

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 September 2015

Public Authority: Petersfield Town Council
Address: The Town Hall
Heath Road
Petersfield
GU31 4EA

Decision (including any steps ordered)

1. The complainant has requested copies of lease agreements relating to four local sports facilities, let by Petersfield Town Council ("the Council"). The Council did not hold one of the leases and applied section 43(2) (commercial interests) to withhold the remaining three.
2. The Commissioner's decision is that section 43(2) is not engaged.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant the information withheld under the exemption at section 43(2), taking steps to redact any personal data contained within it.
4. The public authority 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

5. On 28 November 2014, the complainant wrote to the Council and made the following request for information:

"Under the Freedom of Information Act, I would like to confirm the request made by email on behalf of Petersfield Rugby Club. I would like to request copies of the leases held by Petersfield Town Council with the differing sporting and leisure organisations in Petersfield, namely Petersfield Football Club, Petersfield Cricket Club, Petersfield Town Juniors Football Club and Petersfield Open Air Swimming Pool."

6. The Council responded on 24 December 2014 and refused to disclose the information, stating that it was exempt from disclosure under section 42 (legal professional privilege) of the FOIA.
7. It provided an internal review on 17 March 2015 in which it revised its position. It stated that it did not hold any relevant information in respect of the open air swimming pool. It withdrew its reliance on section 42 and substituted instead section 43(2) (commercial interests) to withhold the requested information in respect of Petersfield Football Club, Petersfield Cricket Club and Petersfield Town Juniors Football Club.

Scope of the case

8. The complainant contacted the Commissioner on 19 March 2015 to complain about the way his request for information had been handled. He disagreed with the Council's reliance on section 43(2).
9. During the course of the investigation the complainant indicated that he did not challenge the Council's assertion that it did not hold the swimming pool lease. He also confirmed that he was not interested in seeing any personal data which might be contained in the leases. The Commissioner has therefore excluded these matters from the scope of the investigation.
10. The Commissioner considers the scope of this decision notice to be whether the Council was entitled to rely upon section 43(2) to withhold the leases for Petersfield Football Club, Petersfield Cricket Club and Petersfield Town Juniors Football Club.

Reasons for decision

Section 43 – prejudice to commercial interests

11. Section 43(2) of the FOIA provides that information is exempt from disclosure if disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it. In this case, the Council has said that the disclosure of the

requested information would be likely to prejudice its own commercial interests because it would interfere with its ability to negotiate the leasing of other Council-owned land and property, competitively.

12. It said that disclosure of the leases to the complainant would set a precedent whereby all Council leases (including those held with commercial organisations) would be rendered potentially disclosable. The threat of lease information being placed in the public domain would make it "*virtually impossible for the Town Council to negotiate terms and conditions for any lease renewal or break clause periods as such information – to commercial clients – could be commercially sensitive and potentially impacting on their ability to do business.*" It would deter potential tenants (particularly commercial ones) from entering into lease agreements with it and would make it harder for the Council to achieve best price for its property.
13. The Council said that this would be likely to have a number of knock-on effects: reduced income streams; higher local taxes; and fewer sporting facilities for local people. It also pointed to a pre-existing problem with vacant Council property which it had been unable to let and said that disclosure would exacerbate this problem.
14. However, it provided no evidence to support its contention that disclosure would be likely to result in a "chilling effect" on its ability to contract with potential tenants.
15. Section 43(2) is a prejudice based exemption which means that in order to engage the exemption a public authority must be able to demonstrate that disclosure would or would be likely to cause the prejudice the exemption is designed to protect against. To do this a public authority must be able to meet the requirement of the prejudice test which involves a number of steps.
 - Identify the "*applicable interests*" within the relevant exemption
 - Identify the "*nature of the prejudice*". This means:
 - Show that the prejudice claimed is "*real, actual or of substance*";
 - Show that there is a "*causal link*" between the disclosure and the prejudice claimed.
 - Identify the "likelihood of the occurrence of prejudice".
16. Identifying the applicable interests within an exemption means that a public authority must be able to show that the prejudice it envisages

affects the interest which the exemption is designed to protect. In this case, the Commissioner would accept that the Council's arguments are relevant to the section 43 exemption. Clearly, if it can be shown that disclosure would make it harder for the Council to competitively negotiate on future leases, this would affect its commercial interests.

17. However, before the exemption can be successfully engaged the Council must also be able to show that there is a link between disclosure and the prejudice occurring. That is to say, it must be able to show how disclosure would, or would be likely to, cause the prejudice. Any argument must be more than just assertion or belief that disclosure would lead to prejudice. The public authority must be able to demonstrate that there is a logical connection between the disclosure and the prejudice.
18. In this case the Council has offered no evidence to support its contention that disclosure of the requested information would adversely affect future lease negotiations, beyond stating that it would. For instance, it has not provided credible evidence from third parties confirming that they would be less willing to contract with it or that they would do so on terms which were disadvantageous to the Council, to reflect a perceived risk. Nor has it argued that there is anything in the leases which is particularly sensitive or revealing (the Commissioner has looked at the leases and they appear to be standard agreements, involving relatively small amounts of money). It has not argued that knowledge of the terms of these leases would give prospective tenants a commercial advantage when negotiating future, similar leases (in fact, it stated to the Commissioner that the particular circumstances of each of the requested leases were so diverse that there was nothing to be gained from comparing them against other leases). It is therefore the Commissioner's conclusion that the Council's arguments amount to little more than mere assertion.
19. The Council's argument that disclosure would set a dangerous precedent demonstrates a misunderstanding of the FOIA. The Council's leases are already potentially disclosable under FOIA. Disclosure in response to this request would not automatically mean that all leases should be disclosed, since each request must be considered on a case by case basis and by reference to the information involved and the exemptions. And with regard to its point that the threat of disclosure would make potential tenants less willing to engage with it, the Commissioner has seen no credible evidence that the possibility of disclosure under the FOIA is a real deterrent to bodies looking to contract with public authorities.

20. Taking all of this into account, it is very difficult to see how disclosure of the requested information would be likely to have the effect that the Council has described.
21. The Commissioner therefore finds that the Council has failed to demonstrate a causal link between disclosure of the information and any prejudice to its commercial interests. For these reasons the Commissioner's decision is that section 43(2) is not engaged.

Other matters

Section 45 – internal review

22. There is no obligation under the FOIA for a public authority to provide an internal review process. However, it is good practice to do so, and where a public authority chooses to offer one the section 45 code of practice sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
23. The complainant asked for an internal review of his request on 8 January 2015 and the Council provided the outcome of the internal review on 17 March 2015, 48 working days later. It offered no explanation for the length of time taken to conduct the review and there appear to be no exceptional circumstances which would account for it.
24. The Commissioner considers that in failing to conduct an internal review within the timescales set out above, the Council has not conformed with the section 45 code.

Right of appeal

25. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

26. 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.
27. 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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