

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 February 2016

Public Authority: Council of the Isles of Scilly
Address: Town Hall
St Mary's
Isles of Scilly
TR21 OLW

Decision (including any steps ordered)

1. The complainant has requested information relating to the Isle of Scilly airport lease. The Council of the Isles of Scilly refused the request under the exemption for prejudice to commercial interests (section 43(2) of the FOIA), the exemption for information intended for future publication (section 22 of the FOIA) and the exemption for research information (section 22A of the FOIA).
2. The Commissioner's decision is that the Council of the Isles of Scilly has failed to demonstrate that the exemptions in section 22, section 22A and section 43(2) are engaged in respect of the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant.
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.

Background

5. The Council of the Isles of Scilly (the "council") has explained that it is the smallest unitary authority with the broadest remit of services in the

country covering 5 inhabited islands. It employs some 160 people and operates from St Mary's, situated off the west coast of Cornwall. The council operated a commercial airfield (St Mary's Airport – the "Airport") on the islands to allow one of two transport links to mainland England (sea and air).

6. The council has confirmed that it currently leases the Airport from the principle landowner throughout the islands, the Duchy of Cornwall. The lease was entered into on 24 August 1982 for a period of 99 years and the Airport is operated as a trading account of the council rather than as a separate trading company.
7. The provision of an Airport service is not a statutory function of the council and, in September 2015, the issue of the future operation of the Airport was placed before the 'Transport, Economic Development and Infrastructure Committed (TEDI) for a decision. The resulting resolution was that the Airport lease be surrendered for the Duchy of Cornwall to appoint a new operator (or operate the Airport itself).
8. The requested information in this case is a report which informed the discussion and decision taken by councillors in relation to this matter.

Request and response

9. On 23 October 2015, the complainant wrote to the council and requested information in the following terms:

"1. The report and background documentation to item 4, which was debated at the 17 September 2015 meeting of the Transport, Economic Development and Infrastructure Committee, and which resulted in the minuted resolution: "That the Airport lease be surrendered at the earliest opportunity to enable the Duchy of Cornwall to appoint another operator."

2. The report and background documentation presented as item 13, at the 22 September 2015 of Full Council entitled 'Airport Lease'. If you require any additional clarification about this request, please contact me by return email. I understand certain elements may need to be redacted to protect the commercial information and the identification of any staff, but as this is a request for documentation which already exists and which has already been presented, I think it is reasonable for it to be fulfilled within 7 days."

10. The council responded on 9 November 2015. It stated that it was withholding the requested information under the exemption for prejudice to commercial interests (section 43(2) of the FOIA).

11. Following an internal review the council wrote to the complainant on 13 November 2015. It stated that it was maintaining its position.

Scope of the case

12. On 1 December 2015 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
13. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly withheld the requested information under section 43(2) of the FOIA.
14. During the course of the Commissioner's investigation the council confirmed that it also wished to rely on the exemptions for information intended for future publication as grounds for refusing the request (section 22 of the FOIA) and the exemption for information obtained from a programme of research (section 22A of the FOIA).
15. The Commissioner has considered whether the council has correctly applied the exemptions cited.

Reasons for decision

Section 43(2) – prejudice to commercial interests

16. The council has withheld the entirety of the report which was presented at the meeting of TEDI on 17 September 2015 and a meeting of the full council on 22 September 2015. The withheld information consists of a report and an annex to the report.
17. Section 43(2) provides an exemption from disclosure for 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.
18. "Commercial interests" in the context of this exemption encapsulates a wide variety of activities. In this case, the withheld information relates to a decision regarding the operation of a commercial service, namely the running of an airport. The Commissioner is satisfied that the information falls within the scope of the exemption.
19. In order for the exemption to be engaged it is necessary for it to be demonstrated that disclosure of information would result in some identifiable commercial prejudice which would or would be likely to be affect one or more parties.

20. The ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; i.e. either prejudice 'would' occur or prejudice 'would be likely to' occur.
21. With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15).
22. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
23. In this instance the council has argued that disclosure would be likely to prejudice the commercial interests of the Duchy of Cornwall. The Commissioner has, therefore, considered whether the likelihood of the prejudice identified by the council is more than an hypothetical possibility.

The nature of the prejudice

24. The council has stated that the exemption was initially applied on the basis that the information contained within the report had on 2 occasions (before both committee meetings) been considered exempt information pursuant to Schedule 12A Local Government Act 1972, by virtue of its fundamental commercial sensitivity.
25. The council has argued that, as the Duchy of Cornwall (the "Duchy") is the ultimate landlord for the Airport, discussions around the return of the Airport fundamentally deal with matters that would be of a commercial nature to them. The council considers that, should the information enter the public domain, it would be likely to prejudice any onward conversation the Duchy would have with commercial operators.
26. The council considers that, with reference to *John Connor Press Associates Limited v The Information Commissioner* (see above), in the event that the information was disclosed, there is more than just an hypothetical possibility that discussions and negotiations regarding the future operation of the Airport would be damaged.
27. The council has argued that commercial operators, the Duchy and the council itself should be able to enter into robust debate without fear of confidential commercial information entering the public domain until

such discussions have concluded. The council has stated that, as the issue is still live, there would be fundamental damage to the whole process if the information was made available at this stage.

28. The council has also suggested that, whilst it considers it is the Duchy's commercial interests which would be affected by disclosure, any other commercial operator may be reluctant to engage with the Duchy in circumstances where it is viewed that that their information or details may enter the public domain via the FOIA.

The Commissioner's analysis

29. In relation to the council's first rationale for engaging the exemption, namely the council's decision to exempt the material at its meetings under Schedule 12A of the Local Government Act 1972, the Commissioner does not consider that this, in itself, demonstrates that disclosure would be likely to result in commercial prejudice to any party. As set out above, the exemption in section 43(2) has its own criteria for engagement and the mere fact that information has been suppressed under other legislation does not meet these terms.
30. The council's second argument is that the fact the information is commercial in nature automatically means that disclosure would be likely to cause prejudice. However, whilst the Commissioner has accepted that the information is commercial in nature, it is for the council to go on to demonstrate that its disclosure would result in a real and significant risk of prejudice. It is not sufficient to simply state that disclosure will be likely to result in prejudice simply by virtue of the information being commercial in nature. In this instance, the council's definition of the putative prejudice is vague and generic and makes no reference to the actual content of the information. For example, the council does not define the nature of the alleged impact on negotiations and discussions regarding the future operation of the airport which disclosure would cause. It also doesn't identify the specific elements of the withheld information which would contribute to this impact.
31. In view of the above, the Commissioner, therefore, does not accept that the council's second argument demonstrates that disclosure would be likely to result in prejudice to the Duchy's commercial interests.
32. Thirdly, the council has argued that the Duchy, commercial operators and the council itself should be free to enter into discussions without fear of information entering the public domain before processes have concluded. The Commissioner recognises that the sensitivity of commercial information is relative and that, during negotiations or before contracts have been awarded, the disclosure of information can have an impact on the direction that discussions take. However, this is

an entirely generic observation and the council's arguments do not transcend the generic or specify the precise nature of the commercial prejudice which would be likely to ensue or link this to any aspect of the withheld information.

33. Finally, in relation to the council's suggestion that other commercial operators may be reluctant to engage with the Duchy because their information might enter the public domain via FOIA, the Commissioner does not see the relevance of this argument. Firstly, since the passing of the FOIA authorities should make all potential contractors or business partners aware of their responsibilities and the potential for information to be accessible via requests. Secondly, the council has not provided any evidence that third parties would pass up the opportunity to enter into potentially lucrative contracts because of the possibility of relevant information being disclosed.
34. Finally, where prejudice relates to the commercial interests of third parties, in line with the Information Tribunal decision in the case *Derry Council v Information Commissioner (EA/2006/0014)*, 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.
35. In this case the council has not provided any evidence that it has consulted with the Duchy in relation to this matter. He has, therefore, concluded that the arguments provided by the council are, in addition to being generic, entirely speculative in nature and not reflective of the actual commercial concerns of the Duchy.
36. In view of the above the Commissioner has concluded that the council has failed to demonstrate that the disclosure of the information would be likely to result in prejudice to the commercial interests of the Duchy, or indeed the commercial interests of any party. As the exemption is not engaged he has not gone on to consider the public interest test.

Section 22 – Information Intended for Future Publication

37. During the Commissioner's investigation the council applied section 22 to withhold the requested information. The Commissioner has considered whether the exemption has been correctly applied.
38. Section 22 of FOIA states that:

"Information is exempt information if-

a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

b) the information was already held with a view to such publication at the time when the request for information was made, and

c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a)."

39. For the exemption in section 22 to apply, the public authority must, at the time of the request, hold the information and intend that it or 'any other person' will publish it in future. This means that it must have a settled expectation that the information will be published at some future date.
40. The council has confirmed that it holds the requested information, namely the report and that it will publish the information after 23 September 2016 or prior to this, should the Duchy appoint a commercial operator to the Airport.
41. The Commissioner accepts that the council has satisfied parts a) and b) of the exemption. However, in order for the exemption to be engaged a public authority must demonstrate (as required in c) above) that it is reasonable in all the circumstances that the information should be withheld from disclosure until the date identified in a).
42. The Commissioner's guidance provides that, when considering whether it is reasonable for information to be withheld, a public authority should demonstrate that such an approach is:
 - sensible;
 - in line with accepted practices; and
 - fair to all concerned.
43. The council has not provided any submissions in relation to the reasonableness of withholding the information.
44. The Commissioner notes that decision to give up the Airport lease had been taken at the time of the request: This information was in the public domain. The Commissioner, therefore, does not see how disclosure would have any impact on the council's decision making in this regard.
45. The Commissioner has found in this decision notice that disclosure of the information would not be likely to result in prejudice to the commercial interests of the Duchy, nor to any other parties. He does not see, therefore, that it is reasonable in all the circumstances that that the report should be withheld from disclosure until the date identified by the council.

46. As the Commissioner finds that the council has not demonstrated that the terms of part c) of the exemption have been met, he has concluded that the exemption is not engaged. As the exemption is not engaged he has not gone on to consider the public interest test.

Section 22A – research information

47. The council has stated that it also considers that the report is exempt under section 22A of the FOIA.

48. Section 22A states:

(1) Information obtained in the course of, or derived from, a programme of research is exempt information if —

(a) the programme is continuing with a view to the publication, by a public authority or any other person, of a report of the research (whether or not including a statement of that information), and

(b) disclosure of the information under this Act before the date of publication would, or would be likely to, prejudice —

(i) the programme,

(ii) the interests of any individual participating in the programme,

(iii) the interests of the authority which holds the information, or

(iv) the interests of the authority mentioned in paragraph (a) (if it is a different authority from that which holds the information)."

49. The council has provided no explanation of why it considers that section 22A applies in this case.

50. The Commissioner's guidance defines the scope of information captured by the exemption in the following terms:

*"The exemption applies to information 'obtained in the course of, or derived from, a programme of research', where the research is ongoing, and there is a plan to publish a report of the outcome."*¹

¹ <https://ico.org.uk/media/for-organisations/documents/1172/information-intended-for-future-publication-and-research-information-sections-22-and-22a-foi.pdf>

51. The FOIA does not define “research” so the Commissioner relies up the ordinary definition of the term research: A systematic investigation intended to establish facts, acquire new knowledge and reach new conclusions.

52. In light of the above definitions, the Commissioner does not consider that the withheld report can in any way be construed as “research” for the purposes of the FOIA. The council has not provided any submissions in this regard and has simply stated that section 22A has been applied. The Commissioner does not consider it his role to construct submissions on behalf of public authorities and, as it is clear from the nature of the information and its purpose that it in no way constitutes research he has determined that the information does not fall within the scope of the exemption. He has, therefore, concluded that the exemption is not engaged.

Right of appeal

53. 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

54. 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.
55. 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
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