

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 October 2013

Public Authority: London Borough of Newham Council

Address: Newham Dockside
1000 Dockside Road
London
E16 2QU

Decision (including any steps ordered)

1. The complainant requested information on the revenue received by the London Borough of Newham ('the Council') from the rental of specific property during the 2012 London Olympic Games.
2. The public authority refused to provide the information by applying the exemption to disclosure which prevents prejudice to the commercial interests of the Council or others. The Commissioner's decision is that Council incorrectly applied the exemption.
3. The Commissioner requires the public authority to disclose the requested information to ensure compliance with the legislation.
4. The public authority must take this action 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

5. On 8 November 2012 the complainant made the following request for information under the FOIA:

"Now that the Olympics are over can you please tell me how much Newham Council received from (a) the BBC for the rental of Lund Point, for use as a BBC studio, and (b) from Al Jazeera Sports for the rental of similar studio space at Dennison Point."

6. On 11 December 2012 the Council responded with a refusal notice citing the exemption found at section 43(2) where disclosure would, or would be likely to, prejudice the commercial interests of any person. The Council stated that it had consulted with the third parties and concluded that the requested information remains commercially sensitive notwithstanding that the Olympic Games had ended.
7. Following an internal review the Council wrote to the complainant on 4 February 2013 upholding its initial response.

Scope of the Case

8. The complainant contacted the Commissioner on 19 February 2013 to complain about the Council's response.
9. The complainant stated his opinion that the potential commercial damage to the BBC and Al Jazeera was not sufficient to engage the exemption at section 43(2) and in any event he considered that the public interest favoured disclosure.
10. The Commissioner's investigation has therefore focussed on the Council's application of section 43(2).

Reasons for decision

11. **Section 43(2)** states:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it.)"

12. Consideration of this exemption is a two-stage process. Firstly, for the exemption to be engaged prejudice to commercial interests must be at least likely to result from disclosure of the information. If the exemption is engaged the Commissioner will consider the public interest in disclosure. The requested information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

Whose commercial interests and the likelihood of prejudice

13. The Council explained to the Commissioner that it had consulted with the third parties named in its initial consideration of the request and at the time of the internal review. It maintained that prejudice to its own and the third parties commercial interests *would* arise if the requested

information was disclosed. The determination of "would prejudice" places a strong evidential burden on the Council to demonstrate that prejudice.

The nature of the prejudice

14. The Council stated that because it anticipates that other events will be held at the Olympic site in the future, it assumes that it will receive further requests for the use of the towers by broadcasters. It concludes that the disclosure of the rates paid at the time of the 2012 Olympic Games would prejudice its negotiations for the rental of the space during such future events.
15. The Council also considered that the disclosure of financial information would be likely to undermine confidence in the commercial sector's engagement with the Council on similar transactions. The Council explained that it was concerned that potential negotiations would be adversely affected if interested parties considered that there was a risk of sensitive business information becoming available to their competitors and other interested parties. The Council suggested that the awareness of such information would in turn be likely to cause prejudice to those organisations' business interests.
16. The Council explained that the BBC considered that the disclosure would undermine its bargaining position in future negotiations with providers of similar facilities. The Council went on to explain that at the time of the request the BBC was considering its broadcasting options in respect of the 2014 Commonwealth Games and it anticipated requiring similar facilities in Glasgow. It considered that disclosure of the amount paid would adversely affect its ability to achieve future successful negotiations both for the Commonwealth Games and other undetermined events.
17. At the time of the request Al Jazeera considered that it would suffer commercial prejudice by the release of the information. However at the time of the internal review Al Jazeera changed its position and agreed that the licence fee it had paid could be disclosed, although it considered that other information including the terms of the licence remained commercially sensitive. As the complainant had requested disclosure of the fee alone Al Jazeera agreed to the disclosure in this case. The Council nevertheless withheld the information in respect of its consideration of prejudice to its own future negotiations.
18. In consideration of the decision taken by Al Jazeera the Commissioner asked the Council to revert to the BBC and to reconsider its reliance on section 43(2).

19. The Council informed the Commissioner that the BBC maintained its position that the requested information should be withheld and provided further arguments to the Council in support of this position.
20. The Commissioner considered the justification provided which focussed on its view that the BBC must not be disadvantaged against its commercial competitors. In support of this the Council cited decision notice FS50504830 which considered a request directly to the BBC for the same information from a different complainant. In that case the Commissioner decided that the information was held by the BBC for the purposes of 'journalism, art or literature' and consequently did not fall to be considered under the FOIA. As a result of this derogation the information was not disclosed.
21. The BBC explained to the Council that there is an "acknowledgement that there is protection of the BBC and other public service broadcasters from the disclosure of information which would disadvantage them against commercial rivals".
22. The Commissioner notes the arguments provided, however the request in this case is a request to the Council not to the BBC and as such the information cannot be derogated.
23. When considering the likelihood of prejudice to a public authority's commercial interests in relation to subsequent negotiations, the Commissioner takes into account both the nature of the information requested and the degree of similarity between the financial transactions. Where the Commissioner considers that potential negotiations regarding future events are not comparable with the transaction relating to a request, it will be a factor likely to reduce the likelihood of prejudice arising from disclosure of the requested information.
24. The Commissioner considers that the Olympic Games are a sufficiently distinct event in terms of profile and commercial value for broadcasters that disclosure of the fees paid by broadcasters would not significantly influence fee negotiations for subsequent events. The Commissioner also notes that the Lund Point and Dennison Point Towers leased from the Council by the broadcasters are due to be demolished. Residents are currently being moved out of the properties. The vacation of the Towers allowed the Council to lease the vacated space to the broadcasters in 2012. Although this process of moving residents may take some time to complete, it is not the intention of the Council to retain the towers as an on-going commercial asset once the Towers are vacated. The Commissioner accepts that should an event occur at the Olympic Park in the years preceding demolition the Towers could again be leased to communications networks. Nevertheless he is not convinced that public

knowledge of the fees paid in 2012 would cause a commercial detriment to the Council. He considers that the nature of the future event and the anticipated public demand for broadcast viewing would have a significantly greater influence.

25. The Commissioner's view on the BBC's reasoning is that the release of the fee paid by the BBC would not substantively undermine its bargaining position in future negotiations with facilities' providers. The requested information is simply the amount paid by the broadcasters to the Council. No other details have been requested which would create a fuller picture of the negotiations undertaken or the detail of the terms of agreement between the parties.
26. The Commissioner does not consider that the Council and the BBC have demonstrated a direct causal link between disclosure of the information and commercial prejudice to their operations. He does not accept that disclosure would result in the prejudice described by the Council and the BBC. Consequently the Commissioner has determined that the exemption is not engaged and the information should be disclosed. As the exemption is not engaged the Commissioner is not required to assess the public interest in disclosure.

Right of appeal

27. 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

27. 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.
28. 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

Alexander Ganotis
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