withheld information.

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

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