

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 June 2013

Public Authority: High Peak Borough Council
Address: Municipal Buildings
Glossop
Derbyshire
SK13 8AF

Decision (including any steps ordered)

1. The complainant requested information about the licensing arrangements between High Peak Borough Council (the council) and Nestle/ Buxton Mineral Water Company Limited (the company) for the extraction for sale of natural mineral water from springs at Buxton. The council provided some information but withheld other information including part of the text of its agreement with the company (the agreement) relying on the section 43(2) FOIA exemption.
2. The Commissioner's decision is that the council has correctly applied the exemption at section 43(2) FOIA and that the public interest in maintaining the exemption outweighed the public interest in disclosure.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 23 July 2012, the complainant wrote to the council and requested information in the following terms:
 1. *A copy of the extraction licence between High Peak [the council] and Nestle/ Buxton Mineral Water [the company].*
 2. *Information about how and when the licence, and the amount paid for extraction of water, can be reviewed.*
 3. *The current amount paid per litre of water extracted and whether this figure will change in future.*
 4. *Information about how the rate for extraction was arrived at.*

- 5. The annual income that High Peak has received from Nestle/ Buxton Mineral Water for the past 3 years and estimates for future years.*
 - 6. Why this income is not specified in your Annual Statement of Accounts.*
5. The council responded on 14 August 2012 providing some of the information it held relating to the information requests; it withheld the agreement (request 1) and the price being paid (request 3) relying on the commercial interests exemption, section 43(2) FOIA.
 6. Following internal review the council wrote to the complainant on 11 October 2012 maintaining its refusal and earlier reliance on the exemption at section 43(2) FOIA.

Scope of the case

7. On 17 October 2012 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The complainant told the Commissioner that the agreement had been varied on many occasions and had been extended in January 1987 to last for 100 years. He said he was concerned at what he regarded as a lack of public scrutiny and accountability by the council in this matter. He was concerned that the agreement did not, in his view, take account of possible changing circumstances over time or the possibility that a better deal could be made for the public either with the company or with others.
9. The complainant referred the Commissioner to the Derbyshire Act 1981 which he believed was relevant; the Commissioner has seen, and had regard to, section 15 of the 1981 Act.
10. The council provided the Commissioner with a comprehensive response to the complaint on 18 March 2013 which he has taken into account. He has also taken into account representations by the complainant and has reviewed the withheld information.
11. During the course of the Commissioner's investigation, the council held discussions with the company about what information could be disclosed without causing significant detriment to the company's commercial interests. The company's view, as expressed in confidence to the council, has been relayed to the Commissioner who took it into account in reaching his decision.
12. Also during the course of the Commissioner's investigation, the council disclosed additional information to the complainant, including a

conformed copy of the agreement between the council and the company dated 9 January 1987 as amended with its commercially sensitive content redacted. The council has also disclosed a redacted copy of a letter between the council and the company dated 26 September 2001 (the 2001 letter).

13. On 29 April 2013 the complainant indicated that he was not satisfied that his information request had been properly handled by the council and the Commissioner.
14. The Commissioner therefore proceeded to decide the application of the section 43(2) FOIA exemption and the associated public interest test to the relevant information in the agreement and the 2001 letter which is still being withheld by the council.

Reasons for decision

15. Section 43(2) of FOIA 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).'

16. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner believes that three criteria must be met.
 - First, 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.
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie 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.

17. 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.
18. In this matter, the council did consult the company and relayed its views to the Commissioner and he has had regard to them.
19. The council told the Information Commissioner on 18 March 2013 that disclosure of information concerning the business model underlying the price paid by the company for the source water and information about the volume of water abstracted would damage the relevant commercial interests of the company and, by extension, of the council itself.
20. The company said that it competes with other mineral water suppliers and it has indicated that its business model and the related pricing and abstraction information is a closely guarded commercial secret. That information is not known generally or between the competing companies. Some aspects are unique to the agreement between the company and the council which, if generally known, would put the company at a significant disadvantage among its competitors and also the purchasers of its product. Detriment to the company would indirectly result in consequential detriment to the council by putting at risk the commercial benefits it derives from the agreement.
21. Accordingly, with regard to the three-limb test for engaging a prejudice based exemption set out above, the Commissioner is satisfied that the first limb is met. The prejudice to the commercial interests of the council and the company clearly relates to the interests which section 43(2) FOIA is designed to protect.
22. With regard to the second limb of the test, the Commissioner is satisfied that there is a causal link between disclosure of the requested information and the particular prejudice identified to the commercial interests of the company and the council. Furthermore, the Commissioner is satisfied that the nature of the prejudicial effects is one that can correctly be described as being real, actual or of substance.
23. As regards the third limb of the test, the Commissioner accepted the evidence from the council and the company that the detriment identified would result from disclosure.
24. The Commissioner therefore decided that disclosure would result in real and substantial prejudice to the commercial interests of the council and

the company and that the section 43(2) FOIA exemption was engaged and had been correctly relied upon by the council.

Public interest test

25. Section 43(2) FOIA is a qualified exemption and therefore the Commissioner must consider the public interest test contained at section 2 of FOIA and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. If the public interest arguments are equally weighted, the information must be disclosed; to that extent the legislation effectively contains a presumption in favour of disclosure.

Public interest arguments for disclosing the redacted information

26. The Information Commissioner has seen that disclosure would provide evidence of accountability and transparency in the council's acquisition and application of public funds. It would enable the furtherance of public debate and understanding of the net benefits to the council and its residents arising from the contractual arrangements between the council and the company. These arrangements are firmly established, are exclusive between the parties, are of long standing and are also intended to be of long duration.

Public interest arguments for maintaining the exemption

27. The Information Commissioner has seen that the main public interest factors in favour of maintaining the exemption included the following.
- In deciding that the exemption was engaged, the Commissioner had seen that detriment to the company and the council would result from disclosure.
 - The unique and commercially sensitive nature of the information derived from the company's proprietary business model which, it says, would be of considerable commercial value to its competitors and is a closely guarded secret.
 - The council explained to the Commissioner that the company has made a substantial capital investment in plant in the town and is a major employer; it continues to invest in its facilities and in community events within the local area. The council said that it is in the public interest for the company to continue to operate successfully and profitably and to continue to invest in the Buxton area. It said that disclosure of information that would put those things at risk would be against the public interest.
 - The income to the council is more than half a million pounds a year; the exact sums are, by law, disclosed by the council in its

accounts. It is the methodology leading to its calculation rather than the size of the sum itself that is sensitive.

- Disclosing sensitive information against the express wishes of the company and in the face of its evidence of the harm that disclosure would cause, would undermine public confidence and trust in the council and would make its relationships with the company and others more difficult in future.
- As regards the 100-year duration of the agreement, the council said that it is in regular discussion with the company about the agreement, the terms of which could be subject to periodic review by both parties and consequential renegotiation without limit. The fees paid for the water are subject to annual indexation and can be reviewed every 10 years.

28. The Information Commissioner decided on balance that, in all the circumstances of the case, the public interest in the council maintaining the commercial interests exemption outweighed that in disclosing the information. The Commissioner therefore decided that the council had correctly withheld the relevant information.

Right of appeal

29. 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

30. 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.
31. 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

Jon Manners
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