

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 February 2012

Public Authority: The Department for Culture, Media and Sport
Address: 2-4 Cockspur Street
London
SW1Y 5DH

Decision (including any steps ordered)

1. The complainant requested a copy of the agreement between The Royal Parks (TRP) and the London Organising Committee of the Olympic and Paralympic Games (LOCOG) regarding the equestrian and modern pentathlon test events held in Greenwich Park in July 2011. TRP provided a copy of the agreement but redacted a number of small sections on the basis that disclosure of these sections would prejudice not only its commercial interests but also those of LOCOG and other third parties.¹
2. The Commissioner's decision is that TRP is entitled, under the terms of the Freedom of Information Act (FOIA), to withhold the redacted information as it is exempt from disclosure on the basis of section 43(2). Furthermore, the Commissioner is satisfied that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

Request and response

3. On 25 June 2011 the complainant contacted TRP and asked for 'information on the conclusion of the substantive Contract with LOCOG, and for sight of its terms'.
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¹ The Commissioner notes that under FOIA The Royal Parks (TRP) is not a public authority itself but an executive agency of the Department for Culture, Media and Sport (DCMS). Therefore in this case the public authority is actually DCMS and not TRP. However, for the sake of clarity in the body of this notice refers to the TRP as if it were the public authority.

4. TRP responded on 12 July 2011 and explained that discussions with LOCOG about an agreement covering all Royal Parks were continuing and that LOCOG's venue plans, and the terms of the agreement, would be informed by the outcomes of LOCOG's recently commenced testing programme. However, TRP explained that it had concluded a specific Venue Use Agreement ('the agreement') with LOCOG in relation to the equestrian and modern pentathlon test events that were currently taking place in Greenwich Park. TRP suggested that since the first part of the complainant's email of 25 June referred to these test events in particular, it provided him with a copy of that agreement. However, TRP noted that a small amount of information had been redacted from the agreement on the basis of section 43(2) of FOIA.
5. The complainant contacted TRP on 7 August 2011 and asked for an internal review of this decision to be undertaken.
6. On 7 September 2011 TRP informed the complainant of the outcome of the internal review; this upheld the decision to redact certain parts of the agreement on the basis of section 43(2).

Scope of the case

7. The complainant contacted the Commissioner to complain about TRP's decision to redact certain parts of the agreement. The parts of the agreement that had sections redacted are clause 31 which concerns indemnity, clause 32 which concerns insurance and schedule 5 which concerns anticipated reinstatement costs. The Commissioner has therefore considered the application of section 43(2) to each of these redactions.
8. The complainant made a number of points in support his view that the redacted information should be disclosed. The Commissioner has referred to these submissions at the relevant parts of his analysis below.

Reasons for decision

9. Before setting out his findings in respect of section 43(2) the Commissioner wishes to confirm that as part of his consideration of this complaint he did consider whether the withheld information constituted 'environmental information' as defined by the Environmental Information Regulations (EIR) and thus whether this complaint should be determined under that piece of legislation rather than FOIA. The Commissioner is satisfied that whilst some parts of the agreement fall within the definition of environmental information as set out in the EIR the

redacted sections do not. Therefore the Commissioner is satisfied that this complaint should be determined under FOIA.

10. 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).'

11. In order for a prejudice based exemption, such as section 43(2), 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 believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there 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 to discharge.

12. In relation to the commercial interests of third parties, the Commissioner does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, the Commissioner expects that arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns.

13. TRP has explained to the Commissioner that the reasons why, in its opinion, disclosure of the redacted indemnity information and insurance information would cause commercial prejudice are similar and related. Therefore in determining whether the exemption is engaged the Commissioner has separated his analysis into two parts, firstly the application of section 43(2) to clauses 31 and 32 and secondly the

application of section 43(2) to the redactions made to schedule 5. In its submissions to the Commissioner TRP explained that it had consulted with LOCOG in order to ascertain the latter's views in respect of prejudice to its commercial interests. The Commissioner was provided with copies of this correspondence between TRP and LOCOG.

14. TRP's submissions to the Commissioner were detailed in nature and included information which TRP considered to be, in itself, commercially sensitive. Such information encompasses references to the redacted information itself but also includes to a number of specific reasons why TRP believed that prejudice would occur if the redacted information was disclosed. Therefore the Commissioner's analysis which is set out below does not include an explicit assessment of all of the reasons why TRP considers the redacted information to be exempt from disclosure. However, the Commissioner's analysis of these two additional sets of arguments is set out in the confidential annex which will be sent to the public authority only.

Clauses 31 and 32

15. In submissions to the Commissioner, TRP set out a number of reasons why it believed that disclosure of the redacted information **would** (i.e. not just be likely to) cause commercial prejudice. These reasons can be summarised as follows:
 - (i) Disclosure would prejudice TRP's position in future commercial negotiations. This is because it would find it difficult to negotiate indemnity and insurance terms with future park users that are different from, or more beneficial (from TRP's position) than the terms which are set out in the agreement. In essence disclosure would reveal TRP's 'bottom line' to prospective contractors thus undermining its bargaining position.
 - (ii) Similarly, LOCOG's ability to negotiate less onerous (from its perspective) terms in respect of indemnity and insurance with other venue operators would be compromised if the terms it had agreed to in respect of the test events in Greenwich Park were disclosed. Again, disclosure would reveal LOCOG's 'bottom line' to its prospective contractors.
 - (iii) Disclosure would prejudice LOCOG's relationships with those venue operators with whom it had already entered into agreements. It was imperative to the smooth running of the 2012 Games that LOCOG maintained good working relationships with its venue operators.

- (iv) Disclosure of details and limits of the indemnity and insurance would encourage or assist potential litigants to bring claims against TRP and/or LOCOG.
 - (v) Disclosure would dissuade potential TRP customers (i.e. those looking for a venue) to use it if it meant disclosing their commercially sensitive information. As a major venue operator, TRP competes with private, commercial venue businesses that are not subject to FOIA. People who are planning an event have a range of options when deciding where to stage their event. Although TRP venues are attractive and iconic, those are not the only factors which potential customers consider when deciding whether to hold an event in a Royal Park.
 - (vi) Disclosure would also provide TRP's competitor venues with an advantage as they would know what terms TRP routinely offers and better them.
16. A further two reasons, (vii) and (viii), are identified in the confidential annex.
17. With regard to the three limb test for engaging a prejudice based exemption set out above at paragraph 11, the Commissioner is satisfied that in relation to all six of these arguments the first limb is met. That is to say the nature of the harm envisaged, namely prejudice to the commercial interests of either TRP and/or LOCOG, clearly relates to the interests which section 43(2) is designed to protect.
18. In reaching this finding the Commissioner notes that the complainant argued that it was doubtful whether either TRP or LOCOG could correctly be deemed to have commercial interests:
19. In respect of TRP the complainant argued that whilst he accepted that a Department of State may have 'commercial interests' in a recognisable sense (e.g. in the supply of goods and services for its own operation) he did not accept that the Secretary of State for Culture, Media and Sport's powers of management over the Royal Parks authorised him to exploit them as commercial assets; rather the Parks are dedicated to public use and the Secretary of State is the guardian on the public interest in that respect. The complainant argued that if the interpretation of section 43(2) was not correspondingly conditioned then the Secretary of State's

public accountability for the management of the Royal Parks would be seriously undermined.²

20. In respect of LOCOG the complainant argued that it was questionable whether it was a commercial enterprise in the normal sense: although it was a private company its sole purpose is a semi-public one, namely to conduct a major international sporting event of largely public character. The LOCOG was not in a competitive situation as it holds the exclusive monopoly right over the 2012 Games, it operates them under the aegis of government departments, it is not dedicated to the making of commercial profits for its promoters and its losses are underwritten by the taxpayer. Consequently, the complainant argued that it would only be in the rarest of instances that LOCOG's relationship with public authorities might conceivably be regarded as threatening its commercial interests and only then if disclosure would have an adverse effect on the terms on which LOCOG would be able to procure goods and services in the exercise of its semi-public purpose.
21. With regard to TRP and the engagement of this exemption, the Commissioner does not believe he has to consider whether the Secretary of State has exercised his powers of management over the TRP correctly. It is clear that the Secretary of State has approved a strategy for TRP that includes generating income through commercial use of its assets, in addition to the grant-in-aid it receives from the government. Whether this is the correct interpretation or not of the Secretary of State's powers in respect of TRP, and whether such a business plan sufficiently respects the fact that the Parks are dedicated to public use, does not alter the fact that under such an approach TRP is undoubtedly in a position where they use the various Parks' assets for commercial gain. Thus section 43(2) is clearly applicable and the Commissioner does not believe that it should not or cannot apply simply because there may be some dispute as to the basis upon which the public authority actually finds itself in a commercial situation.
22. With regard to LOCOG as the arguments at (i) to (vi) make clear, the scenario is in fact one of the rare instances envisaged by the

² The Secretary of State for Culture, Media and Sport, is the Minister responsible for TRP. He/she determines policy objectives, financial framework and allocation of financial resources, including key targets, and also approves the Corporate and Business Plans for TRP. Day-to-day management of the Royal Parks has been delegated by the Secretary of State to the Chief Executive of TRP.

complainant. That is to say, disclosure of the redacted information could have an adverse effect on the terms on which LOCOG would be able to procure goods and services in the exercise of its semi-public purpose.

23. Turning to the second limb of the test, the Commissioner accepts that for all of the reasons (i) to (vi) there is some causal link between disclosure of the redacted information and the particular prejudicial effect described by TRP. Furthermore, the Commissioner is satisfied that the nature of the prejudicial effects are ones that can be correctly described as being real, actual or of substance.
24. With regard to the third limb of the test, the Commissioner is not convinced that the likelihood of prejudice occurring in the manner described at point (iii) is one that is anything more than hypothetical. However, to explain why he is of this opinion requires reference to information that that TRP considers to be prejudicial. The Commissioner has therefore explained his reasoning in relation to point (iii) in the confidential annex.
25. In respect of (iv), in submissions to the Commissioner TRP has identified a number of specific ways in which it believes that the prejudicial consequences described at point (iv) could occur. The Commissioner finds these submissions compelling evidence that the likelihood of prejudice in this manner is one that is more than hypothetical and indeed meets the threshold of the higher test of likelihood. However, he cannot reveal the exact nature of these submissions without revealing the content of the redacted information itself.
26. In respect of the arguments described at (i), (ii), and (vi), the Commissioner accepts that the likelihood of each them occurring is one that goes well beyond simply being a hypothetical risk. Indeed the Commissioner is again satisfied that the likelihood of prejudice occurring is one that meets the higher threshold of 'would' prejudice. The Commissioner has reached this conclusion primarily because he considers the rationale underpinning all three of these arguments to be logical and sound. That is to say it is broadly accepted that a situation of information asymmetry - where one party to a commercial transaction has more (or better) information than the other - is highly likely to distort the competitive buying process to the extent that the party in a position of having less (or worse) information is commercially disadvantaged. More specifically, the future commercial negotiations that TRP has identified as being distorted are ones that are clearly likely to occur regularly and/or involve significant sums in respect of insurance and indemnity. For example, for TRP the use of its Parks as venues for events of this type represents an increasing proportion of its overall income as its grant-in-aid from DCMS decreases. Thus there will be numerous occasions in the future where it will be the position of

undertaking similar negotiations. For LOCOG whilst the timeframe within which it operates is limited, at the time of the request it still had to conclude agreements with numerous different venue operators.

27. Finally, in respect of point (v) the Commissioner is prepared to accept that the organisations looking for venues clearly consider the terms of any insurance and indemnity agreements to be commercially sensitive. This is clearly evidenced by LOCOG's strong desire that its own information about this is not disclosed as evidenced in the correspondence between TRP and LOCOG. It is therefore reasonable to assume that future prospective clients of TRP would be likely to be put off using TRP if similar information in respect of its events was disclosed under FOIA.
28. For the reasons set out in the annex the Commissioner is not persuaded that section 43(2) is engaged on the basis of the arguments numbered (vii) and (viii).
29. Nevertheless, in light of his findings in respect of arguments (i), (ii), (iv), (v) and (vi), the Commissioner is satisfied that the section 43(2) is engaged in respect of the information that has been redacted from clauses 31 and 32.

Schedule 5 Anticipated Reinstatement Costs

30. The information redacted from this part of the contract contains specified financial amounts for the cost of work to be undertaken after the test events by TRP's chosen contractor. TRP explained that disclosure this information would be prejudicial for two reasons:
 - (i) Firstly, disclosure of this information (when combined with the other information in schedule 5 which has already been disclosed) would prejudice the commercial interests of TRP's contractor that undertakes the reinstatement work. This is because it would enable the contractor's competitors to work out exactly what it charges for specific types of work undertaken in the Royal Parks. In future competitions for work in the Royal Parks, and indeed in future competitions for similar work for different employers, the contractor would be at significant disadvantage to its competitors.
 - (ii) Secondly, TRP is in the process of retendering its grounds maintenance contract. The items in schedule 5 form part of the TRP's grounds maintenance tender specification and bidders are required to provide rates against these activities. Disclosure of the redacted costs

would therefore reveal TRP's negotiation position because bidders would know precisely how much TRP had paid in the past for similar services. TRP's preference is to conduct tender exercises in which the maximum possible competitive tension is maintained with bidders not knowing what their competitors are bidding or what TRP has previously paid for services. This allows TRP to derive the best possible value for money.

31. Again, the Commissioner is satisfied that the three limbs of the test are met in relation to both of these arguments: the nature of the harm envisaged clearly relates to commercial interests (first limb) and there is a clear causal link between disclosure of the information and the prejudice envisaged in both scenarios (second limb). Furthermore, the Commissioner is satisfied that the likelihood of prejudice occurring is one that meets the higher threshold given that the disclosure would create a similar situation of 'information asymmetry' as discussed above. More specifically, in respect of TRP's commercial interests given that it is actually in the process of retendering its grounds maintenance contract, and that this represents a significant proportion of its annual expenditure, the Commissioner believes that this substantially increases the likelihood of prejudice to its interests occurring. In relation to TRP's contractor, given that the disclosure of redacted information would allow its competitors to work out how much it charged per square metre for turfing services it is very easy to see how this contractor's commercial interests would be harmed.
32. The Commissioner is therefore satisfied that the section 43(2) is engaged in respect of the information that has been redacted from schedule 5.

Public interest test

33. Section 43(2) is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Commissioner has considered the public interest arguments for the two different classes of information together given that the same arguments effectively apply to both.

Public interest arguments in favour of maintaining the exemption

34. TRP argued that there was a strong public interest in protecting it from commercial prejudice. This was on the basis that it was partly funded by the taxpayer and it is clearly in the public interest to ensure best value for money when spending public funds.

35. TRP also argued that although LOCOG was largely privately financed, it was clearly not in the public interest to harm its commercial interests to the detriment of the 2012 Games. Moreover, the government guaranteed to the International Olympic Committee that it will provide all necessary financial support to LOCOG to ensure a successful Games so prejudice to the commercial interests of LOCOG may have a direct consequence on the public purse. Furthermore it would not be in the public interest that other third parties have their commercial interests prejudiced simply because they have entered into commercial relationships with TRP.
36. TRP argued strongly that the public interest in disclosure of the redacted information had to be seen against the backdrop of its adopted policy of maximum transparency in relation to the 2012 Games as result of which the public already has access to comprehensive information about how the Parks will be used during the Games. In particular TRP emphasised, the substantial amounts of information it had proactively disclosed in relation to this topic, the fact that it had provided the complainant with numerous documents concerning the Games and in particular the fact that only a very small amount of information had been redacted from the agreement which is the subject of this information. In respect of this latter point, TRP noted that of clause 32 only the specific amount of insurance cover had been redacted. The fact that insurance was required, the risks that such insurance covered, and the fact that LOCOG's liability to TRP was not limited to the amount of insurance cover remain readily apparent to the reader of the disclosed agreement. Similarly, in relation to schedule 5, only the costs of the reinstatement work have been redacted. The types of work undertaken, the effective quantity of each work, and other facts relevant to reinstatement have been disclosed.

Public interest arguments in favour of disclosing the requested information

37. The complainant argued that the decision to permit equestrian events in Greenwich Park, and for that purpose to grant exclusive use of the Park, to a private company, had been the subject of acute controversy. The complainant suggested that there were two key questions in respect of this decision: Firstly whether the Park was a suitable venue for these events at all given the risk they inevitably pose to its unique and irreplaceable historical, archaeological and ecological value; and secondly the nature and especially the reliability and viability of the measures contemplated to mitigate that risk, and reverse it if damage in fact occurs.

38. The complainant suggested that it is was very clear that the information which had been redacted would significantly address these two questions because it would, for example, reveal:
- The Secretary of State's acknowledgment of the nature and scope of the actual risk to which he was exposing Greenwich Park and his assessment of its monetary value, both of which would be essential to any discussion of whether that assessment was adequate;
 - The adequacy of the financial arrangements for meeting that risk, including therefore the residual liability that might fall on public funds;
 - How far the practical arrangements for meeting that risk are likely to achieve actual restoration of Greenwich Park to its former state.
39. The complainant argued that all of the above would feed directly into the underlying question of whether the Secretary of State's decision to permit the use of Greenwich Park is a reasonable matter of policy, or even, ultimately, whether it is justifiable in law as an exercise of his powers of management over TRP.

Balance of public interest arguments

40. The Commissioner readily recognises that the decision to use Greenwich Park, on an exclusive basis, for the equestrian events in the 2012 Games has been a controversial one. In light of this the Commissioner believes that there is a considerable and weighty public interest in disclosure of information that would inform the public about the basis upon which the Park is being used for the Games. Whilst the Commissioner recognises the amount of information disclosed to date by TRP, and in particular the lack of redactions made to the agreement, he is of the view that there is always a strong public interest in complete disclosure so that the public can fully understand the issues behind a particular decision. In particular, the Commissioner believes that redacted information would indeed directly address the concerns identified by the complainant at paragraph 38.
41. However, despite the strong weight which the public interest arguments in favour of disclosure clearly attract, the Commissioner must remember that it is not just the commercial interests of TRP that would be harmed but also those of LOCOG and also other third parties. In the Commissioner's opinion the fact that the prejudice would occur to a number of parties, not just one, significantly strengthens the public interest in maintaining the exemption for all of the redacted information.

Furthermore, the fact that prejudice would occur, and not just be likely to, adds additional weight to the public interest in maintaining the exemption. Moreover, the Commissioner agrees with TRP that is very much against the public interest that its ability to secure best value for money in spending public funds is undermined.

42. Ultimately in conclusion the Commissioner therefore finds that the public interest favours maintaining the exemption.

Right of appeal

43. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

44. 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.
45. 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

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