



Case Reference: EA/2024/0002
Neutral Citation Number: [2025] UKFTT 114 (GRC)

**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

**Decided without a hearing
Decision given on: 7 February 2025**

Before

**JUDGE SOPHIE BUCKLEY
MEMBER EMMA YATES
MEMBER MIRIAM SCOTT**

Between

SHING HEI YIP

and

**(1) THE INFORMATION COMMISSIONER
(2) NOTTINGHAM CITY COUNCIL**

Appellant

Respondents

Decision: The appeal is Allowed

Substituted Decision Notice:

Organisation: Nottingham City Council

Complainant: Shing Hei Yip

The Substitute Decision - IC-258829-M1Z8

1. For the reasons set out below:
 - a. Nottingham City Council (the Council) was not entitled to rely on section 43(2) of the Freedom of Information Act 2000 (FOIA) to withhold the information that it withheld under section 43(2).

- b. The Council did hold the information that it had refused to provide on the basis that it was not held by the Council under FOIA.
2. The Council is required to take the following steps within 35 calendar days of the date that this decision is sent by the parties by the tribunal:
 - a. For any information in relation to which the Council gave a 'not held' response, the Council is required to issue a fresh response to the request of 2 May 2023, confirming that it holds the information **and** must either
 - i. supply the information sought, or
 - ii. serve a refusal notice under section 17 FOIA including the grounds relied on.
 - b. For any information which the Council withheld under section 43, the Council must disclose that information to the appellant.
3. Any failure to abide by the terms of the tribunal's substituted decision notice may amount to contempt which may, on application, be certified to the Upper Tribunal.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice IC-258829-M1Z8 of 29 November 2023 which held in relation to a request for information under the Freedom of Information Act 2000 (FOIA) made to Nottingham City Council (the Council):
 - a. the Council did not hold some of the information.
 - b. the Council was entitled to rely on section 43(2) of FOIA to refuse to provide some but not all of the information withheld under section 43(2).
 - c. the Council was entitled to rely on section 40(2) of FOIA to refuse to provide the information withheld under section 40(2).
2. The Commissioner required the Council to disclose the information which the Commissioner had determined it was unable to withhold under section 43(2).
3. This appeal relates only to whether the Council held the information and to section 43(2). There is no appeal in relation to section 40(2).
4. All parties consented and the panel was satisfied that it was in the interests of justice and in accordance with the overriding objective to determine the appeal without a hearing.

Background to the appeal

5. Following the Russian invasion of Ukraine, the Council ended its 'twinning' relationships with two Russian and Belarusian cities on 2 March 2022.
6. 'Nottingham Stands With Hong Kong', a campaign group that advocates for a more democratic Hong Kong in Nottingham, launched a petition, under the petitions scheme, and called on the Council to end twinning arrangements with the Chinese city of Ningbo for the country's alleged past and present human rights abuses. The petition was signed by over 1400 people.
7. Councillor David Mellon is the Leader of the Council. He is the lead portfolio holder in relation to twinning arrangements.
8. In response to the petition, Councillor Mellen wrote to the campaign group and stated:

"The Council has committed to reviewing the nature of all of its current formal relationships and twinning links, including its arrangement with Ningbo. Once this review is concluded, I will write to you again personally to outline the Council's position in relation to Ningbo, and to all of its other arrangements with its twin cities. Finally, I would like to thank you for your efforts in coordinating this Petition - we are always keen to listen to the views of our constituents, particularly where there is a significant sense of public support for an issue, and we welcome the opportunity to discuss these matters in due course."

9. The following statements were made by Councillor Mellon on 9 January 2023 at a Full Council meeting:

"As a result of receiving the petition, Nottingham City Council committed to reviewing the nature of all its currently twinning and international arrangements including its formal twinning arrangement with Ningbo in China ... We also know that, as civic leaders in Nottingham, we must also ensure that any current or future international relationships are with those places that uphold the same principles in relation to diversity, inclusion and human rights as we have and that there are tangible benefits for the city and its residents. Hence, the review we are undertaking as a Council must consider both the benefits of the relationships with other cities across the world, as well as the behaviour and values of the countries' governments where the twinned cities are located."

...

"As part of the review, Nottingham City Council has been engaged with stakeholders to fully understand and assess the impacts of international links. Once this work is concluded, the council will make clear its intention with regards to all its existing relationships."

10. At the relevant time the Labour Group had the most Councillors and had overall political control of the Council. Council officers prepared two documents for a meeting of the Nottingham Labour Group on 13 February 2023.

- a. A paper entitled 'Review of twinning arrangements and international links'.
- b. A powerpoint presentation on the twinning arrangements.

11. The paper set out three options for decision:

Option 1 - to retain the formal twinning relationship with Ningbo and use the existing partnership to formally write to the Municipality of Ningbo raising the concerns around human rights abuses.

Option 2 - to end the formal arrangements between Nottingham City and the Municipality of Ningbo.

Option 3 - to allow for a natural lapsing of the five-year plan signed with Ningbo in 2021."

12. The Labour Group held a vote and decided on option 1.

13. Following that decision the Leader of the Council, David Mellen, wrote to the Chinese Ambassador raising concerns around human rights abuses.

14. The Nottingham Post reported the outcome of the review on 25 April 2023:

"...confirming it has rejected the petition, a Nottingham City Council spokesperson said: "Nottingham's twinning arrangement with Ningbo has been reviewed by the city council. We are satisfied that retaining the relationship between Nottingham and Ningbo is important for both our cities. We have also responded in full to the petition organisers."

The request

15. This appeal concerns a request made by the appellant to the Council on 2 May 2023 for the following information:

"1. According to a statement released by Nottingham Stands with Hong Kong, a campaign group that advocates for a more democratic Hong Kong in Nottingham, the city council has already "reviewed its relationship with the city of Ningbo". Please provide a softcopy of the results of such a review. Documents reviewed during such a process should also be provided.

2. Please provide all email that mentions, or refers to, the word "Ningbo" "Ningbo" in councillor David Mellen's mailbox [*email address redacted*]

The response

16. The Council responded on 26 June 2023. In relation to part 1 of the request it stated that the information was not held by the Council because it was held by the Labour Group who are not a public authority. In relation to part 2 of the request the Council provided some information. It withheld some information under part 2 of the

request. The Council stated that it was withholding any correspondence regarding the Labour Group because that information was not subject to FOIA. The Council redacted certain information from the correspondence in reliance on section 40(2) (personal information). The Council stated that it also held other documents within part 2 that it was withholding under section 43(2) (commercial interests).

17. The Council upheld its position on internal review.
18. During the Commissioner's investigation the Council identified two documents within the scope of part 1 of the request that were held by the Council for the purposes of FOIA (a report and a presentation). It disclosed the presentation in full and the majority of the report. It withheld parts of the report under section 40(2) and section 43(2).

The Decision Notice

Information not held by the Council

19. The Commissioner accepted the Council's argument that the information was withheld on the basis that it was held by the Labour Group solely in relation to a vote by members of the Labour Group in their capacity as elected members. The Commissioner noted that his guidance is clear that where information is held solely in relation to Councillors' function as elected members this information is not considered to be held by the Council for the purposes of FOIA.
20. The Commissioner was satisfied that the information created and shared by the Labour councillors in relation to the vote was held by the Council only on behalf of the Labour Councillors.

Section 43(2) - prejudice to commercial interests

21. The Commissioner held that some of the information related only to Nottingham Trent University (NTU) and that the Council had failed to demonstrate that the exemption was engaged for this information, because its arguments only related to the University of Nottingham (UoN).
22. The Commissioner noted that NTU had asked that certain statistics not be disclosed and the Commissioner was satisfied that the statistics related to the recruitment of international students which was a commercial activity, but did not accept that there was a causative link between disclosure of those statistics and the prejudice asserted by NTU.
23. In relation to the remainder of the withheld information the Commissioner accepted that it related to UoN's recruitment of international students to its campus in Nottingham and its operation of a campus in Ningbo, both of which were commercial activities.
24. Having reviewed the withheld information, the Commissioner considered that the withheld information was much broader than insight into economic gain, relating to

the University's international strategy with respect to China more broadly, however, the Commissioner nevertheless accepted the argument that to disclose the majority of the withheld information would provide information upon which UoN's competitors could act in order to encroach upon its market position both with regards to recruitment of international students, particularly Chinese students, and in terms of provision of education on its campus in China. The Commissioner held that this would particularly be the case should there be any change to the twinning relationship in future as the information relates to the impact that a change in the twinning relationship would have on UoN's business operations. The Commissioner was therefore satisfied that there was a causal relationship between disclosure of most of the information and the claimed prejudice to the commercial interests of UoN. The Commissioner did not accept there was the necessary causal relationship in relation to copies of the emails (excluding attachments) exchanged with UoN.

25. The Commissioner held that there was a real and significant risk that competitors would use the withheld information to gain a competitive advantage to the detriment of UoN.
26. The Commissioner accepted that, in context, there was a significant public interest in the disclosure of information to provide transparency about how the Council has taken decisions about twinning relationships. The Commissioner considered that the information disclosed in response to the request went a long way in meeting that public interest. The Commissioner did not consider that the withheld information would add anything significant to the debate about whether the Council should end the relationship or significantly increase understanding about how the decision was made. The Commissioner considered that while the commercial interests of UoN are distinct from the public interest, there was considerable overlap between those interests. The Commissioner concluded that the public interest balance favoured maintaining the exemption.

Section 40(2) - personal information

27. The Commissioner held that disclosure of the personal information (the name of the more junior author of a report reviewing twinning arrangements) was not necessary to meet the legitimate interest of seeking a greater understanding of how the Council/the Labour Group has considered Nottingham's relationship with Ningbo.

Notice of Appeal

28. The grounds of appeal are:
 - a. The information requested is "held" by the Council under section 3(2) FOIA, and that the Commissioner erred in failing to undertake investigations or consider fully on whether there was an "appropriate connection" between the information and the Council;

- b. That the prejudice claimed by the Council under the exemption of section 43(2) of FOIA was not "real, actual and of substance" and the causal link was ill-founded.
- c. The public interest favours disclosure.

The Commissioner's response

29. The Commissioner stood by his decision notice.

The Council's response

Information not held

30. The Council stated that as a result of the outcome of the vote by the Labour Group Councillors, a formal decision by the Council was not required. It submitted that the vote taken by the Labour Group on 12 February 2023 was a political decision made by elected members, not officers and therefore information held for those purposes of the vote is not held by the Council for the purposes of FOIA.
31. The Council stated that it has not identified any recorded information within the scope of part 1 of the request that is held by Nottingham City Council for its own purposes, save for two documents that have been provided to the appellant.

Section 43(2)

32. The Council set out the prejudice claimed by the UoN and submitted that it was real, actual and substantial. In summary this is:
 - a. The University has invested many years in forging its relationship with Ningbo which has brought economic growth to Nottingham as well as a cultural richness to Nottingham and the UK.
 - b. Disclosure could have immediate consequences on both UoN's home and international operations in that:
 - i. Disclosure would give a great deal of insight into how much economic gain the University, the City and Nottinghamshire gains from its international student body.
 - ii. This would give competitors insight into UoN's financial operations which could be exploited, giving competitor institutions the opportunity to change current offerings to attempt to lure UoN's prospective students to their institution, significantly reducing UoN's market position in terms of overall attractiveness as well as reducing revenue in coming years. The international student placements market is highly lucrative.

- iii. This would impact on students and staff, research projects, staffing levels and investment in facilities. University income from UK students is falling and Universities need to find ways of filling this financial shortfall.
33. The Council submitted that disclosure would be likely to have a prejudicial effect on the UoN's commercial interests, based on the knowledge and experience of colleagues at the UoN and that there is a direct causal link as disclosure would directly impair the University maintaining its Chinese student population alongside long term links with China.
34. The Council acknowledged the weight of the public interest arguments supporting disclosure specifically around transparency and accountability. However, due to the likely and significant detrimental financial impact on the UoN the Council submitted that the public interest in maintaining the exemption outweighed those arguments.

The appellant's replies

35. The appellant made eloquent, coherent but extensive submissions. The tribunal has considered the submissions in full but has not set them all out here.
36. The appellant submitted that the information can be held by both the Labour Group and the Council. It will be held by the Council if there is an appropriate connection between the requested information and the Council's role and functions as a public authority and if the Council holds the information to some extent for its own purposes.
37. The appellant submitted that the extent to which the information related to and influenced the public authority and functions is of paramount importance. He submitted that the significant bearing of the meeting and vote towards the outcome of the review, part of the Council's functions of local government, should be the decisive factor in considering the nexus between the information and the considering authority. The appellant asked: If the Council is justified and materially bound by the information, namely the meeting and vote, not to take any action, then why has an 'appropriate connection' not already been established?
38. The appellant submitted that local governments are always made up of members from the political party with the most seats. This should not be used to circumvent legitimate public scrutiny of the decision-making process.
39. It was submitted that the review of the relationship with Ningbo was a matter for the Council not for the Labour group of Councillors, for the reasons set out in the Notice of Appeal.
40. The appellant reiterated his submissions in the Grounds of Appeal in relation to section 43(2).

Legal Framework

41. Section 1(1) FOIA provides:

“Any person making a request for information to a public authority is entitled –
to be informed in writing by the public authority whether it holds information
of the description specified in the request, and
if that is the case to have that information communicated to him.”

42. Section 3(2) FOIA provides:

“For the purposes of this act, information is held by a public authority if –
(a) it is held by the authority, otherwise than on behalf of another person, or
(b) it is held by another person on behalf of the authority.”

43. Section 43(2) provides:

“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)”

44. ‘Commercial interests’ should be interpreted broadly. The ICO Guidance states that a
commercial interest relates to a person’s ability to participate competitively in a
commercial activity.

45. The exemption is prejudice based. ‘Would or would be likely to’ means that the
prejudice is more probable than not or that there is a real and significant risk of
prejudice. The public authority must show that there is some causative link between
the potential disclosure and the prejudice and that the prejudice is real, actual or of
substance. The harm must relate to the interests protected by the exemption.

46. Section 43 is a qualified exemption, so that the public interest test has to be applied.

47. In considering the factors that militate against disclosure the primary focus should be
on the particular interest which the exemption is designed to protect.

48. The **APPGER** case gives guidance on how the balancing exercise required by section
2(2)(b) of FOIA should be carried out:

“... when assessing competing public interests under FOIA the correct approach
is to identify the actual harm or prejudice that the proposed disclosure would (or
would be likely to or may) cause and the actual benefits its disclosure would (or
would be likely to or may) confer or promote. This ... requires an appropriately
detailed identification of, proof, explanation and examination of both (a) the
harm or prejudice, and (b) benefits that the proposed disclosure of the relevant

material in respect of which the exemption is claimed would (or would be likely to or may) cause or promote.”

The role of the tribunal

49. The tribunal’s remit is governed by section 58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner’s decision involved exercising discretion, whether he should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

50. The issues for the tribunal to determine are:

- a. Was the information held by the Council?
- b. Would disclosure be likely to prejudice the commercial interests of the UoN?
- c. If so, does the public interest in maintaining the particular exemption outweigh the public interest in disclosing the information?

Evidence

51. We read an open and a closed bundle. The closed bundle consists of the withheld information.

Discussion and conclusions

Was the information held by the Council?

52. The requested information is physically held by the Council – it is held on the Council’s servers, but the Council asserts that the information was held on behalf of the Councillors acting as elected representatives rather than acting on behalf of the Council.

53. Under section 3(2) FOIA, as interpreted by the Upper Tribunal in **University of Newcastle upon Tyne v Information Commissioner and BUAV** [2011] 185 (AAC), information held by a public authority is only outside the scope of FOIA where it is held solely on behalf of another. If it is held to any extent on behalf of the authority itself, the authority ‘holds’ the information within FOIA.

54. The question of whether the information is held solely on behalf of another, or if it is held to any extent on behalf of the Council is a question of fact to be determined on the evidence. In this appeal it is informed by the nature and the purpose of the information and the capacity in which the relevant Councillors are acting. A Councillor has a number of roles, some relating to their function as an elected

member (representing a political party, representing residents in their ward) and some relating to the Council's functions.

55. During the course of the Commissioner's investigation the Council disclosed two documents produced by Council officers for the purposes of a meeting of the Labour Group on 13 February 2023. One of those was a paper headed as follows:

"Item Name: **Review of twinning arrangements and international links**

Corporate Director and Lead Officers: **Frank Jordan**

Lead Portfolio Holder: **Cllr David Mellen**"

56. The purpose of the paper is set out as follows:

"The purpose of this paper is to update Labour Group on:

- a) The options in relation to the twinning arrangement between Nottingham City and the Municipality of Ningbo in China;
- b) Feedback collated from key stakeholders as part of the review of those arrangements;
- c) Advice on next steps for each option."

57. The three options on which the Labour Group was asked to make a decision were as follows:

"Option 1 - to retain the formal twinning relationship with Ningbo and use the existing partnership to formally write to the Municipality of Ningbo raising the concerns around human rights abuses.

Option 2 - to end the formal arrangements between Nottingham City and the Municipality of Ningbo.

Option 3 - to allow for a natural lapsing of the five-year plan signed with Ningbo in 2021."

58. The report outlines the 'next steps' that would follow a decision by the Labour Group Councillors on each option:

"4.1.5 Although there are no formal decisions related to option 1, the Council would write to the Municipal government in Ningbo to raise the concerns articulated in the petition regarding human rights abuses. Appropriate advice would be sought in drafting the letter and there would be open dialogue with the University of Nottingham and Nottingham Trent University so that they are appropriately informed."

...

4.33 The Council is required to take a formal decision to end its agreement with the Municipality of Ningbo.

4.35 The Leader of the Council has executive authority within the scheme of delegation to authorise a decision in relation to twinning arrangements or international links however the Council may choose to propose a motion to Full Council to agree a policy decision on its relationship with Ningbo. Decisions taken to de-twin with Chinese sister-cities by Newcastle and Bath and Somerset both did so via Council motions in November 2022. Full Council is next scheduled to meet in March 2023.

4.35 A communications strategy to be coordinated to manage stakeholder and press engagement.

4.36 The Council may consider sending a formal letter to counterparts in Ningbo to explain may sending to counterparts in Ningbo to explain the reasons for ending the agreement two years early.

...

4.5 There are no formal decisions required with option 3. There would however, be open dialogue with the University of Nottingham and Nottingham Trent University so that they are appropriately informed and able to plan accordingly for the lapsing of the agreement in December 2025."

59. The Councillors in the Labour Group meeting were tasked with making the decision as to which option the Council would take. They were not asked to make a recommendation. They chose option 1, and as a result of their decision the twinning relationship was retained and the Leader of the Council wrote a letter to the Chinese Ambassador.
60. The withheld information consists of correspondence and information created and shared by Nottingham Labour Group Councillors for the purposes of the decision that was to be taken at the Labour Group meeting on which option to select from the three put forward by Council officers. In the tribunal's view this decision was clearly Council business. We do not accept that the fact that Council officers absented themselves for the vote itself is determinative. It is the Council, not the local Labour Party, that is the lead organisation in the twinning or friendship arrangements between Nottingham and other cities and towns. It is a function of the Council, not the local Labour party, to make decisions about whether or not to continue those relationships. The decision resulted in action being taken by the Council, in writing to the Chinese Ambassador. We do not accept that the withheld information relates or relates only to party political business rather than Council business. The Labour Councillors are, in this instance, taking decisions in their role as part of the Council.

61. For those reasons we do not accept that the information was held by the Council solely on behalf of another. On that basis we find that the Council did hold the requested information.

Section 43

62. Section 43 is relied in relation to correspondence from the UoN and NTU. It is also asserted in relation to certain paragraphs from the two documents released during the Commissioner's investigation.

63. The asserted prejudice is to the commercial interests of the University of Nottingham.

64. It is asserted that disclosure would give a 'great deal of insight' into how much economic gain the UoN, the City and Nottinghamshire gains from its international student body.

65. It is said that would give competitors insight into UoN's financial operations which could be exploited. The Council says that this would give competitor institutions the opportunity to change current offerings to attempt to lure UoN's prospective students to their institution.

66. It is said that this would significantly reducing UoN's market position in terms of overall attractiveness as well as reducing revenue in coming years.

67. It is said that the reduction in revenue would impact on students and staff, research projects, staffing levels and investment in facilities. This is significant because University income from UK students is falling and Universities need to find ways filling this this financial shortfall.

68. We accept that the relevant interests of UoN are clearly commercial interests and we accept that the claimed prejudice is real, actual and of substance.

69. Having reviewed the content of the withheld information we do not accept that there is a causative link between disclosure of that information and a real and significant risk of harm to the commercial interests of UoN.

70. The tribunal is unsure if it is claimed that any of the information that provides insight into how much economic gain the City and Nottinghamshire gains from its international student body would lead to the claimed prejudice. If that is the Council's case we are not persuaded that there is any causative link between insight into the economic gain to the City and Nottinghamshire and the claimed prejudice to the commercial interests of UoN. Much of the withheld information concerns the benefits, in fairly general terms and/or with reference to data from published research, to the City and the area.

71. Where the information refers to the benefits to UoN, much of that is in general terms and with reference to data from published research. We are not persuaded that this information in general terms or based on public information gives any or any

sufficiently valuable insight into UoN's financial operations, and certainly insufficient valuable insight to assist a competitor to the extent that there would be likely to be any impact on the numbers of international students attending UoN or its market position.

72. We accept that there is one item of information, which appears in a number of places, including at the end of CB2, which allows the reader to derive the figure used in calculations to represent annual income that UoN receives or received from its Chinese students. However, it is not possible to ascertain whether this is an average amount, or the amount for a specific year, or a net amount. There is no information on what figures make up this amount, including whether it is limited to fees or includes other income.
73. This figure accordingly gives very limited insight into UoN's financial operations. An approximate estimated annual income for a specific year could be calculated using publicly available information on the number of Chinese students at Nottingham University and the tuition fees for international students. We are not persuaded that the figure that can be derived from the withheld information gives any more valuable insight into UoN's financial operations than an estimated figure for annual income in a specific year would provide.
74. We are not persuaded that competitors could exploit the withheld information to lure students away from UoN, and it has not been explained to us how competitor institutions could use this information to 'change current offerings to attempt to lure UoN's prospective students to their institution'. We are not persuaded that competitors would be assisted in this by the withheld information.
75. For all those reasons we are not persuaded that disclosure would be likely to lead to any reduction in UoN's market position in terms of overall attractiveness or a reduction in revenue in coming years.
76. On that basis we find that section 43(2) is not engaged. The Council has not raised any other exemptions in the alternative.
77. The appeal is allowed.

Next steps

78. In relation to the information that was withheld under section 43, we have ordered disclosure because the Council has not, at any stage, raised any other exemptions.
79. The position is different in relation to the information which the Council said that it did not hold. An appeal in which the public authority has given a 'not held' response to a request for information (or, for example, a neither confirm nor deny response or where the public authority relies on section 12 or section 14) is sometimes referred to as a 'gateway' appeal because the public authority has not yet given a substantive response to the request. The Council has not yet passed through the "gateway" of compliance with ss. 1, 2 and 17 of FOIA which, following

the Upper Tribunal's Decision in Malnick v IC and ACOBA [2018] UKUT 72 (AAC), the Council would have to do before being entitled to raise a late exemption before the tribunal.

80. As we have concluded that the Council did hold the requested information, the correct course of action is for the Council to issue a fresh response and at that stage, it should disclose the information or claim any exemptions that it considers apply.

Signed

Sophie Buckley

Date:

31 January 2025