

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 January 2016

Public Authority: Plymouth City Council
Address: Ballard House
West Hoe Road
Plymouth
PL1 3BJ

Decision (including any steps ordered)

1. The complainant has requested information connected with the use of Plymouth Hoe Promenade. Plymouth City Council ('PCC') provided most of the requested information but refused to disclose information connected to the use of the area by Plymouth University, citing section 43(2) (commercial interests) of the FOIA. The Commissioner's decision is that section 43(2) is not engaged.
2. The Commissioner requires PCC to take the following steps to ensure compliance with the legislation:
 - Disclose the Heads of Terms Licence document entitled: "*Plymouth University Use of Plymouth Hoe*".
3. PCC 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

4. On 22 July 2015, the complainant wrote to PCC and requested information in the following terms:

"I would be grateful to receive the following information which I believe should be held by Plymouth City Council.

- 1. A schedule of all consents, licences or other authorities granted by Plymouth City Council for bodies of all and any description to occupy Plymouth Hoe Promenade, including its surrounding grass parkland for the Financial years 2000, 2001, 2002, 2003, 2004, together with a statement of how long each user was present including pre-event and post event works as well as for the actual live event period. A similar schedule of the situation to date in the current Financial Year 2015 together with the projected diary of events through to the Financial Year end.*
- 2. A statement of the fee schedules used by Plymouth City Council to assess the licence and other charges to be paid for permission to use Plymouth Hoe Promenade, including its surrounding grass parkland.*
- 3. A statement of the fees paid to Plymouth City Council by each of the individual users set out in the answer to question one above.*
- 4. A statement of the procurement procedures used by Plymouth City Council when letting packages of work for services and the supply of goods in connection with events in which it has an operational interest held on Plymouth Hoe Promenade, including its surrounding grass park land.*
- 5. Copies of all documents which set out the criteria and policy background to be used when deciding whether to accept individual applications to occupy Plymouth Hoe Promenade, including its surrounding grass parkland.*
- 6. Copies of all documents relating to the decision making process concluding in consent being granted for MTV Crashes to occupy Plymouth Promenade Hoe and its surrounding grass park land this July, together with a statement of the fees paid to Plymouth City Council if any, and in turn all disbursements incurred by Plymouth City Council in connection with this event.*
- 7. Copies of the all the Title Documents relating to the ownership of Plymouth Hoe Promenade, including its surrounding grass park land whether by freehold, lease or other form of licence, together with copies of all bye laws and other statutory or regulatory documents which set out how The Hoe Promenade, including its surrounding grass park land is to be used, in particular any which prevent the public from freely passing across it all times or to loiter upon it for the purpose of recreation".*

5. On 24 July 2015, the complainant clarified to PCC:

"Please accept my apologies but I note that I have not typed in the dates correctly at paragraph 1 of my FOI request set out below. At line two the dates should read 2010, 2011, 2012, 2013 and 2014. I would be grateful if you would amend my FOI request accordingly".

6. The Council responded on 19 August 2015 and provided most of the information requested. However, in respect of part (3) it refused to provide the information citing section 43(2) (commercial interests) of the FOIA.
7. Following an internal review the Council wrote to the complainant on 16 October 2015. It maintained its position.

Scope of the case

8. The complainant contacted the Commissioner on 23 October 2015. He asked the Commissioner to consider the non-disclosure of information in respect of part (3) of his request only. He further confirmed to the Commissioner he wished the Commissioner to only consider the refusal of PCC to release information regarding the fee paid by Plymouth University for the right to occupy Plymouth Hoe for its graduation ceremony.
9. The Commissioner has therefore only considered the fee paid by Plymouth University.
10. The Commissioner has had sight of the withheld information. This consists of a document entitled: *"Plymouth University Use of Plymouth Hoe"* subtitled *"Licence - Heads of Terms"*.
11. The Commissioner has considered whether or not this complaint should have been dealt with under the terms of the Environmental Information Regulations 2004. However, as the information in this part of the request relates only to fees paid for holding events he is satisfied that it can be properly dealt with under the terms of the FOIA.

Reasons for decision

Section 43(2) – commercial interests

12. Section 43(2) of FOIA states that information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any party (including the public authority holding it). Section

43(2) is a qualified exemption which means that, if a public authority is able to satisfy the test of prejudice, it must then go on to consider the balance of the public interest in disclosure.

13. The successful application of section 43(2) is dependent on a public authority's ability to demonstrate a clear link between disclosure and the commercial interests of a party. The test of prejudice is not a weak test; there must be a significant risk of the prejudice described in the exemption occurring and the prejudice must be real, actual and of substance.
14. 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. 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.
15. PCC has advised the Commissioner that it had telephone calls with Plymouth University in connection with this request on 29 September 2015, 9 October 2015 and 16 October 2015. It had not recorded the actual content of the calls but confirmed that they were: *"... fairly short, with the university clarifying whether the rates were standard. They were informed they were different, and more favourable than other commercial arrangements"*. On this basis, PCC has claimed the higher level of prejudice, ie that in its opinion the likelihood of the prejudice occurring is that it *would* occur because: *"the rates offered differ, and some organisations would demand the same rates as the university"*.
16. The Commissioner raised further queries with PCC regarding the types of licences issued for those holding events on the Hoe. He specifically enquired as to whether the University was the only organisation that is given a "licence for occupation" and, if so, how could disclosure of the related fee be prejudicial if no other organisation had a comparable licence. PCC confirmed that:

"The university is the only organisation to have a licence of this type to use the Hoe for a private invite only event to facilitate the graduations for students and families".

It did not offer any further arguments as to why disclosure would be prejudicial.

17. The Commissioner further enquired as to whether - if it remained PCC's contention that the University was given a favourable rate to other lessees so disclosure would be prejudicial - it could advise which other

parties had the same terms and provide examples. The only example provided was for different terms and did not demonstrate that the University was given a favourable rate.

18. Before the section 43 exemption can be successfully engaged a public authority must be able to show that there is a causal link between disclosure of the information requested 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.
19. It is the Commissioner's view in this case that PCC has failed to supply any cogent evidence to support its contention that disclosure of the requested information would prejudice any party's commercial interest. As far as PCC has evidenced, the University is the only organisation to be issued with a particular type of licence so no comparison can be made between its terms and any others. As no further explanations for this position were offered the Commissioner concludes that PCC has failed to explain any causal link between the implied commercial prejudice, to either its own interests or the University's interests, and the disclosure of the information. Put simply, in this case PCC's representations were insufficient to persuade the Commissioner and so his conclusion is that the section 43(2) exemption is not engaged. Where the Commissioner finds that an exemption is not engaged, he is not required to go on to consider the public interest.

Right of appeal

20. 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

21. 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.
22. 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

Carolyn Howes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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Wilmslow
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SK9 5AF