

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 August 2024

Public Authority: Fermanagh and Omagh District Council
Address: Townhall
2 Townhall Street
Enniskillen
Co Fermanagh
BT74 7BA

Decision (including any steps ordered)

1. The complainant requested from Fermanagh and Omagh District Council (the Council) information relating to dog breeding licences. The Council considered the information exempt from disclosure and cited section 43(2) (commercial interests) of FOIA to the withheld information.
2. The Commissioner's decision is that the Council has failed to demonstrate that the exemption is engaged, and is therefore not entitled to rely on it.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation;
 - Disclose the most recent inspection reports for both the licence holders in question, which are specified in part 3 of the request.
4. The Council must take these steps within 30 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 21 January 2024 the complainant wrote to the Council and requested information in the following terms:

"In respect of [name redacted] (licence holder 8) please provide

1. a copy of her most recent application for a dog breeding licence
2. any correspondence to or from the licence holder relating to the most recent application
3. a copy of the most recent inspection report for the breeding establishment

In respect of [name redacted] (licence holder 1) please provide

1. a copy of his most recent application for a dog breeding licence
 2. any correspondence to or from the licence holder relating to the most recent application
 3. a copy of the most recent inspection report for the breeding establishment
 4. a copy of the most recent licence. The last version I have, expired on 13 January 2024."
6. On 21 February 2024 the Council responded and provided information to some parts of the request. In relation to the inspection reports for both premises, the Council considered the information exempt from disclosure and cited section 43(2) (commercial interests) of FOIA to the withheld information.
 7. On 23 February 2024 the complainant informed the Council that some information relating to the request had been omitted from its response, and she asked "Where are the breeding dogs housed?" The complainant considered that this information should be on the licence application and should have been provided as part of the Council's response. She also asked the Council to confirm if the breeding dogs in question are housed at [address redacted]. The complainant asked for an internal review and said copies of inspection reports should be provided.
 8. On the same day the Council acknowledged the complainant's correspondence and said that her question would be treated as an FOI request. The complainant replied and expressed her disappointment with the Council deciding to treat her subsequent question as a new FOI request.
 9. On 21 March 2024 the Council provided its review response to the two subsequent questions relating to the request.

10. On 22 March 2024 the complainant thanked the Council for providing confirmation to one of her questions – that the breeding dogs on [redacted name] dog breeding licence are located at [redacted address].
11. However, the complainant stated she was still seeking the Council's response about copies of inspection reports in relation to two named dog breeders.

Reasons for decision

Section 43 – commercial interests

12. Section 43(2) of FOIA 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.
13. 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 authority alleges would, or would be likely to occur if the withheld information were 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 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.

14. The Commissioner's published guidance¹ on section 43(2) defines "commercial interests" as follows:

"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."

15. The Commissioner acknowledges that dog breeding is a commercial activity in that breeders generally sell puppies with the aim of making a profit. Therefore he accepts that the first part of the prejudice test is met.

16. The Commissioner's guidance about the prejudice test explains the level of detail required from the public authority:

"It is not sufficient for you to simply argue that because information is commercially sensitive, its disclosure would, or would be likely to, prejudice commercial interests. You must be able to demonstrate a causal relationship between the disclosure of the information in question and the prejudice you envisage."

17. The Council considered disclosure would compromise the commercial interests of licence holders, ie the dog breeders. The Council said this is mainly due to the scoring. If a request was received for investigation reports with a lower scoring, it may be misunderstood and misconstrued. This is because the public do not know the context of the investigation and the methodology of the scoring. The Council stated releasing the scores would not add anything further in public understanding of the inspection regime. The Council said that as the information contains "a report of the circumstances at the time of the inspection, businesses have an opportunity to make changes after the inspection, if needed."

18. The Council maintained that if the inspection reports were disclosed, the information could be used against an establishment in negative publicity. This, it said, could encourage protests outside of a business, which for some, are also home addresses. The Council added, this could cause reputational damage to businesses and they could incur loss of business.

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

19. The Council also reported that establishments have been targeted in the past, and how one local dog breeder's outbuilding was subjected to an arson attack.
20. The Commissioner observes that the Council's arguments appear to refer to the disclosure of negative inspection reports. The Council did not address the potential impact of disclosing positive inspection reports. However the Commissioner wishes to emphasise that this should not be taken to mean that the withheld inspection reports in this particular case contain negative findings.
21. The Commissioner's published guidance further sets out that if a public authority proposes to withhold information because the disclosure would, or would be likely to, prejudice a third party's commercial interests, the authority must have evidence that this accurately reflects the third party's concerns.

"It is not sufficient for you to simply speculate about the prejudice which might be caused to the third party's commercial interests. You need to consult them for their exact views in all but the most exceptional circumstances."
22. The Commissioner asked the Council whether it had consulted the dog breeders in question. The Council confirmed it had not consulted them.
23. The Commissioner examined all of the information provided by the Council but is not persuaded that disclosure of the withheld information in this case would be more likely than not to have the prejudicial effect claimed. Despite claiming the higher threshold of prejudice, the Council's arguments indicate that disclosure of the withheld information "could" prejudice dog breeders' commercial interests, which is insufficient in the context of section 43. The Commissioner accepts there is potential for disclosure of the information to have an impact on the public perception of the licence holders. However, he does not consider this to be a robust argument for concluding that disclosure would be more likely than not to result in damage to their commercial interest in this particular case.
24. The Commissioner considered whether it would be appropriate to apply the lower threshold, ie would be likely to prejudice. However he is of the opinion that the Council has failed to demonstrate the causal link between the withheld information and the prejudice claimed. The Commissioner cannot accept such generic arguments, particularly in the context of the specific withheld information, since they clearly do not demonstrate that the public authority has considered all the circumstances of this case.

25. Furthermore, in the absence of any consultation with third parties, the Commissioner considers the Council's arguments about prejudice to be based on speculation and therefore inadequate in the context of the exemption. The Commissioner has not been made aware of any exceptional circumstances which would render consultation unnecessary.
26. The Commissioner is mindful that it is for a public authority to satisfy him it has handled a request in accordance with the requirements of FOIA. Accordingly, the Commissioner expects public authorities to ensure they provide full details of their decision-making and any information or arguments they wish the Commissioner to take into account. Public authorities should bear in mind that the Commissioner cannot make assumptions in the public authority's favour.
27. In light of the above, the Commissioner cannot be satisfied the exemption at section 43(2) is engaged. Consequently, he is not required to consider the public interest.

Right of appeal

28. 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

29. 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.
30. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Sarah O’Cathain
Senior Case Officer
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF