

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 July 2015

Public Authority: Blackpool Council
Address: PO Box 4
Blackpool
FY1 1NA

Decision (including any steps ordered)

1. The complainant has requested information relating to a loan made by Blackpool Council to Blackpool Pleasure Beach. The Commissioner's decision is that the council has correctly applied the exemption for prejudice to commercial interests at section 43(2) in this case. He does not require any steps to be taken.

Request and response

2. On 7 February 2015, the complainant made the following request for information via the WhatDoTheyKnow website:

"Some years ago (believe 2010?), the Council made a loan, believed to be in the region of £5 million to Blackpool Pleasure Beach. Could you let me know over what period the loan is to be repaid and what will be the total interest repaid?"
3. The complainant contacted the council chasing a response on 8 March 2015. Having received no response, the complainant requested an internal review on 9 April 2015.
7. The council responded on 29 April 2015. It informed the complainant that it agreed to make a Business Loan to Blackpool Pleasure Beach on the 7 May 2010 for £5m and that the loan is due to be repaid on 30 November 2017. It refused to provide the requested information in relation to the total interest to be repaid citing the exemption for commercial interests at section 43(2) of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 29 April 2015 to complain about the way his request for information had been handled.
9. The Commissioner has considered whether the exemption at section 43(2) of the FOIA applies to the information relating to the total interest to be repaid.

Reasons for decision

Section 43(2)

10. Section 43(2) FOIA provides an exemption from disclosure of information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption, and is therefore subject to the public interest test.
11. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43¹. This comments that:

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."
12. In this instance the council has applied section 43(2) to the expected total interest repayment figure for the loan provided to Blackpool Pleasure Beach. The Commissioner considers that the information relates to the commercial activity of providing loans which the council conducts in a competitive financial market environment and therefore the requested information does fall within the remit of section 43(2) FOIA.

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.ashx

13. The council said that it is primarily its own commercial interests that would likely to be prejudiced. It also said that the consequences on the commercial interests of the Pleasure Beach were discussed and this was based around the Pleasure Beach's private business information that is not publicly available. For the purpose of this decision, the Commissioner will first consider whether the exemption is engaged, and the public interest test correctly applied, on the basis of the council's commercial interests.
14. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.
15. In its submission to the Commissioner, the council said that it considered the prejudice 'would be likely' to occur, even though it considers that there is more than a 50% chance of prejudicing occurring. It said there is a real and identifiable link between the information requested and the prejudice, and the risk is not remote. However, it submitted that the prejudice should be that of 'would be likely' as the number of significant value loans to be agreed in the future is unknown. The Commissioner considers that it is appropriate in this case to apply the lesser test of "would be likely to" occur.
16. The Commissioner has considered how any prejudice to council's commercial interests would be likely to be caused by the disclosure of the withheld information. This includes consideration of whether the prejudice claimed is "real, actual or of substance" and whether there is a causal link between disclosure and the prejudice occurring.
17. The council said that disclosure of the total amount payable could be reverse calculated to determine the actual interest rate charged. It explained that it negotiates the interest rate it applies to a loan based on rigorous due diligence. This includes a risk assessment and analysis of the business requesting the loan, consideration of its current financial position and the ability to repay the loan, and whether the anticipated outcome of the 'project' will benefit the town for example by an increase in employment opportunities or by encouraging visitors to the town and its attractions. It said that to this end, it typically contracts an external company to undertake the due diligence and provide a report to the council, which includes confidential information, and this was the approach undertaken for the loan to Blackpool Pleasure Beach.
18. It further explained that in recent years it has made 10 loans, which were of significant value, to businesses within the town. The council

submitted that if a business within the town was to learn the interest rate applied to another business loan, other businesses could approach the council to renegotiate their interest rate which would be likely to prejudice the its ability to recover the costs of the loan and consequently impact its commercial interests. It also said that disclosure of the business rate would be likely to prejudice the council's ability to apply a higher interest rate to future loans. The council said that this determination is based on the knowledge of the officers working within the service that liaises for such loans, and their discussions with the businesses that have, or have applied for, loans from the council.

19. It is clear to the Commissioner that the council's commercial interests would be harmed if it had to reduce the interest rates it offered on loans. What isn't clear is why the council would have to reduce interest rates on current loans as it is likely that such loans would be provided under a contractual agreement. In relation to future loans, it could be argued that disclosing the interest rate in this case would not lead to a reduction in an interest rate offered as the rate is dependent on the particular circumstances, as evidenced by the council's due diligence process described above. However, the Commissioner does accept that disclosure of the withheld information in this case could lead to it having to offer lower interest rates in future as it would weaken the council's negotiating position and strengthen the position of businesses requiring a low interest rate loan, which would prejudice the council's commercial interests.
20. The Commissioner notes that it could be argued that the council would not have to offer a loan at a rate it considered to be too low. However, the council has an interest in improving the town's economy by, for example, encouraging visitors and increasing employment opportunities, and the provision of loans to local businesses aides this improvement.
21. The Commissioner therefore considers that the prejudice claimed is real, actual and of substance; that there is a sufficient causal link between disclosure and the prejudice occurring; and that the likelihood of prejudice is real and significant therefore section 43(2) of the FOIA is correctly engaged. As section 43(2) is a qualified exemption, the Commissioner has gone on to consider the public interest arguments in this case.

Public interest arguments in favour of disclosing the requested Information

22. The council submitted that it may be in the public interest to understand:

"- what loans are being made to businesses within the town;

- that the council is getting a suitable return on the loan;
- that the Council does not encounter any debt as a result of the loans made (the loan is at no cost to the tax payer);
- that businesses are not unfairly supported by the Council;
- that businesses in the town were supported to invest in the town and enable ongoing or future employment."

23. The Commissioner recognises that there a general public interest in accountability and transparency in relation to the activities of public authorities. The release of this type of information could demonstrate that the council has spent public money effectively.

Public interest arguments in favour of maintaining the exemption

24. The Council considered that;

- "- the public have an expectation that the council is able to negotiate the best or most suitable interest rate for a loan which will vary for each loan based on due diligence including the specific circumstances and a risk analysis;
- the public expectation that the Council is able to maintain working relationships with businesses within the town;
- the need to ensure that a business is not unfairly disadvantaged if information regarding its financial circumstances were disclosed to the public;
- the consequences of the wider impact the disclosure may have on the public and the town."

25. It also said that it considered the level of the interest rates applied to other loans and the position it would be placed in if the public, including other businesses, were to learn that a lower interest rate may have been applied to a loan which would be likely to prejudice its ability to support other businesses in the future.

26. The Commissioner recognises that there is a public interest inherent in prejudice-based exemptions, in avoiding the harm specified in the exemption – in this case harm to the commercial interests of the council. Having found the exemption engaged, he must take into account that there is automatically some public interest in maintaining it.

Balance of the public interest

27. The Commissioner has considered both sets of arguments.

28. As exemptions from the right of access to information public authorities hold aim to protect particular, specified interests, the public interest

arguments in favour of maintaining an exemption must relate specifically to that exemption. He notes that the argument in relation to supporting other businesses in future does not relate to the council's commercial interests and has therefore not taken it into account.

29. He has taken into account the council's arguments in relation to maintaining the exemption, as described at paragraph 25, only so far as they relate to its commercial interests.
30. While he considers the principles of transparency and accountability in the spending of public money to be important ones, in this case he considers that the damage to the commercial interests of the council to be the overriding factor. The Commissioner considers that there is a strong public interest in not disclosing information which would be likely to have a negative impact on the council's financial position. Particularly so in the current economic climate where local authorities are expected to do more for less.
31. Therefore on balance, the Commissioner considers that in this case the public interest arguments in favour of disclosing the information are outweighed by the public interest arguments in favour of maintaining the exemption.
32. As the information has been correctly withheld on the basis of prejudice to the commercial interest of the council, the Commissioner has not needed to individually consider the interests of the Blackpool Pleasure Beach.

Right of appeal

35. 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

36. 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.
37. 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

Andrew White
Group Manager
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