

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 November 2023

Public Authority: Nottingham City Council
Address: Loxley House
Station Street
Nottingham
NG2 3NG

Decision (including any steps ordered)

1. The complainant requested information from Nottingham City Council ("the Council") relating to the Council's relationship (a twinning arrangement) with the city of Ningbo in China. The Council disclosed some information within the scope of the request, but refused to provide some information on the grounds that it was not held by the Council for the purpose of FOIA and withheld other information under section 43(2) of FOIA (commercial interests) and section 40(2) of FOIA (personal data).
2. The Commissioner's decision is that:
 - the Council does not hold, for the purposes of FOIA, the information it has refused to provide on this basis,
 - the Council is entitled to rely on section 43(2) of FOIA to refuse to provide some but not all of the information withheld on this basis,
 - the Council is entitled to rely on section 40(2) of FOIA to refuse to provide the information withheld on this basis.

3. The Commissioner requires the Council to disclose the following information, which the Commissioner has determined the Council is not entitled to withhold under section 43(2) of FOIA, to ensure compliance with the legislation:
 - Paragraph 7 of the joint letter (other than the final sentence, which relates to both universities)
 - The statistics relating to NTU in the table at the end of the joint letter
 - Paragraph 5 of page 4 of the joint impact assessment.
 - Copies of the emails exchanged with UoN (excluding the attachments), appropriate redactions should be made in relation to personal data.
4. The Council 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 2 May 2023, the complainant wrote to the Council and requested information in the following terms:
 - “1. According to a statement released by Nottingham Stands with Hong Kong, a campaign group that advocates for a more democratic Hong Kong in Nottingham, the city council has already “reviewed its relationship with the city of Ningbo”. Please provide a softcopy of the results of such a review. Documents reviewed during such a process should also be provided.
 2. Please provide all email that mentions, or refers to, the word “Ningbo” in councillor David Mellen’s mailbox (David.mellen@nottinghamcity.gov.uk).”
6. The Council responded on 29 June 2023. It stated that the information requested in part 1 of the request was not held by the Council. Specifically, it stated that the meeting and the vote were held by the Labour Group, not the City Council and that the Labour Group are not a public authority as defined under FOIA. It disclosed some information within the scope of part 2 of the request, it redacted this information to withhold some information under section 40(2) of FOIA (personal data).

It also withheld some information within the scope of part 2 of the request under section 43(2) of FOIA (prejudice to commercial interests). It also stated that any correspondence relating to the Labour Group is not held by the Council for the purposes of FOIA.

7. The complainant requested an internal review on 30 June 2023. Regarding part 1 of the request they highlighted a number of statements that they believe suggest that the review was carried out by the Council, rather than the Labour Group. In addition, they suggested that, in any event, any information held within the scope of this part of the request would be held by the Council for the purposes of FOIA, specifically they suggested the Council may hold this information on behalf of the Labour Group. Regarding part 2 of the request, they asked the Council to review its decision to withhold information under section 43(2).
8. Following an internal review the Council wrote to the complainant on 25 August 2023. It upheld its original position.

Scope of the case

9. During the course of the Commissioner's investigation the Council identified two documents within the scope of part 1 of the request that were held by the Council for the purposes of FOIA (a report and a presentation). It disclosed the presentation in full and the majority of the report. Parts of the report were withheld under section 40(2) of FOIA (personal data) and section 43(2) of FOIA (prejudice to commercial interests).
10. The complainant confirmed to the Commissioner that they still wished to pursue their complaint following the disclosure of this additional information, they also asked the Commissioner to investigate whether the Council was entitled to withhold the information redacted from the report.
11. The scope of this case is therefore to consider:
 - whether the Council holds any further information within the scope of part 1 of the request for the purposes of FOIA,
 - whether the Council was entitled to withhold the information withheld under section 43(2) of FOIA (it will consider all of the information withheld on this basis, both that was originally withheld and the information redacted from the report partially disclosed during the course of the Commissioner's investigation),

- whether the Council was entitled to withhold the information withheld under section 40(2) of FOIA from the report partially disclosed during the course of the Commissioner's investigation.

Reasons for decision

Section 3(2) - information held by a public authority

12. Section 3(2)(a) of FOIA states that information is "held" by a public authority if it is held "otherwise than on behalf of another person".
13. Therefore, if information is held only on behalf of another person, including a "legal person" such as an organisation, it is not "held" for the purposes of FOIA, and does not need to be considered for disclosure in response to a request made under FOIA. The Commissioner's guidance on information held for the purposes of FOIA¹ indicates that when considering whether information is held only on behalf of another person the question to consider is whether the information is held to any extent for the public authority's own purposes.
14. As noted above in paragraph 9, during the course of the Commissioner's investigation the Council identified two documents within the scope of part 1 of the request that were held by the Council for the purposes of FOIA (a report and a presentation). The Council stated that this information was produced by Council officers (with contributions from third party organisations) and it therefore considered the information to be held by the Council for the purposes of FOIA. The Council has disclosed the majority of the report and the presentation in full. It has issued a refusal notice for the information within the report that it has withheld (citing sections 43(2) and 40(2) of FOIA).
15. However, the Council has refused to provide the remaining information that its searches for information within the scope of part 1 of the request identified on the grounds that this information is not held by the Council for the purposes of FOIA. This information constitutes "information created and shared by Nottingham Labour Group Councillors for the purposes of the vote undertaken by Nottingham Labour Group Councillors". The Council's position is that, although this

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/information-you-hold-for-the-purposes-of-foia/#whoholdsthe>

information was held on its servers, it holds it solely on behalf of the Labour Group Councillors.

16. The following analysis considers whether the Council is correct when it says it does not hold this information to any extent for its own purposes and does not, therefore, hold this information for the purposes of FOIA.
17. The Commissioner's guidance states that information is likely to be held for the Council's own purposes (to at least some extent) in the following circumstances:

"Information held by local councillors **only** when carrying out functions of a local authority. This includes circumstances in which councillors:

- hold information in their role as cabinet members,
- have executive responsibility for a service area,
- represent the local authority in relevant forums, eg a regional forum, and
- carry out relevant administrative public functions.

It **does not** include circumstances in which local councillors hold information when performing their function as elected members. That is, when corresponding with residents of their ward, when discussing council business with fellow councillors in the context of a voting strategy or when campaigning on behalf of their political party."

18. Regarding the question of whether it was the Council or the Labour group of Councillors that had carried out a review of the relationship with Ningbo, in its submissions to the Commissioner the Council stated:

"The meeting and vote regarding Nottingham City Council's continued relationship with Ningbo were held by the Labour Group not the Council. No Council employees were present during the vote or part of the decision-making process.

It is acknowledged statements issued should have therefore made it clear that the meeting, vote and subsequent decision were made by Nottingham Labour Group Councillors and not the City Council."

19. The Council also provided the following details as to a chronology of events and the roles of the Council and Councillors in the process:

"I have provided a chronology of events in relation to the petition and subsequent vote below:

- The petition was handed to the Council.
- A presentation of options was provided by Council officers to Nottingham Labour Group Councillors on 13 February 2023.
- The Council officers left the meeting, and the Labour Group Councillors held a vote regarding the petition and the relationship with Ningbo.
- The decision was made by the Labour Group Councillors that the relationship would be maintained."

20. It also stated that as the decision was made to maintain the relationship no further action was required by the Council.

21. During the course of the investigation the Commissioner asked the Council to address the complainant's suggestion that some councillors may hold the information for the purposes of carrying out functions of the local authority (as it relates to their role as cabinet members and their responsibility for a service area) rather than performing their function as elected members.

22. The Council's position is that it held this information, on behalf of all Councillors, in their capacity as elected members only rather than any other capacity in which they act on behalf of the local authority. Specifically it stated:

"it is clear the vote undertaken by Nottingham Labour Group was part of the Councillors membership of the Nottingham Labour Group, and therefore the information regarding the vote is not held for the purposes of carrying out functions of the local authority as a portfolio holder, cabinet member or their responsibility for a service area".

"The vote was a political decision made by the Labour Group Councillors, Council officers were not present during the vote, and the result of the vote by the Labour Group Councillors required no further action by Council officers."

23. The Commissioner accepts the Council's argument that this information was held solely in relation to a vote by members of the Labour Group in their capacity as elected members. The Commissioner's guidance is clear that where information is held solely in relation to Councillors'

function as elected members this information is not considered to be held by the Council for the purposes of FOIA.

24. The Commissioner is satisfied that the information created and shared by the Labour councillors in relation to the vote is held by the Council only on behalf of the Labour Councillors. Therefore his decision is that the information is not held by the Council for the purposes of FOIA and so it was not obliged by FOIA to disclose it.

Section 43(2) – prejudice to commercial interests

25. Section 43(2) provides that –

“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).”

26. In order for a prejudice-based exemption, such as section 43, to be engaged the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the public authority 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 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. The anticipated prejudice must be more likely than not.

Does the information relate to a person’s commercial interests?

27. The Council argues that disclosure of the withheld information would prejudice the commercial interests of the University of Nottingham (UoN).

28. The term 'commercial interests' is not defined in FOIA; however, the Commissioner has considered his guidance on the application of section 43², which clarifies that: "A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent."
29. The withheld information originally withheld under this exemption constitutes correspondence between the Councillor named in part 2 of the request and UoN regarding the impact any change to the twinning relationship would have. Some correspondence has been sent jointly by the UoN and Nottingham Trent University (NTU), other correspondence is solely with UoN.
30. The Council's arguments relate to the commercial interests of UoN only, not those of NTU. In the case of the joint correspondence the Council argues that the information relating to each university cannot be separated, having reviewed the withheld information, the Commissioner accepts that this is the case for the majority of the information. However, he notes that both of the joint documents contain a small amount of information that refers specifically to NTU only.
31. The Commissioner's view is that the following information relates to NTU only:
 - Paragraph 7 of the joint letter (other than the final sentence, which relates to both universities)
 - The statistics relating to NTU in the table at the end of the joint letter
 - Paragraph 5 of page 4 of the joint impact assessment.
32. The Commissioner's view is that the Council has failed to demonstrate that the exemption is engaged for the information through its arguments made to the Commissioner as these relate only to the commercial interests of UoN.
33. However, the Commissioner notes that the Council did consult with NTU regarding the disclosure of this information and has provided a copy of the relevant correspondence. NTU asked that the statistics relating to

² <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

NTU in the table at the end of the joint letter not be disclosed as it considers disclosure of this information would prejudice its commercial interests. Although it is the Council's responsibility to demonstrate that the exemption is engaged, given that the Commissioner is aware of the arguments made by NTU regarding its own commercial interests, he will take its arguments in to account on this occasion despite the Council not having relied on them to demonstrate that the exemption is engaged. NTU did not consider that disclosure of any other information in the joint documents would prejudice its commercial interests.

34. The Commissioner's decision is therefore that the exemption is not engaged with respect to the information about NTU specifically, other than the NTU statistics, he therefore orders disclosure of the following information:
 - Paragraph 7 of the joint letter (other than the final sentence, which relates to both universities)
 - Paragraph 5 of page 4 of the joint impact assessment.
35. With respect to the NTU statistics the Commissioner considers that the interests in question are the commercial interests of NTU, this information relates to the recruitment of international students which is a commercial activity.
36. With respect to the remainder of the information originally withheld under the exemption, the Commissioner accepts that the interests in question are the commercial interests of UoN. This information relates to both UoN's recruitment of international students to its campus in Nottingham and its operation of a campus in Ningbo, both of which are commercial activities.
37. The Council also withheld some information from the report it partially disclosed during the course of the Commissioner's investigation under section 43. It redacted several paragraphs from the report itself. The joint letter and joint impact statement which it had already withheld and have been considered above, formed appendices to the report, these were also redacted to withhold the content. Therefore the only additional information withheld under this exemption was the paragraphs redacted from the report itself, this information also relates to the impact any change to the twinning relationship would have. The Commissioner accepts that the interests in question in respect to this information are the commercial interests of UoN for the reasons given above.

The causal relationship

38. The Commissioner will first consider the causal relationship between the disclosure of the NTU statistics and the prejudice described by NTU,

before considering the causal relationship between the disclosure of the information relating to the commercial interests of UoN and the prejudice described by the Council.

39. The NTU statistics show the number of students from various countries studying at NTU in Nottingham over the academic years 2018/19 to 2021/22. NTU has argued that recruitment of international students is a competitive market and disclosure of these statistics would be likely to allow other Higher Education competitors to match its international recruitment success, therefore damaging its commercial advantage in the sector.
40. NTU also stated,

“To enable the University to compete in the global higher education market against both domestic and international competitors, the University must ensure that information pertinent to its international recruitment strategy which will be of enormous commercial benefit to its competitors, is not placed into the public domain”.
41. The Commissioner does not consider that the arguments provided by NTU demonstrate a causal link between the disclosure of the statistics and the envisaged prejudice. While he accepts that student recruitment is a very competitive market and there may be some advantage to competitors in understanding NTU’s recent numbers of international students, he does not consider that disclosure of these statistics would allow competitors to match those levels of recruitment as argued by NTU. Simply being aware of the figures would not in and of itself allow competitors to recruit the same or higher numbers of students from the various countries.
42. The Commissioner therefore considers that the exemption is not engaged for the statistics relating to NTU in the table at the end of the joint letter, he therefore orders disclosure of this information.
43. Regarding the remainder of the information withheld under this exemption, which relates to the commercial interests of UoN, the Council has argued that disclosure of this information would be likely to prejudice the commercial interests of UoN.
44. The Council has consulted with UoN in reaching this conclusion and has provided copies of the correspondence to the Commissioner.
45. As noted above, this information comprises:
 - correspondence between the Councillor named in part 2 of the request and UoN regarding the impact any change to the twinning relationship would have. Some correspondence has been sent

jointly by the UoN and NTU, other correspondence is solely with UoN.

- several paragraphs redacted from the report that was partially disclosed during the course of the Commissioner's investigation. This information also relates to the impact any change to the twinning relationship would have.

46. The Council quoted the following statement from UoN in its submissions to the Commissioner regarding the causal relationship between the disclosure of the withheld information and the envisaged prejudice:

"The release of this documentation gives a great deal of insight into how much economic gain the University, the City and indeed the county of Nottinghamshire at large gains from its international student body, many of whom are Chinese. This will give our competitors insight into our financial operations which could be exploited, giving competitor institutions the opportunity to change current offerings to attempt to lure our prospective students to their institution, thus significantly reducing our market position in terms of overall attractiveness as well as reducing revenue in coming years."

47. Having reviewed the withheld information, the Commissioner considers that the withheld information is much broader than insight in to economic gain, it relates to the University's international strategy with respect to China more broadly, however, the Commissioner nevertheless accepts the argument that to disclose the majority of the withheld information would provide information upon which UoN's competitors could act in order to encroach upon its market position both with regards to recruitment of international students, particularly Chinese students, and in terms of provision of education on its campus in China. This would particularly be the case should there be any change to the twinning relationship in future as the information relates to the impact that a change in the twinning relationship would have on UoN's business operations.
48. The Commissioner is therefore satisfied that a causal relationship exists between the disclosure of the majority of the information that relates to the commercial interests of UoN and the prejudice to the commercial interests of UoN that the council described. For this information the Commissioner has gone on to consider the likelihood of the prejudice occurring below.
49. However, the Commissioner does not accept that there is a causal relationship between the disclosure of the following withheld information

and the prejudice to the commercial interests of UoN that the council described:

- Copies of the emails exchanged with UoN, excluding the attachments.
50. While the Commissioner accepts the causal link between the disclosure of the attachments to these emails (other than the information relating solely to NTU) for the reasons set out in paragraph 47, he does not consider that the same can be said of the content of the emails themselves, which do not contain any significant detail about UoN's international strategy or operations. He therefore orders disclosure of these emails (excluding the attachments). Appropriate redactions should be made in relation to personal data.

The likelihood of the prejudice occurring

51. The Council argues that a disclosure of the information 'would be likely to' cause the prejudice it has foreseen. The Commissioner has therefore considered whether the chance of prejudice occurring meets the threshold of the chance of prejudice being suffered being more than a hypothetical possibility; there must be a real and significant risk.
52. The Commissioner has considered the commercial interests of UoN and considers that the Council's arguments are persuasive.
53. A key factor in this is the extent to which, with the presence of a campus in Ningbo, UoN has a particularly strong presence in this market, the Commissioner considers it likely that competitors would act on information which would allow them to gain a competitive advantage to the detriment of UoN.
54. Although, as noted above, the Commissioner considers that the risk of prejudice would be heightened should there be a change to the twinning relationship in the future, the Commissioner considers that even without any change to the twinning relationship there is a real and significant risk that competitors of UoN would use the withheld information to attempt to gain a competitive advantage to the detriment of UoN.

The Commissioner's conclusions

55. The Commissioner has found that the exemption is not engaged for some information that relates solely to the commercial interests of NTU and for the emails (excluding attachments) exchanged with UoN. He has therefore ordered disclosure of this information.
56. The Commissioner has decided that the Council is correct in that section 43(2) is engaged by the rest of the information withheld on this basis as

the disclosure of this information would be likely to result in prejudice to commercial interests. Since it is a qualified exemption, he must therefore go on to consider the public interest test required by section 2 of FOIA.

The public interest

57. The complainant stated, when requesting an internal review, that they consider there to be a strong public interest favouring disclosure due to increasing tensions between the UK and China and increasing public scrutiny of relations between the two countries.
58. The Council acknowledged the public interest arguments in transparency regarding the relationship between Nottingham and China when the actions of the Chinese government are under considerable scrutiny.
59. However, it considers that this public interest is outweighed by the public interest in maintaining a diverse and thriving student population including an international student population and the intellectual, economic and cultural benefits that this brings.
60. The Commissioner accepts the complainant's characterisation of relations between China and the UK being more strained and facing increased scrutiny. He considers this to be a widely accepted view. At the time of the request, UK relations with China had been impacted over several years by tensions over various issues including the implementation of new laws in Hong Kong, the treatment of pro-democracy protesters from Hong Kong, the treatment of the Uighur people in Xinjiang province and the UK government's decision to order the removal of all Huawei kit from 5G networks by 2027 due to concerns about potential spying. The Commissioner agrees that there is increased interest in the nature of the relationship that the UK has with China and the accusations of human rights abuses and potential spying activities increase the public interest in transparency regarding how decisions about the UK's relationship with China are taken.
61. The Commissioner understands that part of the controversy locally regarding the city's continued twinning relationship with Ningbo is that following Russia's invasion of Ukraine the Council severed ties and terminated the sister city status with Minsk in Belarus and Krasnodar in Russia. However it has not ended its relationship with Ningbo in China, despite the concerns about the actions of the Chinese government referred to in paragraph 60 of this notice. The Commissioner accepts that within this context particularly, there is a significant public interest in the disclosure of information in order to provide transparency to the public about how the Council has taken decisions about the twinning relationships.

62. However, the Commissioner considers that the information disclosed in response to this request goes a long way in meeting that public interest. Although the precise details of the arguments made to the Council by UoN regarding the impact of changing the twinning arrangement have been withheld, it has already been made clear from the information disclosed that the Council has considered the views of UoN when considering the future of the twinning arrangement.
63. The Commissioner does not consider that disclosure of the withheld information would add anything significant to the debate about whether the Council should end the twinning relationship or significantly increase understanding of how the decision to keep the status quo was reached. The Commissioner does not therefore consider the public interest in the disclosure of the withheld information to be particularly significant.
64. In addition, the Commissioner has already acknowledged that the envisaged prejudice would be likely to occur. He considers that the Council's arguments are strong in identifying likely issues which would arise from a disclosure of the withheld information. While the commercial interests of UoN are undoubtedly distinct from the public interest, the Commissioner nevertheless considers there is a considerable overlap between these interests. Universities carry out work both through teaching and research which has a significant positive impact and weakening UoN's ability to generate funds both through international student recruitment and the operation of its campus in Ningbo would not be in the public interest.
65. For these reasons, the Commissioner's decision is that the public interest in the exemption being maintained outweighs that in the information being disclosed on this occasion. The Council was not, therefore, obliged to disclose this information.

Section 40(2) – personal information

66. The following analysis considers whether the Council was entitled to rely on section 40(2) of FOIA to redact the name of a former Council staff member from the report that it partially disclosed during the course of the Commissioner's investigation. The report is titled, "Review of twinning arrangements and international links", the name of one of the authors, who is a senior member of staff has been disclosed, the name of the other author has been redacted. This former member of staff was more junior (below head of service level).
67. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.

68. Section 3(2) of the Data Protection Act 2018 defines personal data as:

“any information relating to an identified or identifiable living individual.”

69. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

70. In this case, the withheld information comprises the name of a former Council staff member. Therefore, the Commissioner is satisfied that the withheld information is personal data as the information relates to and identifies the former staff member.

71. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on principle (a), which states:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”

72. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

73. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.

74. The Commissioner considers that the complainant is pursuing a legitimate interest in seeking to obtain a greater understanding of how the Council/the Labour Group has considered Nottingham’s relationship with Ningbo.

75. However, the Commissioner does not consider that disclosure of the withheld information is necessary to meet that legitimate interest.

76. The report sets out three options with regards to the twinning arrangement and feedback from stakeholders. Although it refers to the benefits and risks of each option it does not propose one option over another, the Commissioner considers that it is a presentation of various options rather than an expression of the authors’ opinions on the best option. Particularly in light of the fact that the name of the more senior author of the report has been disclosed, the Commissioner does not consider it is necessary for the name of the more junior author to be disclosed to meet the legitimate interests. The Commissioner does not consider that the disclosure of their name would increase understanding

of how the Council/the Labour Group has considered the twinning relationship with Ningbo.

77. The Commissioner's decision is therefore that the Council was entitled to rely on section 40(2) of FOIA to refuse to provide the information.

Right of appeal

78. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

79. 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.

80. 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

Victoria James
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