

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 March 2022

Public Authority: Bristol City Council
Address: The Council House
College Green
Bristol
BS1 5TR

Decision (including any steps ordered)

1. The complainant has requested information relating to the purchase of a barge by the council. The council refused the request on the basis that section 43(2) of the FOI Act applies to the information (prejudice to commercial interests).
2. The Commissioner's decision is that the council was correct to apply section 43(2) to withhold the information from disclosure.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 24 November 2020, the complainant wrote to the Council and requested information in the following terms:

"I wish see full copies of the valuation reports, terms of sale and contracts relating to the purchase of the Ebenhaezer barge mentioned in the article below:

<https://www.bbc.co.uk/news/uk-england-br...>"

5. The council responded on 10 December 2020. It said that the information was exempt under section 43(2) of the Act (prejudice to commercial interests).
6. Following an internal review, the council wrote to the complainant on 21 June 2021. It maintained its position that the information is exempt under section 43(2).

Scope of the case

7. The complainant contacted the Commissioner on 21 June 2021 to complain about the way his request for information had been handled.
8. He considers that the council was wrong to withhold the information under section 43(2).

Reasons for decision

Background to the case

9. The request relates to the decision of the council to purchase a barge which, due to its mooring position, was preventing the redevelopment of some derelict buildings taking place.
10. The BBC reported some the issues surrounding the purchase, and some of the political and public concerns which subsequently arose as a result of this, at <https://www.bbc.co.uk/news/uk-england-bristol-48922585>.

Section 43(2) – prejudice to commercial interests

11. Section 43(2) provides 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).”

12. In order for a prejudice-based exemption, such as section 43, to be engaged the Commissioner believes 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 was 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 resultant 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.

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

13. The council argues that its own commercial interest would be prejudiced if the requested information were to be disclosed.
14. 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."
15. The council argued that a disclosure of the information would be likely to affect its ability to negotiate best value and impact upon its competitiveness in certain types of property purchases in the future if this information were to be disclosed.
16. The purchase and sale of property is a commercial activity, and the council's argument is that its ability to purchase property at best value in the future could be hindered by the disclosure of the withheld information.
17. The Commissioner therefore accepts that the interests in question are the commercial interests of the council.

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

The causal relationship

18. The council argues that the withheld information relates to its negotiating strategies in specific situations. It argues that a disclosure may prejudice its ability to carry out negotiations in similar circumstances, where it would generally rely upon the same approach as it has in this case. It said that a disclosure of the information would be likely to prejudice its position because its strategies in such scenarios would be revealed to sellers, and this would be likely to affect their negotiating position during negotiations.
19. It argues that a disclosure of the withheld information would be likely to impact upon the expectations of third parties, and as a result, may make negotiations more difficult, time consuming and potentially more expensive for the council.
20. It gave, as an example, where a potential seller notes the amount paid to other sellers in what appear to be similar circumstances, and therefore decides to hold out for higher offers from the council as a result. This would affect both the time which the council takes to negotiate a deal, as well as the potential that further funds might need to be expended where they would not otherwise need to be.
21. The council argues that disclosing the information would inform on its negotiating tactics, and the processes and calculations which it undertakes when it negotiates purchases of this nature, and these are applied consistently by it in such negotiations. It argues that if the information were to be disclosed, sellers would be pre-armed with information on its strategies and the processes it uses when negotiating such purchases, and they may therefore be more robust in their negotiations as a result.
22. As a result, its negotiations may take longer, and potentially result in a higher cost to the council. In addition, additional resources would be required to undertake the negotiations, potentially over a longer period of time. This could hold back the start of other projects which it wishes to start work on, and potentially, again increase the costs to the council and therefore the taxpayer.

The likelihood of the prejudice occurring

23. The council argued that a disclosure of the information 'would be likely' to cause the prejudice it had foreseen. The Commissioner therefore considers that the chance of prejudice occurring must be a real and significant risk.

24. The council clarified that, although this purchase could be argued to be an individual issue, relating to an unusual situation, in fact, the information which has been withheld is also relevant to the way it deals with wider issues which occur on some occasions when it purchases properties. It said, therefore, that purchases of a similar nature do occur on occasions, and are likely to occur again. The Commissioner does have reservations with this argument as he notes specific circumstances with this individual issue which he would not expect to arise as a norm. Nevertheless, the Commissioner accepts the council's argument that the nature of the purchase in question does extend to wider types of purchases which the council would expect to undertake on an occasional, if not an annual basis.
25. She is also satisfied that the nature of the withheld information would be likely to affect the expectations of third parties, and as a result, may make negotiations more difficult, time consuming, and potentially more expensive for the council in future such purchases.
26. The Commissioner therefore considers that the council's arguments are persuasive. He accepts that the prejudice foreseen by it would be likely to occur at points in the future if this information were to be disclosed.

The Commissioner's conclusions

27. The Commissioner has decided that the council is correct in that section 43(2) is engaged by the withheld information. He must therefore go on to consider the public interest test required by section 2 of the Act.

The public interest

28. The test, as set out in section 2(2)(b), is whether "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information"

The public interest in the disclosure of the information

29. The council recognised that there is a clear and understandable public interest in ensuring that public money is not wasted, and that value for money is obtained when entering into contracts.
30. The central public interest in the disclosure of the information rests around creating greater transparency over the council's use of a significant amount of tax payers' money to purchase the barge. A disclosure of the withheld information would provide details relating to the costs verses the benefits of the purchase, and the reasons behind the council's actions.

31. There is a public interest in the public being able to access relevant information where purchases such as this are made, and to understand the council's reasoning and methodology for the decisions it has taken, particularly in cases where its reasoning may not be immediately understandable. In this way the public would be better able to hold the council to account for the decisions they have taken, and can form their own opinions on the council's actions from an informed basis.
32. The Commissioner notes that there have been political arguments suggesting that the council did not need to purchase the barge, and that there were other methods of approaching the issue. A disclosure of the withheld information would provide greater clarity on the reasoning of the council, which may therefore address some of these concerns and/or allow interested parties to recognise areas where opportunities may have been missed by the council.

The public interest in the exemption being maintained

33. The council argues that, if the information was made available to competitors in the marketplace, it would undermine the commercial interests of the council in similar transactions in the future, thereby affecting its competitive edge and its ability to obtain contracts at best value.
34. It further argues that the requested information contains sensitive information regarding its relationship with third parties. It argues that a disclosure would be likely to impact upon the third parties' confidence in the council's ability to fulfil contractual obligations in the future.
35. The council argues that a disclosure of the withheld information would be likely to impede its ability to fairly pursue commercial activities intended to generate public funds, which would prove counterproductive to the public interest.

The Commissioner's analysis

36. The Commissioner recognises that there is a strong public interest in the disclosure of further information regarding the council's decisions and actions over the barge. The concerns which have been raised about the purchase arise as a result of the council's actions not being transparent enough to allow a full understanding of its reasoning. The council has used significant public funds to purchase the barge but insofar as the public is concerned, it has not been able to fully explain its reasons for doing so, nor why it has agreed to pay the amount it did to purchase the barge.

37. The Commissioner accepts that there is a significant public interest in the transparency of decisions requiring the investment of large sums of public money.
38. That said, the council's arguments are also very strong in identifying likely issues which would arise from a disclosure of the withheld information. These issues would be likely to affect its commercial negotiations in some instances in the future, and as a result, would be likely to be detrimental to its ability to achieve best value for money in future negotiations in similar circumstances. There is a strong public interest in protecting public funds, as these can be used for other key functions which the council is required to carry out.
39. The Commissioner considers that the competing public interests in this case can be summarised as, on the one hand, the public interest in understanding the decision of the council to use public money to purchase the barge, and on the other, the public interest in preventing commercial prejudice to its negotiations in the future where public money is being used.
40. The Commissioner recognises that in some cases, the weight of public interest in maintaining the exemption will exceed that of the information being disclosed purely on the basis that disclosing the information would create commercial damage to the council's future negotiations, which would ultimately cost taxpayers more over a space of years.
41. The council has demonstrated that its concerns are real, and that the prejudicial effect of disclosing the information would be more likely than not.
42. Whilst it is not easy to quantify the likely future cost that a disclosure of this information might entail, the Commissioner is satisfied that a disclosure of the council's strategies and its calculations could be used against it in future negotiations, and that this would not be in the public interest. The potential effect of such prejudice being repeated on a number of occasions over a period of years could be of significant detriment to the council, and therefore to the public purse.
43. For this reason, the Commissioner's decision is that the public interest in the exemption being maintained outweighs that in the information being disclosed on this occasion. The council was not, therefore, obliged to disclose the requested information.

Right of appeal

44. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. 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.
46. 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

Ian Walley
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Wycliffe House
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