

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 November 2018

Public Authority: Mid Ulster District Council

Address: Philip.Moffett@midulstercouncil.org

Decision (including any steps ordered)

1. The complainant has requested information from Mid Ulster District Council ("the Council") regarding a report in relation to one of the Council's leisure facilities. The Council refused to disclose the requested information, citing the exemptions as set out in sections 36(2)(b)(ii), 36(2)(c), 42(1) and 43(2) of the FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that the Council has correctly applied section 43(2) of the FOIA to the report. As that section of the FOIA applies to the report in its entirety, the Commissioner has not gone on to consider the Council's application of the other sections of the FOIA mentioned above. Therefore, the Commissioner requires no steps to be taken.

Request and response

3. On 15 September 2017, the complainant wrote to the Council and requested information in the following terms:

"I recently received a copy of the draft report from Strategic Leisure to Mid Ulster District Council regarding Greenvale Leisure Centre and the Pulse contract review. Since this is dated August 2016 and draft, I respectfully request a copy of the FINAL report issued to elected officers prior to their decision to activate the no fault termination clause."

4. The Council responded to the complainant's request on 10 October 2017. It stated that it held the requested information, however it refused to disclose that information, citing section 43(2) of the FOIA as a basis for non-disclosure.
5. The complainant sought an internal review of the Council's response on 20 October 2017, the result of which was provided to him on 20 November 2017. The reviewer upheld the original decision and also stated that the Council was now also applying sections 36(2)(b)(ii) and 36(2)(c) as a basis for non-disclosure.

Scope of the case

6. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
7. The Commissioner wrote to the Council seeking its detailed submissions on 10 July 2018. The Council responded to the Commissioner on 13 August 2018, providing its submissions as to its application of the above exemptions and citing an additional exemption, section 42 of the FOIA, as a basis for non-disclosure.
8. The Commissioner has considered the Council's handling of the complainant's request.

Reasons for decision

Section 43(2)-commercial interests

9. Section 43(2) of the FOIA provides an exemption from disclosure of information which would, or would be likely to, prejudice the commercial interests of any person (including, but not limited to, the public authority holding it).
10. Section 43(2), is a prejudiced based exemption. The Commissioner's approach to the prejudice test is based on that adopted by the Information Tribunal in *Christopher Martin Hogan and Oxford City council c the Information Commissioner* (EA/2005/0026 and 0030, 17 October 2006) (referred to as 'Hogan'). This involves the following steps:
 - Identifying the "applicable interests" within the relevant exemption.

- Identifying the “nature of the prejudice”. This means showing that the prejudice claimed is “real, actual or of substance”, and showing that there is a “causal link” between the disclosure and the prejudice claimed.
- Deciding on the “likelihood of the occurrence of prejudice”.

Applicable interests

11. The Council must show that the prejudice it is envisaging affects the particular interests that the exemption is designed to protect – in this case commercial interests. The withheld information relates to the Council’s provision of leisure and recreational services, which would be classed as a commercial activity. The Commissioner is therefore satisfied that the withheld information relates to the commercial interests of the Council and other companies.

Nature of the prejudice

12. Although the Council previously disclosed the draft report to the complainant, it argues that the final report (‘the withheld information’) is substantially different and that it contains up-to-date information, the disclosure of which would be likely to prejudice the Council’s commercial interests and those of third parties. The Council has argued that disclosing the withheld information into the public domain would inform competitors of the costs of its services and the reasons behind their decision to select particular companies for the provision and delivery of the Council’s recreation and leisure services. This would be likely to cause harm to the commercial interests of the Council as any companies in the future who are tendering for Council’s business in the provision and delivery of such services would have access to the rationale behind Council’s tender selection and this would be likely to result in the Council having to pay more for such services, which would increase costs in general, the burden of which would be likely to be borne by the ratepayer.

13. The Council has also stated that disclosure of the withheld information would be likely to cause prejudice to the commercial interests of third party suppliers and advisers. This appears to be on the basis that one particular third party would gain a commercial advantage over others in tendering to supply goods and/or services in relation to the Council's provision and delivery of recreation and leisure facilities. However, the Commissioner notes that disclosure of the information would be to the world at large and that therefore all potential current and future suppliers of such goods and services would have access to that information. Moreover, the Council has not consulted directly with these third parties in line with the section 45 Freedom of Information Code of Practice or provided representations from them as to why and how disclosure of the withheld information would be likely to prejudice their respective commercial interests. Therefore, the Commissioner is unable to determine definitively whether disclosure of the withheld information would be likely to cause prejudice to the commercial interests of those third parties, so she has only considered the nature and likelihood of prejudice to the commercial interests of the Council itself.
14. The Commissioner agrees that the final report differs substantially from the draft report and she is satisfied, on the evidence as outlined above, that there is a causal link between the disclosure of the withheld information and potential damage caused to the commercial interests of the Council, and that this damage is real and of substance.

Likelihood of prejudice

15. In the Hogan case, the Tribunal said: *"there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not."* (paragraph 33).
16. The first limb identified relates to 'would'. 'Would' is therefore taken to mean more probable than not i.e. more than a 50% chance of disclosure causing the prejudice. This does not mean that the Council has to show that it will definitely happen, but that the chain of events is so convincing that it is clearly more likely than not to arise.

17. The second limb identified relates to 'would be likely'. This means that there must be more than a suggestion or hypothetical possibility of prejudice occurring, so although the probability is less than 50%, it is still a real and significant risk. This interpretation was relied on by the Information Tribunal in *John Connor Press Associates v Information Commissioner* (EA/2005/0005, 25 January 2006), who said "*We Interpret the expression "likely to prejudice" as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk.*"
18. In this case, the Council has declined to specify which limb it is relying upon, stating that it would prefer to save such disclosure for any future Tribunal proceedings. This is somewhat unusual so, in the absence of a definitive statement from the Council, the Commissioner will assume that it is relying upon the lower limb of likelihood i.e. 'would be likely to prejudice'. The withheld information contains both financial and non-financial information pertaining to the Council, which the Council states would be very useful to any potential supplier of goods and services to it, but particularly leisure and recreational services. The non-financial information includes technical and confidential details about the Council's structuring of its leisure services delivery model in Greenvale Leisure Centre. The financial information includes sensitive and confidential projections concerning the Council's expectations regarding likely and foreseeable income streams and cost projections.
19. The Council states that disclosure of the withheld information would be likely to prejudice Council's ability to commission goods and/or services in connection with delivery of leisure and recreational services, as information relating to the reasons and rationale behind the Council's decisions as to the nature and form of its leisure and recreational service delivery would then be in the public domain. If such information were to be disclosed, the Council could no longer procure third party goods and/or services for leisure purposes on the basis that profit-seeking commercial entities did not have access to information which would give them a commercial advantage when tendering for Council's business. This in turn would result in the Council being forced to pay more than it otherwise would to a potential supplier had the supplier been required to submit a tender in the absence of 'inside information.'
20. Having perused the withheld information, the Commissioner is satisfied that the chance of this harm occurring to the Council's commercial interests is real and not remote, and that therefore section 43(2) has been appropriately engaged by the Council.

The public interest test

21. The exemption under section 43(2) is subject to the public interest test. This means that, even when a public authority has demonstrated that the exception is engaged, it is required to consider the balance of the public interest in deciding whether to disclose the information. The public interest is not a tightly defined concept, and can cover a range of principles including, but not limited to:
 - transparency and accountability;
 - good decision-making by public bodies;
 - upholding standards of integrity;
 - ensuring justice and fair treatment for all;
 - securing the best use of public resources; and
 - ensuring fair commercial competition in a mixed economy.
22. The Council states that it has carried out a balancing exercise of all the public interest factors in favour of both disclosing the information and maintaining the exemption.
23. The Council accepts that there is a strong public interest in public authorities being transparent, accountable and informing the public of the processes and rationale behind their decision-making. However, it argued that there was a strong public interest in not disclosing the withheld information given that its disclosure would be likely to undermine its position in being able to secure timely, value for money provision and delivery of leisure and recreation services. In the opinion of the Council, it would be against the public interest if its ability to secure best value for money was harmed and the increase in costs potentially passed onto the ratepayer and/or the public in general, if costs of using the facilities had to be increased as a result of disclosure of the withheld information.
24. The Commissioner recognises that there is significant public interest in the Council being open and transparent about decisions it takes involving public money and this includes information about its tendering and selection processes for suppliers of goods and services to it. Disclosure of the withheld information would provide a detailed insight into these processes for the Council's selection of suppliers for the provision and delivery of leisure and recreation services to Greenvale Leisure Centre and could reassure the public about the thoroughness of these processes.

25. However, in the Commissioner's opinion there is a very strong and inherent public interest in ensuring fairness of competition and in her view it would be firmly against the public interest if a public authority's commercial interests are harmed, potentially affecting the public purse, simply because it is a public authority, subject to the FOIA in a way that a private sector company would not be. Furthermore, the Commissioner believes that there is an inherent, and very strong, public interest in ensuring that a public authority's ability to secure value for public money is not undermined. The Commissioner has therefore concluded that the public interest favours maintaining the exemption contained at section 43(2) and withholding the information falling within the scope of the request.
26. As the Commissioner considers that section 43(2) applies to the entirety of the withheld information, she has not gone on to consider the Council's application of the other exemptions under the FOIA.

Right of appeal

27. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

28. 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.
29. 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

Deirdre Collins

Senior Case Officer

Information Commissioner's Office

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