

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 August 2021

Public Authority: Hambleton District Council
Address: Civic Centre
Stone Cross
Northallerton
North Yorkshire
DL6 2UU

Decision (including any steps ordered)

1. The complainant requested from Hambleton District Council ("the Council") information relating to a loan it had made to Broadacres Housing Association ("BHA"). The Council withheld the requested information under section 41(1)(1) (information provided in confidence) and section 43(2) (commercial interests) of the FOIA.
2. The Commissioner's decision is that the Council was not entitled to withhold the requested information under section 41(1) or section 43(2).
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information, subject to any necessary redactions of 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 29 April 2020, the complainant wrote to the Council and requested information in the following terms:

"Information relating to loans or advances made or considered for making from Hambleton District Council to members of the Broadacres group for the three year period ending 5 March 2019. To include all contracts, committee papers, minutes, agendas, discussion documents; internal or external correspondence and details of dates and any notes of meetings undertaken by or for the Council in relation to the Matters.

I do not require disclosure of Capital and Treasury Management Quarterly Reports presented over the period. The request is in some ways similar to HDC 2387 IR made over a year ago, but seeks more clarity in the terms of request, and by passage of time, any argument for non disclosure on the basis it would cause actual commercial harm is eliminated.

I ask the Council consider the extent of material already publicly disclosed by the Council and Broadacres - extent of loan; interest rate; fixed nature of rate; Broadacres' repayment profile; properties mortgaged to cover the loan; extent of difficulties Broadacres got into in relation to Sowerby Gateway; financial viability assessments of Sowerby Gateway and other schemes, etc.. in determining whether this incremental disclosure of background detail would cause actual commercial harm given the material aspects already public.

Please deal with this request under FOI, and to the extent it is applicable to the material, under EIR.

If there is material that would be clerically burdensome to the Council to disclose I would be happy to discuss modification of this request."

6. The Council responded on 21 October 2020. It stated that some of the requested information was already publicly accessible (and provided a URL to access it), but that the remainder was withheld under section 41(1) and section 43(2).
7. Following an internal review, the Council wrote to the complainant on 6 January 2021. It maintained the application of section 41(1) and section 43(2).

Scope of the case

8. The complainant contacted the Commissioner on 7 January 2021 to complain about the way his request for information had been handled, and specifically that the Council was not entitled to withhold information under section 41(1) and section 43(2).
9. This case relates to a request made on 29 April 2020. However, the Commissioner is aware that this request was made following an earlier request (of 5 March 2019, which the Council ascribed the reference of "HDC 2387") in which the complainant sought the following information:

"...any press releases, committee papers, minutes or correspondence relating to loans from the Council to Broadacres entities over the last three years..."

10. In response to that earlier request (to which the Council also sought to withhold the requested information under section 41(1) and section 43(2)) the complainant submitted a complaint to the Commissioner, and the Council subsequently provided the Commissioner with a copy of the withheld information and its arguments for the applied exemptions. The Commissioner did not issue a decision notice in respect of that earlier request, as the complainant withdrew the complaint in order to make the later request under consideration here (in the expectation that, due to the passage of time, the previously applied exemptions may no longer be applicable). However, the Council has maintained the application of the exemptions, and has indicated to the Commissioner that it wishes to rely upon the submissions provided in respect of the earlier request, as the information caught by both requests is the same.
11. The Commissioner has therefore considered the Council's submissions – as provided in respect of the earlier request – in order to make this determination.
12. The scope of this case and of the following analysis is whether the Council was entitled to rely on either section 41(1) or section 43(2) to withhold the information requested by the complainant.

Reasons for decision

The withheld information

13. In the circumstances of this case, the Commissioner considers it relevant to note that the withheld information is contained within approximately 500-600 pages.
14. The Council has provided the Commissioner with a copy of the information in hardcopy form, with an accompanying schedule.
15. The Commissioner understands from the provided schedule that for the majority of the information the Council has applied both exemptions, whilst for the remainder it only seeks to rely upon section 41(1).

Section 41(1) – Information provided in confidence

16. Section 41(1) of the FOIA states that:

Information is exempt information if–

- (a) it was obtained by the public authority from any other person (including another public authority), and*
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

Was the information obtained from another person?

17. The first step is for the Commissioner to consider whether the information was obtained by the Council from any other person in order to satisfy the requirement of section 41(1)(a).
18. In her enquiries to the Council, the Commissioner asked it to identify which third party provided it with the withheld information.
19. The Council has confirmed that the withheld information represents information that was provided to it by BHA.
20. The Commissioner has reviewed the withheld information as provided by the Council to verify this.
21. Having reviewed the information, the Commissioner notes that it includes a significant proportion of information that derives *from* the Council, including email correspondence *to* BHA, as well as information that it is clear was supplied to the Council by BHA.

22. The Commissioner's guidance on section 41(1) confirms that, whilst section 41(1) will typically apply to information provided by a third party, it may also apply to information created by the receiving public authority if that information reveals the substantive content of the information provided by the third party.
23. Having considered the withheld information, the Commissioner recognises that the information created by the Council, being return correspondence, and other documents relating to the subject matter, would reveal the substantive content of the information provided by BHA.
24. Having established that the withheld information was obtained from another person, the Commissioner must next consider whether or not its disclosure to the public (otherwise than under the FOIA), would constitute a breach of confidence 'actionable' by that or any other person.

Would disclosure constitute an actionable breach of confidence?

25. Whilst it is not the only test for establishing confidence, the Commissioner finds that the appropriate test for this case is that which is set out in the case of *Coco v Clark [1969] RPC 41*. According to the decision in this case a breach of confidence will be actionable if:
 - i. The information has the necessary quality of confidence;
 - ii. The information was imparted in circumstances importing an obligation of confidence; and
 - iii. There was an unauthorised use of the information to the detriment of the confider.
26. All three elements must be present for a claim to be made. However, for that claim to be 'actionable' within the meaning of section 41(1)(b), a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed. This requires consideration of whether or not there would be a public interest defence to such a claim.

The 'necessary quality of confidence' (i.)

27. Information will have the necessary quality of confidence if it is more than trivial and not otherwise accessible.
28. The Council has informed the Commissioner that the information relates to a loan provided by the Council to BHA, and includes specific details such as how the loan is structured, interest rates, and the terms

of repayment. The Commissioner is satisfied that such information is not trivial.

29. However, as stated above, this alone is not sufficient to indicate that the material has the necessary quality of confidence. Therefore the Commissioner has considered whether the information is otherwise accessible.
30. The Council has informed the Commissioner that the information is not known to be readily available. The information was provided directly to the Council by BHA.
31. The Commissioner is therefore satisfied that the withheld information in this case has the necessary quality of confidence required to sustain an action for breach of confidence, and as such considers that this limb of the confidence test is met.

The 'obligation of confidence' (ii.)

32. Even if information is confidential, a breach of confidence will not be actionable if it was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.
33. The Council has informed the Commissioner that the loan was subject to a loan agreement, which specifically states that each party will recognise the finance documents it may receive to be confidential. The Council has contacted BHA, which has maintained that the information was provided to the Council in the expectation of confidence.
34. Having considered the Council's explanation, and in particular the context in which the information was created and provided to the Council, the Commissioner accepts that there is an obligation of confidence in the case.

The 'detriment of the confider' (iii.)

35. Having concluded that the information withheld in this case has the necessary quality of confidence, and was imparted in circumstances giving rise to an obligation of confidence, the Commissioner has proceeded to consider whether unauthorised disclosure could cause detriment to the confider.
36. The Council has informed the Commissioner that the information, if disclosed, would be likely to prejudice BHA's bargaining position in respect of any future negotiations with other loan providers.

37. The Council has also informed the Commissioner that the disclosure of specific information relating to BHA's development projects, would be likely to compromise BHA's position in negotiations with developers and other involved third parties.
38. The Commissioner has reviewed the withheld information, in conjunction with the Council's arguments. The Council has applied section 41(1) to a significant volume of information of approximately 500-600 pages spanning email correspondence, attachments to that correspondence, and other information such as reports from other third parties.
39. The Council has seemingly applied section 41(1) to the information simply on the basis that it relates to the substantive matter. Very limited distinction has been made between the content and sensitivity of the information, and no clear explanation has been provided in respect of the claimed detriment and how, in the circumstances of this matter, that detriment would occur in respect of the varied information that the Council has applied the exemption to. It is also relevant for the Commissioner to note that the Council is relying upon arguments relating to the earlier request, and has not reconsidered the information afresh taking into account the passage of time and the impact this may have on the claimed detriment.
40. It is reasonable for the Commissioner to consider that, due to the subject matter (a loan made by the Council to BHA), some of the withheld information may cause detriment to BHA as the confider. However, having had regard to the simplistic arguments made by the Council – in conjunction with the Council applying the exemption so widely to a substantial volume of information – the Commissioner is not satisfied that the Council has demonstrated the claimed detriment.
41. For the above reasons, the Commissioner does not consider that the Council has provided compelling evidence that the third limb of the test is met. As the third limb is not met, there is no requirement for the Commissioner to proceed any further. On this basis she finds that the exemption is not engaged.

Section 43(2) – Commercial interests

42. Section 43(2) 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).

43. The term 'commercial interests' is not defined in the FOIA; however, the Commissioner has considered her guidance on the application of section 43¹, 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."

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

44. The information withheld in this case is various information relating to a loan between the Council and BHA. The Commissioner accepts that such information is commercial in nature.

The likelihood of the prejudice occurring

45. In order for the exemption to be engaged it is necessary for it to be demonstrated that disclosure of information would result in some identifiable commercial prejudice which would, or would be likely to, affect one or more parties.
46. The Commissioner has been guided on the interpretation of the phrase "*would, or would be likely to*" by a number of First-tier Tribunal (Information Rights) ("the Tribunal") decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; i.e. either prejudice 'would' occur, or prejudice 'would be likely to' occur.
47. With regard to 'would be likely to' prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that "*the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk*" (Tribunal at paragraph 15).
48. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that "*clearly this second limb of the test places a stronger evidential burden on the public authority to discharge*" (Tribunal at paragraph 36).

¹ <https://ico.org.uk/for-organisations/foi-guidance/section-43-commercial-interests/>

The Council's position

49. In this case the Council has stated that disclosure of the information 'would be likely to' prejudice the commercial interests of BHA.
50. The Council has informed the Commissioner that the information, if disclosed, would be likely to prejudice BHA's bargaining position in respect of any future negotiations with other loan providers. The Council has provided an example of the envisaged prejudice by explaining that, if another lender was to discover that the Council's loan had a lower yield return, then the lender may assume that BHA would not wish to transact with them, or may believe that their rate is not as attractive.
51. The Council has also informed the Commissioner that the disclosure of specific information relating to BHA's development projects, would be likely to compromise BHA's position in negotiations with developers and other involved third parties. The Council has provided an example of the envisaged prejudice by explaining that, should details relating to BHA's development projects and schemes be disclosed, competitors would be able to use this information to undercut BHA in future bids and developments, whilst BHA's own development partners and contractors would be able to use the information against BHA when negotiating about development activities.
52. The Council has explained to the Commissioner that the housing development industry is exceptionally competitive, and that the content of the withheld information in this case would allow competitors, contractors, and other interested parties to undercut BHA, or to jeopardise BHA's negotiating position.

The Commissioner's conclusion

53. The Commissioner has reviewed the withheld information, in conjunction with the Council's arguments. Similarly to the Council's application of section 41(1), the Commissioner notes that the Council has applied section 43(2) to a significant volume of information of approximately 400-500 pages spanning email correspondence and attachments to that correspondence.
54. The Council has seemingly applied section 43(2) to the information simply on the basis that it relates to the substantive matter. Very limited distinction has been made between the content and sensitivity of the information, and no clear explanation has been provided in respect of the claimed prejudice and how, in the circumstances of this matter, that prejudice would occur in respect of the various information that the Council has applied the exemption to. It is also relevant for the

Commissioner to note that the Council is relying upon arguments relating to the earlier request, and has not reconsidered the information afresh taking into account the passage of time and the impact this may have on the claimed prejudice.

55. It is evident to the Commissioner that, due to the subject matter (a loan made by the Council to BHA), some of the information may cause prejudice to the commercial interests of BHA. However, having had regard to the simplistic arguments made by the Council – in conjunction with the Council applying the exemption so widely to a substantial volume of information – the Commissioner is not satisfied that the Council has demonstrated the claimed prejudice.
56. For the above reasons, the Commissioner does not consider that the Council has provided compelling evidence that prejudice would be likely to occur. As this test is not met, there is no requirement for the Commissioner to proceed any further. On this basis she finds that the exemption is not engaged.

Other matters

57. The Commissioner reminds the Council that in cases where a public authority seeks to withhold information, this should be done with careful consideration of the actual content of the information. In respect of each of the exemptions contained within Part II of the FOIA, the Commissioner has published detailed guidance for public authorities on their application.
58. The Commissioner also reminds the Council that in cases where a significant volume of information is requested, and a public authority is concerned by the resources required to respond to the request (which may include the potential consideration of exemptions), then section 12 (or section 14(1) when the concern relates to consideration of exemptions) provide exclusions from the duty to comply with the request. In respect of these exclusions, the Commissioner has published detailed guidance for public authorities on their application.

Right of appeal

59. 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

60. 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.
61. 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

Daniel Perry
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