

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 July 2019

Public Authority: Bournemouth, Christchurch and Poole Council

Address: Town Hall
Bourne Avenue
Bournemouth
BH2 6DY

Decision (including any steps ordered)

1. The complainant asked Bournemouth Borough Council for information about the trade use of crematoria operated by the Council. The information which the complainant seeks is the number of cremations which have taken place at the Council's crematoria over a two year period, on a daily, weekly or monthly basis, to show which funeral directors or branch of funeral director's undertook each funeral. Having initially refused to comply with the complainant's request in reliance on section 12 of the FOIA, the Council determined that it should rely instead on section 43(2) – where disclosure would prejudice the Council's and funeral directors' commercial interests.
2. The Commissioner's decision is that the Council has correctly applied section 43(2) to the information requested by the complainant and therefore the Council is entitled to withhold that information.
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. On 3 December 2018, the complainant wrote to the Council and submitted the following request for information:

"I would like details appertaining to the 'trade' use of Bournemouth Crematorium along the following lines:

Number of cremations per day or week or month as per individual funeral directing operation ('operation' being the physical office branch

not the person necessarily Company, where a Company may have more than one office.)

Day sheets with redacted irrelevant data may provide the above.

Historical data in as much as it is possible but most importantly being the most recently available.

Ongoing data for the coming weeks ahead.”

5. The Council wrote to the complainant on 21 December 2018, asking him to provide clarification as to whether he is seeking historical data for the past six months, so that it conduct an effective search.
6. The complainant responded to the Council’s request for clarification by confirming that he seeks historical data for the past two years and that he was prepared to restrict his request for a shorter period.
7. The Council made its response to the complainant’s request on 3 January 2019, providing him with the total numbers of cremations per month for 2017 and 2018, broken down according to whether the deceased was resident or non-resident. The Council informed the complainant that to provide the information per day or week or per funeral director will take more than the 18 hour limit due to the way it holds its information. The Council provided the complainant with a description of how it calculated the time it would need to extrapolate the information required by the complainant from its records.
8. The Council advised the complainant that it does not hold information for which individual branch of each funeral company which took care of each cremation.
9. The complainant asked the Council to undertake an internal review on receipt of its response to his request. The complainant advised the Council that he does not ‘necessarily’ require data for any particular period or length of time nor does the data have to be broken down to individual geographical location of branch where this is not recorded. The complainant added, “...while I am happy for some details to be redacted from day sheets, I am not sure what would need to be redacted as most of the data about a cremation is a public record...” He added, “I am not interested in personal details of the deceased, the minister or the content of the funeral service”.
10. The complainant made clear that he required the numbers of cremations per Company/Branch over any historical period of time but added the caveat that he would like an ongoing arrangement for a period of some months where he would be provided with the same data, whether it was provided on a per day, week or month arrangement would be dependent on which method was least onerous to the Council.

11. On 15 February 2019 the Council provided the complainant with the result of its internal review. Having determined how the Council holds its records of cremations the Council conceded that it is possible to extract a weekly diary for each Crematorium Chapel which only includes the time slots booked by the funeral directors.
12. The Council advised the complainant that the Crematorium Chapel diaries show a 7 day period and 30 minute time slots with bookings by Funeral Directors by their individual booking references. Most bookings are made directly by funeral directors who are able to access an area of the Council's case management system. The funeral directors can enter the details of a cremation against a particular time slot or alternatively they can provide a paper-based application. The application is then used by Council staff to enter details onto the case management system under a relevant code by individual funeral directing operation if this has been provided. The Council added that, "where a company has more than one office, the individual branch is not always specified".
13. Conceding that information which would partially meet the terms of the complainant's request could be extracted from its case management system and from the Crematorium Chapel diaries, the Council concluded that refusing the request in reliance on section 12 of the FOIA was inappropriate.
14. The Council identified that the information it holds relates to the work undertaken by third parties - the funeral directors, and therefore, in accordance with section 45 Code of Practice, the Council advised the complainant that it is required to consult with third parties who have supplied information to the Council.
15. On the basis of all the evidence available to the Council's reviewer, and following consultation with Bereavement Services and funeral directors, the Council determined that the information requested by the complainant is exempt from disclosure under section 43(2) of the FOIA. The Council advised the complainant that disclosure of the information would or would be likely to prejudice commercial interests.

Scope of the case

16. The complainant contacted the Commissioner on 18 February 2018 to complain about the way his request for information had been handled.
17. The complainant set out his arguments in respect of his complaint, asserting that the Council's position does not stand up to scrutiny on the grounds that "the use it seeks to protect is ascertainable from the Office of National Statistics. He says that he is interested in analysing how often the crematorium is used by individual funeral directing businesses

which he argues is publicly available at some crematoria (including Poole Crematorium) which operate under a shared regime by way of an online diary.

18. The complainant has advised the Commissioner that the crematorium industry generally goes to considerable lengths with statistical analysis of cremation trends, including cremation numbers, charges per crematorium, relationships of religion, dispersal of ashes, time allocation of service chapel, etc and therefore it could be said that the cremation industry is extremely interested in statistical analysis, when it suits them. To illustrate his point, the complainant has drawn the Commissioner to the Cremation Society's website¹.
19. The complainant says that, "attendance of funeral directors at a crematorium is a public matter and cannot be hidden; it is seen by the eye of all attending at any time..; All crematoria gather details about the funerals that are anticipated and prepare day-sheets; A day-sheet will contain a summary of details of the funerals of the day including name of deceased, name of minister, number of hymns etc and the name of the funeral director". He adds, "The day sheets are often on public display at least in an abbreviated format", and "The Cremation Register is a document a crematorium is obliged to maintain and it is available for public scrutiny".
20. The complainant made clear to the Commissioner that he is only interested in the names of the funeral directors attending and the frequency of their attendance.
21. The complainant argues that the data the Council seeks to protect for its own commercial reasons and for the protection of third-party funeral directors is already in the public domain and importantly in a far more accurate and concise manner².
22. The Commissioner advised the complainant that the focus of her investigation would be to determine whether the Council is entitled to withhold the information he has requested in reliance on Section 43(2) of the FOIA.

Background information

¹ <https://www.cremation.org.uk/statistics>

²<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/datasets/deathsregisteredbyareaofusualresidenceenglandandwales>

23. On 1st April 2019, Bournemouth Borough Council was abolished. A new council was formed called Bournemouth, Christchurch & Poole Council. It is this Council which has responded to the Commissioner's enquiry.
24. The complaint being considered by the Commissioner concerns the release of information relating to the 'trade' use of Bournemouth Crematorium, particularly the names of funeral directors and the frequency of their attendance at the Bournemouth Crematorium.
25. Funeral trends can be derived from the information found at the internet references which were supplied by the complainant. Those links do not include details about burial or cremation, or which funeral directors were used. Had this been the case, the Council has advised the Commissioner that it would have refused to comply with the complainant's request in reliance on section 21 of the FOIA – information available to the applicant by other means, rather than the Council's reliance on section 43(2).
26. The Council acknowledges that certain information relating to funeral directors is published for Poole Crematorium. However, the Council points out that this data is incomplete, in that it does not provide the names of funeral directors by branch, except where it is an independent funeral direct operating from one outlet. Additionally, some entries are marked 'private' and in these instances no funeral details are provided.
27. The Council has explained that funeral directors using the Bournemouth Crematorium had not been consulted about their details being published in this way.
28. Having now consulted with funeral directors for the purpose of responding to the complainant's request, the Council has advised the Commissioner that a number have expressed surprise and dissatisfaction that the former Borough Council had published information of this nature.
29. The new Council has found no evidence that its predecessor authority undertook a consultation of funeral directors. It understands that the publication of cremation diaries was introduced when a new computer system was implemented which facilitated that function. The computer system used by Poole is not the same as that used in Bournemouth.
30. Now that Poole is part of the newly established council and its crematorium falls within the same Bereavement Service as Bournemouth, a decision has been taken that this level of information will not be published in future.
31. Christchurch does not have a crematorium.

32. The Council accepts to some degree the complainant's assertion that attendance of a funeral director at a crematorium cannot be hidden. This is true insofar that an interested party could compile some statistical data over a period of time through visual observation on a daily basis at a Crematorium.
33. That said, the Council points out that such data may be flawed on the grounds that funeral directors occasionally share vehicles and their employees may not always be known to the observer.
34. The Order of Service displayed at the Crematorium which details the funerals for the day does not include details of the funeral director.

Reasons for decision

Section 43 - commercial interests

Section 43(2)

35. The Council argues that the exemption to disclosure provided by section 43(2) of the FOIA applies to the information which the complainant seeks.
36. Section 43(2) states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
37. The Council has also considered the Commissioner's statement that "*a commercial interest is related to a person's ability to participate competitively in a commercial activity.*"
38. It is the Council's position that the disclosure of the information requested by the complainant would prejudice the commercial interests of the funeral directors in its area and those from a wider geographical area which arrange cremations in Bournemouth.
39. The Council makes the point that these funeral directors will include small independent family-run businesses which would be unlikely to compete with larger companies. It also considers that the Council's own commercial interests would be prejudiced by disclosing the information requested by the complainant due to a loss in cremation bookings.
40. Noting that disclosure of information under the FOIA is to the world at large, the Council has considered its application of section 43 exemption and its associated prejudice test on the consequences of disclosing the information to the wider public.

41. The Council has also considered the Commissioner's guidance on section 43 in relation to the identity or motives of the applicant. It has considered whether there would be a real and significant chance that a member of the wider public would use the information in a manner that would prejudice the interests protected by the exemption. The test is therefore not about the identity and motivation of the requester, but rather the purposes the information might be used for if it was disclosed into the public domain.
42. The Council has reason to believe that the requester would use the information in a way that would prejudice the interests protected by the exemption. It has identified correspondence from the complainant, in September and November 2018, which identifies that he has asked for the information for the purpose of reviewing his own business plan for the forthcoming year. In the Council's opinion, the complainant's correspondence demonstrates that the requestor, as a member of the wider public, would use the information in a way that would prejudice the interests protected by the s43(2) exemption.

Prejudice to the commercial interests of local funeral directors

43. The Council holds the view that the information requested by the complainant is commercially valuable to Bournemouth crematorium and to funeral directors who use the Council run crematoria. The Council says that, "The requested information would be of use to funeral directors or potential funeral directors looking to either target an advertising campaign or open up a new branch in the specific areas where the biggest competitors are".
44. At the present time the usage of crematoria by a funeral director branch is not published and therefore competitors and potential competitors are unable to accurately target specific areas in relation to the numbers of funerals undertaken by existing businesses.
45. To substantiate its claim that disclosure of the requested information would prejudice the commercial interests of the funeral directors operating in and around Bournemouth, the Council provided the Commissioner with copies of communications between a number of funeral directors and the Council. Where the funeral directors responded to the Council's consultation, 16 funeral directors made clear that they opposed the disclosure of the information requested by the complainant.
46. Of those 16 funeral directors that responded, 12 referred to the commercially sensitive nature of the information in question. A further 4 funeral directors signalled their willingness to have the requested information disclosed, for various reasons including infrequent use of the

Council's crematoria, being a new operation or having no objection to a 'rough average' being disclosed.

47. Overall, the responses received by the Council clearly show that funeral directors have concerns their competitors will use the requested information to seek a commercial advantage.
48. Where funeral directors did not respond to the Council's consultation the Council believes this is due to them being part of a company with more than one office. Its internal review response noted that, more often than not, when funeral directors enter the details of a cremation against a particular time slot or provide a paper-based application, it is the company and not the individual branch which is specified. The Council believes that this might explain why these funeral directors were not as concerned about disclosure as those operating from only one branch.
49. The Council points out that none of the local funeral directors have their own Crematorium. Instead they rely on using local authority facilities. These businesses are not able to access the privately owned Crematorium near Poole.
50. The complainant's business on the other hand is able to use Council-run crematoria and its privately owned facility. This is why, in the Council's opinion, disclosure of the requested information would enable the complainant's business to have a commercial advantage over its competitors. It would allow that business to target those areas covered by other directors and potentially allowing his business to undercut their prices.

Prejudice to the commercial interests of the Council

51. The Council says that its crematoria are available for booking by funeral directors and are provided in a competitive commercial environment with other local authority crematoria in Weymouth and Southampton, as well as privately-owned crematoria. It adds that there is no duty or contract that requires funeral directors to use the Council-run crematoria.
52. In addition to considering the requested information would be of use to the complainant's business, the Council also believes it would allow other crematoria within the area to target the market with the aim of increasing the usage of their service. This would result in a reduction in the use of Bournemouth or Poole crematoria would impact the Council's Bereavement Service by diminishing its budget.
53. The Council asserts that the potential reduction in the Bereavement Service's budget would result in a loss of staff and the Council being unable to provide the public with the level of service currently available.

According to the Council, this has already happened to some extent following the opening of the private Harbour View crematorium, which saw an immediate reduction in the number of cremations taking place at Poole and more recently at Bournemouth crematorium.

54. The Council argues that disclosing the requested the information would create an unfair playing field where the Council is unable to compete with its competitors. In view of this, the Council considers the disclosure of the requested information would further diminish its ability to operate its crematoria competitively in a commercial market.
55. The combined effects of disclosing the requested information into the public domain leads the Council to strongly assert that it would prejudice its own commercial interests which are protected by section 43(2) of the FOIA.
56. To substantiate this claim, the Council has provided the Commissioner with a copy of a briefing note which refers to the reduction in usage at the Poole Crematorium and the associated loss of revenue since the crematorium at Harbour View opened. Additionally, the Council has drawn the Commissioner's attention to a news article³ published in December 2018 which mentions the effect the new facility has had on those run by the Council.
57. Based on the evidence it has provided the Commissioner, the Council argues that disclosure would meet the higher threshold of 'would prejudice' its own commercial interests rather than the more speculative threshold of 'would likely to prejudice' those interests. The Council argues that the requested information is commercially valuable to others working in the field of directing funerals but it is of little interest to the general public.
58. The identified reduction in the use of the Council's Crematorium since the private facility opened will affect local funeral directors which are not able to access private crematorium facilities.
59. The Commissioner finds that disclosure of the information requested by the complainant would adversely affect the commercial interests identified by the Council. The Commissioner is therefore satisfied that the exemption to disclosure provided by section 43(2) is engaged.

The public interest

³ <https://www.express.co.uk/life-style/life/1055341/council-run-crematorium-private-funeral-home-dorset>

60. The Council's reliance on section 43 is subject to consideration of the public interest.
61. The Council acknowledge this by accepting the public interest inherent in the disclosure of information which would provide openness and transparency in respect of the decisions it makes and how those decisions demonstrate that it provides the public with services in an efficient and effective manner.
62. Weighed against this is the reduction in choice the public would have in the event that smaller independent funeral directors go out of business due to there being fewer crematoria available to them.
63. The level of central government grants made to public authorities has decreased in recent years. This has resulted in greater budgetary pressure on Councils and the need to develop income streams to support the continued delivery and sustainability of its services.
64. It is clear to the Commissioner that the Council's crematoria provide a commercial service and that they constitute an income stream. The Commissioner acknowledges that the ongoing viability of the Council's Bereavement Service is dependent on being able to operate fairly in a commercial market with its competitors. The Commissioner therefore accepts that disclosing the information requested by the complainant would have a detrimental impact on this income stream and that would not be in the public interest.
65. The Council's good working relationship with local funeral directors must also be acknowledged. The Commissioner fully accepts the potential for this relationship to be damaged if the requested information was to be disclosed. This is clearly evidenced by the responses made to the Council's consultation in this matter.

The Commissioner's decision

66. The Commissioner recognises the existence of commercial competition in the business of funeral directing. That being so, she considers that this competition should take place on a level playing field where the Council and funeral directors are not placed at a disadvantage by virtue of a disclosure of information required by the FOIA.
67. Whilst acknowledging that some information about the use of Poole and Southampton crematoria is displayed on crematorium diaries published on their gov.uk webpages, the Commissioner notes that the information provided does not give a complete picture of usage, particularly as some entries are marked as 'private'.
68. The Commissioner notes that some funeral directors publish information on their own websites. She also notes that information is

also published on the Funeral Zone website which includes obituaries and details of funerals. This published information does not meet the terms specified by the complainant in his request as it does not provide the number of cremations per day / week / month by individual funeral directing branch.

69. The Commissioner is mindful of the complainant's comments regarding the statistical analysis of cremation trends that are widely available. She accepts that the cremation industry has a particular interest in statistical information of the type the complainant refers to. This however does not mean the Commissioner accepts his assertion that the information he seeks is already in the public domain in a more accurate and concise format.
70. That assertion is not substantiated by the Commissioner's examination of the web link which the complainant provided. The web link provides statistical information about the numbers of deaths registered by area of the deceased's usual residence. It does not provide a breakdown by cremation or burial or by funeral director.
71. Had the published information already been in the public domain, the Commissioner would have supported the Council's likely application of section 21 on the basis that the information the complainant has asked for is already reasonably accessible to him.
72. The Commissioner accepts that the complainant's request is for historical data – from the past two years, and that such information is less likely to be as commercially sensitive as up-to-date data. The position regarding use of crematoria over the past two years is not necessarily the position now as some funeral directors' business may have waxed and waned over a two year period and the historical data may not be properly representative of their business activity now.
73. The Commissioner agrees with the Council that the historic usage of a crematorium by individual branches of funeral directors would not be a deciding factor in choosing which funeral director to use. In the Commissioner's opinion it is more likely that this choice would be based on such factors as the wishes of the deceased person, a family's previous use of a funeral director, recommendations made to families, advertisements or the cost of the funeral.
74. Other than the limited interests of competitor funeral directors, there is very limited public interest inherent in the information which the complainant seeks. The Commissioner has found no public interest which would outweigh the prejudice which disclosure would cause to the commercial interests of the Council and those funeral directors which use the Council's crematoria.

75. The Commissioner's decision is the Council is entitled to rely on section 43(2) to withhold the information requested by the complainant.

Other matters

76. Having submitted his initial request and subsequently advising the Council that he requires the numbers of cremations per Company / Branch for the past two years, the complainant added the caveat that he would like an ongoing arrangement where he would like the Council to provide him with the same data.
77. Apart from being suggestive that the complainant would like to monitor his competitors' business activities, the Commissioner must make clear that such an arrangement would fall outside of the requirements of the FOIA.
78. Such a request would not be valid under the FOIA, as a request can only be made for information already in the possession of a public authority at the time a request is received. This means that information which might come into the possession of a public authority in the future cannot be requested before it is actually held by that authority.

- 79. Right of appeal
- 80. 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

- 81. 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.
- 82. 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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