

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 September 2024

Public Authority: Mid Devon District Council

Address: Phoenix House
Phoenix Lane
Tiverton
Devon
EX16 6PP

Decision (including any steps ordered)

1. The complainant has requested information about changes to pricing for leisure centre activities. Mid Devon District Council ("the council") withheld some of the requested information under section 43(2) (commercial interests) of FOIA and disclosed the remainder.
2. The Commissioner's decision is that the council is entitled to withhold the information under section 43(2) and does not hold any further information.
3. The Commissioner does not require further steps.

Request and response

4. On 12 January 2024, the complainant wrote to the council and requested information in the following terms:

"At the Cabinet meeting on 9 Jan 2024, in answer to a question from me, regarding the review of Leisure Pricing, the Cabinet Member for Community and Leisure (Cllr David Wulff) said: *"The Council had commissioned a specialist Leisure Consultancy Company to look at the service before any fee changes were considered. The outcome of their extensive report was that our fees could increase when compared to*

the market, locally and nationally. The external report formed the basis of the 'commercially sensitive' report presented to the PDG in October 2023, as required by Motion 593 point 2..... The Charges were published and open to public scrutiny and comment three months before implementation."

(Note: The Audio recording of this meeting has been published and this statement has been transcribed from that recording.)

1. Please supply me with copies of these two reports - i.e. the report prepared by the "Specialist Leisure Consultancy Company" and the report prepared by the MDCC Officer which was presented to the Community Policy Development Group, for their meeting on 24 October 2023.
2. I should also like details of the publication of the new 2024 Leisure Charges, which the Cabinet Member stated was done: "*Charges were published and open to public scrutiny and comment three months before implementation*".

Please provide me with a copy of what was actually published and also give me the details of when, where and for how long, these prices remained published and open to public scrutiny.

Will you please provide the information, in electronic format (either Microsoft Word, pdf or jpeg if you need to scan the advertisement), to me at this email address."

5. The council responded on 12 February 2024. It stated that the information sought by part 1 was withheld under section 43(2) of FOIA. It further stated that the information sought by part 2 was already publicly available (and provided a URL for this), and therefore fell under the exemption provided by section 21 of FOIA.
6. On 7 February 2024, the complainant asked the council to provide an internal review. This was on the basis that the council was not entitled to rely upon section 43(2) for part 1, and that the information referred to in response to part 2 was not that which had been requested.
7. Following an internal review the council wrote to the complainant on 11 March 2024. For part 1, it maintained the application of section 43(2). For part 2, it responded that the information referred to (and already publicly available) was the only information held that was relevant to the request.

Scope of the case

8. The complainant contacted the Commissioner on 27 March 2024 to complain about the way their request for information had been handled.
9. The Commissioner considers that the scope of his investigation is as follows:
 - For part 1, whether the council has correctly applied section 43(2) of FOIA to withhold the requested information.
 - For part 2, whether the council has otherwise disclosed all held information for the purposes of section 1(1) of FOIA.

Reasons for decision

Section 43(2) – Commercial interests

10. Information can be withheld under section 42(3) of FOIA if disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
11. The council has explained to the Commissioner that it considers disclosure of the information would prejudice the commercial interests of the council. The council has explained that the withheld information relates to its operation of leisure services in the Mid Devon area, and specifically three leisure centres that operate as 'Mid Devon Leisure'.
12. The withheld information represents two reports that were drafted to provide the council with a performance assessment, and to assist in deciding future pricings and broader policies. As such, the reports contain information that is specific to market competitiveness. This includes footfall, timings of footfall, target demographics, future risks to profitability, staffing structures, external pressures, pricing calculations, and weaknesses within the business model. The council does not consider it would be possible to disclose the reports in redacted form, as the extent of the redactions would mean that there would be no substantive information within them.
13. The council argues that the disclosure of the information would be likely to prejudice its commercial interests by revealing its business analysis to competitors. This information could allow competitors to undertake price gouging, or to target specific services that the council provides to a demographic group or visitors at any given time. The council argues that it operates in a highly competitive, and saturated, market. For example,

in respect of gym facilities, one of the three leisure centres has approximately 25 competitors within a 20 minute travel distance. The council further argues that, whilst Mid Devon Leisure is a profit organisation, it seeks to provide services at a reasonable price, including some activities that are provided at a loss but are subsidised by more profitable ones. Any impact to its profitability would damage its ability to provide a wider range of services than would otherwise be possible.

14. The Commissioner has considered the council's position, and the withheld information. Having done so, he is satisfied that the information relates to the commercial activity of the council. The Commissioner is also satisfied that the disclosure of the information would prejudice the council's commercial interests by revealing significant detail of the operation of Mid Devon Leisure to competitors. The Commissioner has therefore concluded that section 43(2) is engaged and must go on to consider the public interest test.
15. The Commissioner recognises that there is a public interest that the council operates transparently and is accountable to the public for the commercial decisions it makes in relation to the Mid Devon Leisure. In the context of this case, the Commissioner recognises that the council's proposed increase in fees will clearly impact upon affordability for local residents. In particular, the complainant has raised concerns about the extent of the proposed fees, and the democratic process by which the council has made its decision.
16. However, the Commissioner recognises that there is a public interest that the council is able to pursue best value in the operation of Mid Devon Leisure, which operates in a commercial environment with a range of nearby competitors. Any commercial disadvantage to the council in its running of Mid Devon Leisure may reduce the quality of services it is able to provide, and in particular, may damage the council's ability to subsidise less profitable activities.
17. It is also relevant for the Commissioner to note that there is no evidence available to him that indicates that the council is acting improperly in its handling of this matter, and which would increase the public interest in disclosure. The evidence available to the Commissioner indicates that the matter has been subject to scrutiny by elected representatives, with a resultant decision made on that basis.
18. On balance therefore, the Commissioner finds that the public interest favours maintaining section 43(2).

Section 1 – General right of access to information

19. Under section 1(1) of FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b), to have the information communicated to them if it is held and is not exempt information.
20. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
21. In other words, in order to determine such complaints, the Commissioner must decide whether on the balance of probabilities a public authority holds any - or additional - information which falls within the scope of the request (or was held at the time of the request).
22. Part 2 of the request seeks information about a comment made by a councillor in a cabinet meeting on 9 January 2024, in which the councillor indicates that information (“the new Leisure Charges”) had been published three months before implementation for public scrutiny.
23. In response to the request, the council referred the complainant to the published minutes for that cabinet meeting.
24. The Commissioner asked the council to explain whether it held such further information, and the steps it had taken to verify this.
25. The council has explained to the Commissioner that it has consulted with Democratic Services, and it has established that the comment made by the councillor was in error, and that the information (“the new Leisure Charges”) had not been published three months before implementation. This was confirmed in a cabinet meeting on 5 March 2024, as recorded on page 7 of the associated minutes)¹. As such, there is no further held information other than the public minutes.
26. In respect of other information that the complainant has argued to the Commissioner should have been searched for and disclosed in response to the request (e.g. a “standard letter” that was sent to members of the

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<https://democracy.middevon.gov.uk/documents/g1762/Public%2520reports%2520pack%252005th-Mar-2024%252017.15%2520Cabinet.pdf?T=10>

Leisure Centres on 6 December 2023) the council has explained to the Commissioner that, whilst such information can be requested, it does not consider that it falls within the parameters of the request in this case. The council argues that the request is specific in what it seeks.

27. The Commissioner has considered the submissions provided by both the council and the complainant.
28. The Commissioner understands that the request is specific in seeking information about a statement made by a councillor. This statement was later found to be incorrect, and the associated action (the publishing of leisure charges three months prior to implementation) did not in fact happen. If this action did not happen, the Commissioner would not logically expect information about it to be held.
29. In respect of other information that the complainant has explained that they seek, the Commissioner has reviewed the request. Having done so he is not satisfied that this is the information that has been specified by the request, and at no point has the request been amended to include any wider information. Section 8 stipulates that a request must describe the information requested. As it is written, the Commissioner considers that the request clearly describes what information is requested, and as such, the Commissioner must limit this decision to only that information.
30. Having considered all the circumstances, the Commissioner therefore accepts the council's position that it does not hold further information beyond that which the complainant has been referred to. As such, the Commissioner has decided that the council has complied with section 1(1) of FOIA.

Right of appeal

31. 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

32. 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.
33. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Daniel Perry
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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