

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 October 2018

Public Authority: Fylde Borough Council
Address: The Town Hall
St Annes Road West
Lytham St Annes
Lancashire
FY8 1LW

Decision (including any steps ordered)

1. The complainant has requested a licence agreement relating to the use of Lytham Green. Fylde Borough Council disclosed some information and withheld other information under the exemption for commercial interests (section 43).
2. The Commissioner's decision is that Fylde Borough Council has correctly withheld information under section 43(2) and the public interest favours maintaining the exemption.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 12 February 2018, the complainant wrote to Fylde Borough Council (the "council") and requested information in the following terms:

"Do you know if a copy of the signed Licence Agreement between Fylde Borough Council and Cuffe & Taylor, for use of Lytham Green, is available for public viewing?"
5. The council responded on 22 February 2018. It disclosed the requested information but redacted some details under the exemption for commercial interests, section 43 of the FOIA.
6. Following an internal review the council wrote to the complainant on 26 April 2018. It stated that it was maintaining its position.

Scope of the case

7. On 9 May 2018 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly applied section 43 to withhold some of the requested information.

Reasons for decision

Section 43 – commercial interests

9. Section 43(2) of the FOIA states

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."
10. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner's guidance on the application of section 43 of the FOIA explains that a commercial interest relates to a person's ability to participate competitively in a commercial activity. The underlying aim may be to make a profit however it could also be to cover costs or to simply remain solvent.

11. In this case the withheld information consists of a formula detailing how a fee for the staging of concerts at Lytham Green is calculated. The Commissioner is, therefore, satisfied that the information relates to a commercial activity and falls within the scope of the exemption.
12. In order for a prejudice based exemption, such as section 43(2), to be engaged, the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the public author 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;
 - Secondly, 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 which is alleged must be real, actual, or of substance, and;
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e., 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. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.

The affected party or parties and level of likelihood of prejudice occurring

13. In this case the council has argued that disclosing the information would, primarily be likely to prejudice the commercial interests of the licence holder, namely, Live Nation. The council has also stated that its own commercial interests would be likely to be harmed by disclosure.

The nature of the prejudice

Live Nation

14. The council explained that it negotiated a fee with the license applicant (Live Nation) and, in this case, this was based on a unique methodology developed by Live Nation. It explained that Live Nation undertook a business and costing exercise of its own design methodology to determine the offer for the fee structure which forms the basis for the negotiation. The council has argued that disclosure of this in relation to

fees charged for operating the licence would be likely to prejudice Live Nation's commercial ability to negotiate with other parties and achieve the best rate.

15. The council further argued that disclosure would be likely to harm Live Nation's trading position as its ticket prices are based on the negotiated fees for use of location or services with the council. The council has stated that disclosing the information would provide competitors with an insight into Live Nation's trading position, allowing rivals to modify their own negotiating position in other similar bids for licences or future renegotiations of this licence to the detriment of Live Nation.
16. The council emphasised to the Commissioner that the market Live Nation operates within is highly competitive and disclosing the information would be likely to undermine its negotiating strength. It stated that, should information about the fee negotiated in this instance be disclosed, it would be likely that other authorities may require Live Nation to re-negotiate fees in respect of similar contracts, resulting in direct harm to Live Nation's commercial interests.
17. In providing these submissions, the council confirmed to the Commissioner that, in accordance with good practice, it consulted with Live Nation and sought its views as to the potential effects of disclosure on its interests.

The council's interests

18. The council has argued that disclosure of the information would be likely to prejudice its own commercial interests. It explained that it negotiates licences and agreements with other parties that use its land at varying rates or fees. It stated that some rates and fees may be more beneficial to the council with others negotiated to attract events to the council's area. The council considers that there is a causal link between disclosing the negotiated fees and its commercial interests as public knowledge of the fees in any given case would provide contractors who have current agreements with a lever to challenge fees paid in next future rounds of negotiations. The council considers that disclosure would, therefore, be likely to inhibit its ability to negotiate higher rates resulting in a loss of income.

Conclusion

19. Having considered the council's submissions and referred to the withheld information the Commissioner is satisfied that the council has provided arguments that are relevant to the information withheld and the request context, and that it has done this in accordance with the three criteria set out above. The Commissioner has, therefore, concluded that the

council has demonstrated that disclosing the information would be likely to prejudice its own commercial interests and the commercial interests of Live Nation. She has gone on to consider the public interest test.

The public interest test

20. Section 43 of the FOIA 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.

Public interest in disclosing the information

21. The council acknowledged that disclosure would serve the general principles of transparency and accountability in respect of its decision making and commercial activities.
22. The council confirmed that it recognised that the public have an expectation that it is able to negotiate the best fee rate for events or use of locations and services. It also stated that disclosure would enhance public trust in the council's ability to conduct appropriate negotiations and make suitable decisions.
23. The council also argued that disclosure would show that it does not encounter any disadvantage in any negotiations and that business are not supported by the council in an unfair manner. It also suggested that disclosure would show that business in the council's area were supported to invest and encourage development initiatives in the borough.
24. The complainant has argued that the licence in this instance was not subjected to a competitive tender so they do not consider the disclosure would result in harm to the provider. The complainant also argued that disclosure would provide accountability in respect of the council's decision to work with a specific provider in respect of use of Lytham Green.

Public interest in maintaining the exemption

25. The council argued that there is a strong public interest in it being able to maintain effective working relationships with commercial partners in the borough and to sustain a level playing field in contract negotiations. Disclosing the information, it has argued, would be likely to hinder its ability to achieve these ends, inhibiting its commercial interests.

26. The council has also argued that businesses such as Live Nation have an expectation that the information they provide is treated in confidence or that its commercial value is given due protection. It has also argued that it would not be in the public interest to disclose information which would be likely to directly disadvantage Live Nation's ability to negotiate other similar contracts by revealing details of its financial circumstances and methodology.
27. The Commissioner has also had regard for Live Nation's submissions to the council in respect of the potential damage disclosure would do to its interests. These explain that Live Nation operates in an extremely competitive market, with several companies offering the same services; in addition, there are a limited number of suitable sites in the United Kingdom upon which festivals and outdoor music shows can take place. It is further argued that disclosure of information relating to fees creates a real possibility that competitors will unfairly bias Live Nation and would, therefore, be prejudicial to its commercial activities (i.e. putting on and running festivals and outdoor music shows). Disclosure, the argument runs, would assist competitors in gaining an understanding of Live Nation's pricing mechanism and how it sets up its commercial deals, using this information to undercut Live Nation.

Balance of the public interest

28. In considering the balance of the public interest test the Commissioner has been mindful of the intention behind the exemption, which is designed to protect parties from commercial damage resulting from information disclosure. As she has found that it is likely that Live Nation's commercial interests and, to a degree, those of the council would be prejudiced by disclosure, she has, therefore, accorded this due weighting.
29. In relation to the complainant's concerns about the manner in which the opportunity for a licence for Lytham Green was made available, the Commissioner does not consider that this negates or in any way lessens the public interest in favour of protecting the third party from the likely prejudice to its commercial interests. She does not consider that disclosing the information would not be an appropriate remedy for addressing the complainant's specific concerns in this matter.
30. In weighing the public interest balance in this case the Commissioner has consider the First-Tier (Information Rights) Tribunal decision in *Willem Visser v Information Commissioner EA/2011/0188*, (1 March

2012)¹. This related to a request for information for a business plan, comprising equivalent information to that withheld in this case. In this instance the Tribunal noted that prejudicing the commercial interests of one player in the market would distort competition in that market, which in itself would not be in the public interest.

31. The Tribunal concluded that, in terms of the public interest test, there is a public interest in protecting the commercial interests of individual companies and ensuring they are able to compete fairly:

*"If the commercial secrets of one of the players in the market were revealed then its competitive position would be eroded and the whole market would be less competitive with the result that the public benefit of having an efficient competitive market would be to some extent eroded"*².

32. The Commissioner recognises that there is significant public interest in the council being open and transparent about decisions it takes involving public money and this includes information about how it assesses and analyses proposals for the use of public resources. Disclosure of the withheld information would provide an insight into the discussions and exchanges of information the council had with Live Nation as part of the due diligence process and disclosure could reassure the public about the thoroughness of this process. However, in the Commissioner's opinion there is very strong and inherent public interest in ensuring fairness of competition and in her view it would be firmly against the public interest if a company's commercial interests are harmed simply because they are engaging with a public authority on a commercial basis.
33. Furthermore, the Commissioner believes that there is an inherent, and very strong, public interest in ensuring that a public authority's ability to secure value for public money is not undermined. The Commissioner has therefore concluded that the public interest favours maintaining the exemption contained at section 43(2) and withholding the information.

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<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i691/20120822%20Decisions%20combined%20EA20110188.pdf>

² Ibid., paragraph 20.

Right of appeal

34. 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

35. 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.
36. 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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