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Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 November 2024

Public Authority: London Borough of Lambeth
Address: Lambeth Town Hall
Brixton
London
SW2 1RW

Decision (including any steps ordered)

1. The complainant has requested from Lambeth City Council (the Council) information about its leisure centres. The Council said it did not hold some information and refused to provide the remainder under section 43 (commercial interests) of FOIA.
2. The Commissioner's decision is that the Council has failed to comply with section 1 and section 10(1) of FOIA in that it has failed to answer the part of the request relating to usage data. It has also failed to demonstrate that the exemption at section 43(2) is engaged with respect to the revenue data.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the requested usage data and revenue data as described in 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.

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Request and response

5. On 14 December 2023, the complainant wrote to the Council and requested information in the following terms:

"I am interested in finding out how the usage of Lambeth leisure centres has changed since the move from management by Better to Active Lambeth, as well as how the income realised has compared to what was projected before the change in management and any measures of user satisfaction.

I recognise that the specific information and dates of that information may not be available in the form requested but I have set out in the first paragraph the purpose of my request and hence I hope the closest possible information can be supplied to fulfil that intent.

Please supply information on total revenue of Clapham Leisure centre, Brixton leisure centre, Streatham leisure centre and all Lambeth leisure centres by month for 2023/24 in the original business plan and then actuals.

Please supply any data on user satisfaction for Clapham Leisure Centre, Brixton Leisure centre and Streatham Leisure Centre and for Lambeth leisure centres in total split between 2022/23 and 2023/24."

6. The Council responded on 18 January 2024. It stated that it did not hold information on user satisfaction. It provided some information regarding membership. The Council went on to say:

"Figures related to income are commercially confidential as some elements include income from third party arrangements."

7. The Council did not cite an exemption in its refusal notice.
8. On 18 January 2024 the complainant requested an internal review. They pointed out that they had requested usage data rather than membership data, and disagreed with the Council's position regarding commercial confidentiality.
9. The complainant contacted the Commissioner on 16 March 2024 to complain that they had not received the outcome of the internal review.
10. Following the Commissioner's intervention, on 10 July 2024 the Council provided an internal review in which it maintained its original position regarding the withheld information. It provided some information

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regarding usage figures. It withheld the revenue information citing section 43(2) (commercial interests) of FOIA.

Scope of the case

11. Having received the outcome of the internal review, the complainant contacted the Commissioner again on 11 July 2024. They stated that the Council had not provided them with the usage data requested, but had provided "usage data for an unspecified period, which is not what I asked for".
12. The complainant further disputed that the revenue data should be withheld. They did not raise any issue with the Council's position that it did not hold information relating to user satisfaction.
13. The Commissioner considers that the scope of his investigation is to determine if the Council was entitled to withhold the revenue data. He has also considered whether the Council adequately responded to the request for usage data.

Reasons for decision

Request for usage data

Section 1: general right of access
Section 10(1): time for compliance

14. Section 1(1)(a) of FOIA requires a public authority to inform the complainant in writing whether or not recorded information is held that is relevant to the request. Section 1(1)(b) requires that if the requested information is held by the public authority it must be disclosed to the complainant unless a valid refusal notice has been issued.
15. Section 10(1) requires that the public authority comply with section 1 promptly, and in any event no later than 20 working days after the date of receipt of the request.
16. The complainant maintained that the Council had not provided him with the usage data requested. The relevant part of the request is as follows:

"Please supply information on usage of Clapham leisure centre, Brixton Leisure centre, Streatham leisure centre and for all Lambeth leisure centres, ideally split between use of swimming pool, gym, classes and other for each month in 2022/23 (before the change in management) and then for each month in 2023/24."

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17. The Council did not address this part of the request in its original response dated 18 January 2024. It did provide information relating to membership, but this had not been requested by the complainant.
18. The complainant raised the usage data as part of his request for internal review. In response the Council provided a table containing "usage details aggregated for each individual centre". It did not provide a breakdown of the figures by month, or by facilities within each centre, as the complainant had requested.
19. The Commissioner has considered the information provided by the Council and is satisfied that it does not match the description specified in the request. Consequently the Commissioner finds that the Council has not adequately responded to this part of the request. It has failed to confirm or deny that it holds the usage data as described by the complainant. To the extent that this information is held, it has further failed to disclose the information or issue an appropriate refusal notice.
20. The Commissioner would remind public authorities to ensure that they have properly examined and interpreted requests, so that they do not spend time and resources providing information which has not been requested, whilst not addressing the substantive request.

Request for revenue data

Section 43 - commercial interests

21. Section 43(2) of FOIA states 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)."

The Council's position

22. The Council has stated that disclosure of the revenue information could prejudice pending or future negotiations the Council and or third party may be subject to.
23. The Council did not provide any further argument to support its decision in its refusal notice or internal review.

The Commissioner's position

24. In order to apply section 43(2), an authority must be able to show that the disclosure of the information would, or would be likely to, prejudice or harm its commercial interests, or those of an individual, a company

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or any other legal entity. In conducting this test, an authority needs to identify what the harm is and why it may occur as a result of disclosure.

25. An authority must also decide the likelihood of prejudice arising on the facts of each case.
26. During his investigation, the Commissioner gave the Council opportunities to provide further submissions in support of its position, providing an indication of the level of detail required to engage the exemption.
27. The Council provided the Commissioner with information relevant to the second part of the request:

"Please supply information on total revenue of Clapham Leisure centre, Brixton leisure centre, Streatham leisure centre and all Lambeth leisure centres by month for 2023/24 in the original business plan and then actuals."

28. The Council provided the Commissioner with the income figures split by centre for 2023/24. It did not provide the business plan but did provide the total predicted income figure stated in the business plan.
29. The Council refused to provide the Commissioner the income figures from third parties as it considered this to be commercially sensitive. The Commissioner has commented on this in more detail in Other Matters below.
30. The Council stated that disclosure of the withheld information could prejudice its own commercial interest and those of third parties (although it did not identify any such third parties).
31. The Commissioner's guidance states:

"In order to apply section 43(2), you must be able to show that the disclosure of the information would, or would be likely to, prejudice or harm your commercial interests, or those of an individual, a company or any other legal entity. In conducting this test, you need to identify what the harm is and why it may occur as a result of disclosure.

You must decide the likelihood of prejudice arising on the facts of each case. Establishing the appropriate level of likelihood is important because it affects the public interest test, later.

- "would...prejudice" means that if you disclose the information, it is more probable than not that the harm you have identified would occur (ie there is a more than 50% chance of disclosure causing

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the prejudice, although it is not absolutely certain that it would do so).

- "would be likely to prejudice" is a lower threshold. It means that if you disclose the information, the probability of the harm occurring is less than 50%. However, the risk of prejudice occurring must be real and significant, and it must be more than hypothetical or remote.

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."¹

32. The Commissioner observes that the factors identified by the Council are generic in nature and make no reference to the specific information that is being withheld or the reasons why disclosure could result in prejudice.
33. The Commissioner accepts that whilst information of this nature, ie relating to income and revenue, may be considered to be exempt, it would need to be shown how the generic arguments set out above apply to the specific circumstances of the request. In this case the Commissioner is not satisfied that the Council have provided sufficient arguments to persuade him the exemption would be engaged regardless of having seen the information or not.
34. Furthermore, it is the Commissioner's opinion that the Council could have considered disclosing information with appropriate redactions if it considered that any of the information was indeed exempt.
35. In their request for an internal review the complainant acknowledged this and said:

"Secondly I asked for total revenue figures. I accept that individual elements of revenue may relate to third parties and hence be commercially confidential but I did not ask for a breakdown of individual elements. As those elements will be aggregated with those which do not relate to third parties there is no possible reason for not supplying the information based on commercial confidentiality."

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

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36. The Commissioner considers that, in cases where adequate arguments are not provided, it is not his role to speculate or to construct arguments on an authority's behalf.
37. In this case, for the reasons set out above, the Commissioner considers that the Council's arguments clearly fail to meet the evidential threshold required by the exemption at section 43(2) of FOIA. He therefore concludes that the Council has failed to show that the exemption in section 43(2) is engaged in this case. He has not gone on to consider the public interest test.

Other matters

Internal review

38. Although they do not form part of this notice the Commissioner would like to note the following matters of concern.
39. FOIA does not prescribe a time limit within which public authorities must complete internal reviews. However, the Commissioner's guidance² explains that an internal review should take no longer than 20 working days in most cases, or 40 working days in exceptional circumstances.
40. The Commissioner notes that there is no legal requirement for a public authority to have an internal review process in place under FOIA, although it is recommended as good practice under the Section 45 Code of Practice³ (Code of Practice) and most public authorities choose to do so. This also includes the Council in this case, which offered an internal review to the complainant if he was dissatisfied with the Council response to his request for information.
41. It follows therefore that, when an internal review process is offered to the requesters, there is an expectation that the public authority will adhere to the recommendations outlined in the Code of Practice.
42. In this case the complainant requested an internal review on 18 January 2024 and the Council provided its review response on 10 July 2024, albeit only after the Commissioner's intervention.

² <https://ico.org.uk/for-organisations/foi/guide-to-managing-an-foi-request/#20>

³

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

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43. The Commissioner finds this timescale, almost six months, excessive and wishes to remind the Council about the importance of the timely response to internal review requests. He also wishes to point out that he will generally accept complaints as eligible for investigation where an internal review is delayed or remains outstanding after 40 working days of it being requested.

General compliance with legal obligations and engagement with the Commissioner

44. The Commissioner wishes to comment further on the Council's general compliance with FOIA and engagement with his Office.

45. As part of his investigation, and in line with his usual practice, the Commissioner asked the Council a number of specific questions and requested the Council provide a copy of the withheld information.

46. Whilst the Commissioner attempts to restrict the information he requires to that which is necessary to reach a decision, he expects public authorities to provide comprehensive answers to all of his questions and to provide the necessary evidence to back up any assertions.

47. The Council refused to provide the Commissioner with all of the withheld information stating it considered it exempt under section 43(2) of FOIA.

48. The Commissioner is disappointed to have to remind the Council that there is no provision for a public authority to refuse to provide to the ICO information that falls within the scope of a request, solely on the basis that it is considered exempt from disclosure under the FOIA access regime. Furthermore it is the Commissioner's role to determine whether an exemption has been properly applied.

49. The Commissioner is also disappointed that the Council failed to engage with his initial investigation letter and following chaser letter.

50. The above concerns will be logged and used by the Commissioner when considering the overall compliance of the Council. The Commissioner will use intelligence gathered from individual cases to inform his insight and compliance function. This intelligence will be used and assessed in line with the Freedom of Information and Transparency regulatory manual 2023.⁴

⁴ <https://ico.org.uk/media/about-the-ico/documents/4026123/foi-and-transparency-regulatory-manual-v12.pdf>

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Right of appeal

51. 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

52. 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.
53. 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
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Wycliffe House
Water Lane
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