

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 October 2023

Public Authority: Plymouth City Council
Address: Plymouth
PL1 3BJ

Decision (including any steps ordered)

1. The complainant submitted a three-part request for information held by Plymouth City Council (the council) about a Muse concert which took place at a local football club stadium.
2. The council provided some information to the complainant in response to part two and three of their request. However, it withheld all the information contained within a hire agreement which was relevant to part one of the request, citing the exemption at section 43(2) – commercial interests - of FOIA.
3. The Commissioner's decision is that the council is entitled to rely on section 43(2) as its basis for withholding only part of the information contained within the hire agreement.
4. The Commissioner has also proactively applied section 40(2) of FOIA to a small set of information, which is the personal data of third parties.
5. As the council failed to provide information relevant to the request within 20 working days, the Commissioner has found a breach of section 10(1) of FOIA. In addition, as the council failed to issue a refusal notice in respect of part one of the request within the statutory time limit, and failed to set out its consideration of the public interest test, both in its initial response and in its internal review response, the Commissioner

has found a breach of section 17(1) and section 17(3) of FOIA, respectively.

6. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
 - Disclose a copy of the withheld information with the exception of that information which is subject to the exemptions at section 43(2) and section 40(2) of FOIA, as highlighted within the confidential annex attached to this decision notice.
7. 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

8. On 5 June 2023, the complainant wrote to the council and requested information relating to the Muse concert which took place at Home Park (the stadium of Plymouth Argyle Football Club) on 27 May 2023.
9. The request was separated into three parts; the complainant has raised concerns about the council's handling of part one of their request, which was as follows:
 - “... evidence of a contract/agreement together with costings (including travel/on costs) for the hire of the Pitagone barriers and labour involved in delivery to site, offloading, setting up, demounting and returns to the PCC store.”
10. The council provided its response to the request on 12 July 2023. Whilst some information was provided to the complainant, the council advised that it was withholding the hire agreement relevant to part one of the request on the basis that it is marked 'Sensitive,' and also contains a confidentiality clause.
11. The council's internal review response upheld its original decision in relation to part one of the complainant's request. However, it advised that it should have cited the exemption at section 43(2) of FOIA as its basis for withholding the information.

Scope of the case

12. The complainant has raised concerns about the council's decision to withhold all of the information contained within the hire agreement relevant to part one of their request. They have also complained about the council's general handling of their request.
13. The Commissioner will therefore decide whether the council is entitled to rely on section 43(2) of FOIA as its basis for withholding all of the information set out within the hire agreement in response to part one of the complainant's request.
14. The Commissioner will also consider certain procedural matters, as requested by the complainant.

Reasons for decision

Section 43(2) – commercial interests

15. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
16. When relying upon the exemption at section 43(2) to withhold information, the public authority must be able to demonstrate a clear link between disclosure and the commercial interests of either itself, a third party, or both. The risk of the prejudice to commercial interests occurring must be real and significant for the exemption to be engaged.
17. The exemption is subject to the public interest test, this means that even if the exemption is engaged, the Commissioner will need to decide whether it is in the public interest to release the information.

The council's position

18. The withheld information is a hire agreement signed between the council and Plymouth Argyle Football Club (the football club). It sets out an agreement for the hire of barriers owned by the council for use at the Muse concert which took place at Home Park on 27 May 2023.
19. The council has advised the Commissioner that the disclosure of the information contained within the hire agreement 'would be likely' to prejudice the commercial interests of both itself, and the football club.

20. The council states that the agreement is for goods and services within a competitive market. It argues that disclosure of the conditions of this service to other providers would be likely to undermine the council's competitive advantage (which it states currently enables it to generate additional income by hiring out equipment) in the market.
21. In addition, the council has said that the football club has requested confidentiality on security grounds. The council states that the details of the hire period and the number of barriers being provided are confidential and relevant to the football club's plans for security at events. It argues that given this, should it disclose the information in response to an information request, it would be likely to harm the council's commercial interests as the football club would lose trust and be discouraged from making future deals with the council.

The Commissioner's analysis

22. For section 43(2) to be engaged, the Commissioner considers 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 must relate to commercial interests;
 - 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 to those commercial interests; and,
 - Thirdly, it is necessary to establish whether the alleged prejudice would, or would be likely to, occur.
23. The Commissioner is satisfied that the withheld information is commercial in nature; it is a hire agreement signed between the football club and the council for the latter to provide barriers at an event to be held at the football club's stadium for an agreed fee.
24. The council has provided arguments relating to prejudice to both its commercial interests and that of the football club. The Commissioner accepts that the potential prejudice described by the council relates to the interests that the exemption at section 43(2) is designed to protect, and that the first criterion set out above is therefore met.
25. When considering the second criterion of the three-limb test, the Commissioner must decide whether there is a clear link between the prejudice that has been described by the council and the disclosure of the withheld information.

26. Whilst the council has argued that as the hire agreement is marked as 'Sensitive' and contains a 'confidentiality clause', it should not be disclosed, having considered the content and nature of the information contained therein, the Commissioner is not persuaded that it is all commercially sensitive, nor is it subject to a duty of confidence.
27. The Commissioner also considers the terms set out within the 'confidentiality clause' of the hire agreement to be vague. Reference is made to types of information which should not be disclosed 'if it is confidential in nature'; however, there is no specific detail of the information which is considered to be confidential, nor is it stated explicitly that disclosure of any part of the content of the hire agreement is prohibited on the basis that it is confidential. In addition, clause 22 of the agreement appears to contain provision for circumstances where the 'hirer' might be considering the release of information.
28. In the Commissioner's opinion, the majority of the content of the hire agreement sets out generic details which would be reasonably expected to be included within such a document. It appears to be unremarkable in terms of the clauses that are set out, and as far as the Commissioner can determine, contains nothing unique or unusual with regard to its terms or selling points.
29. Given this, the Commissioner has been unable to identify what information would provide a competitor with a commercial advantage, or alternatively, would place the council or the football club at a commercial disadvantage, if the majority of the information contained within the agreement were to be disclosed.
30. The council has said that revealing some of the details contained within the hire agreement, such as the number of barriers, and the time period of their hire, would pose a risk to future security at events organised at the football club. It argues that if it released this information, the football club would be discouraged from conducting future business with the council.
31. The council has not presented any representations or evidence received from the football club about any concerns that the latter may have about the disclosure of any of the requested information.
32. The Commissioner is not persuaded by the council's argument that the release of the hire agreement would pose a security risk at future events and cause harm to its commercial relationship with the football club as a result. The information will not reveal how or where the barriers were used, nor will it provide details of any of the additional security arrangements that are in place for events held at the football club.

33. The Commissioner has taken into consideration that the council has stated that it is relying on the lower threshold of likelihood in this case, which is that disclosure 'would be likely to' prejudice the commercial interests of the council and the football club.
34. However, having considered the withheld information and the arguments presented by the council, the Commissioner considers that it is not possible to conclude that there is a link between the disclosure of some of the withheld information, and the prejudice which has been described by the council.
35. Therefore, the Commissioner has decided that the second criterion of the three-limb test is not met in respect of part of the withheld information. Given this, the Commissioner finds that the exemption at section 43(2) of FOIA is not engaged in respect of part of the information contained within the hire agreement.
36. However, with regard to that information contained within the agreement that reveals the financial aspects of the hire agreement, such as the agreed charges for the provision of the barriers and liabilities, the Commissioner accepts that such information would be of use to a competitor when bidding against the council for similar contracts, and would place the council at a commercial disadvantage.
37. In addition, it is the Commissioner's view that if the costs and liabilities were released into the public domain, the football club would also be placed at a disadvantage because it may then find it difficult to 'bargain' when requiring similar services from businesses in the future.
38. The Commissioner is therefore satisfied that the council has demonstrated that a causal relationship exists between the disclosure of the information relating to the hire charges and the prejudice to the commercial interests to the council and the football club which have been described.
39. As a result, the Commissioner considers that the second criterion of the three-limb test is met in respect of the information relating to the charges and liabilities set out within the hire agreement.
40. With regard to the third criterion of the three-limb test, the Commissioner accepts that the prejudice identified would be likely to occur, should the information relating to the charges that have been agreed between the two parties be disclosed. This is because details of the fees and liabilities agreed for the hire of the barriers would provide competitors with an insight into the council's pricing policy, and they would then have an unfair advantage when bidding against the council for similar contracts in the future. In the Commissioner's opinion, such a

disclosure would also affect the bargaining position of the football club and place it at a disadvantage when negotiating similar contracts with other businesses.

41. The Commissioner considers that the third criteria of the three limb test is met and is therefore satisfied that section 43(2) is engaged in relation to the withheld information which relates to the charges and liabilities agreed between the council and the football club. Given this, the Commissioner will now go on to consider the public interest test in respect of this information.

Public interest test

The council's position

42. The council has advised that it recognises that there is a public interest in openness and transparency and that given this, it released some outline details of the hire agreement as well as providing a full response to parts two and three of the complainant's request.
43. The council has referred to the arguments that it has presented in support of the application of section 43(2), stating that they are relevant to the consideration of the public interest test. The council's position is that, given the harm that would be caused to the commercial interests of both itself and the football club as a result of disclosure of the details within the hire agreement, the public interest favours withholding the information in this instance.

The balance of the public interest

44. The Commissioner recognises that there is a general public interest in the disclosure of information in order to provide transparency to the public about how a public authority manages its finances. This includes information about income generated from services provided by the public authority as well as its expenditure of public funds.
45. The Commissioner is also aware that the [media reported](#) that there had been some complaints about the organisation and safety at the Muse event. Given this, he accepts that there is some public interest in understanding how the event was organised.
46. However, the Commissioner does not consider that the disclosure of the costing agreed between the council and the football club for the hire of the barriers would provide the public with a greater insight into how the event was managed.

47. Whilst accepting that the disclosure of the charges for the barriers would allow the public to see what income the council generates from its commercial services, the Commissioner considers the harm which would be caused to both the commercial position of the council, and also the football club, to carry significant weight in favour of withholding such information in this instance.
48. It is the Commissioner's view that it would not be in the public interest if the council's bargaining position when bidding for contracts, and its ability to achieve the best rates for the provision of its commercial services, were to be compromised as a result of the disclosure of its fees.
49. It is therefore the Commissioner's decision that, in the circumstances of this case, the public interest in the exemption at section 43(2) being maintained in respect of the information relating to the charges and liabilities set out within the hire agreement outweighs the public interest in disclosure.

Conclusion

50. The Commissioner's decision is that the council is entitled to rely on section 43(2) of FOIA as its basis for withholding only part of the information contained within the hire agreement. Therefore, where section 43(2) has been found not to be engaged, the council is required to disclose the information.
51. The Commissioner has proactively applied section 40(2) – personal information, to a very small part of the information which he has found not to be subject to the exemption at section 43(2). This is because it is the personal data of third parties (their names), and he considers that the disclosure of such information would be likely to breach data protection law.

Procedural matters

52. The complainant also asked the Commissioner to make a decision on the timeliness of the council's response to their request.
53. Whilst the council provided the complainant with some information in response to their request, it failed to do so within 20 working days. As a result, the Commissioner has found a breach of section 10(1) of FOIA.
54. The council also failed to issue a refusal notice within 20 working days in relation to part one of the request, and failed to convey its public interest arguments to the complainant within its initial response to the

request, and its internal review response. As a result, the Commissioner has found a breach of section 17(1) and section 17(3) of FOIA.

55. The Commissioner reminds the council of its obligations under FOIA to set out its consideration of the public interest test when issuing refusal notices.

Right of appeal

56. 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

57. 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.
58. 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

Suzanne McKay
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