

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 June 2016

Public Authority: Aylesbury Vale District Council
Address: The Gateway
Gatehouse Road
Aylesbury
HP19 8FF

Decision (including any steps ordered)

1. The complainant has requested information regarding the annual management fee to be paid by Aylesbury Vale District Council to the Ambassador Theatre Group to run the Aylesbury Waterside Theatre. The Commissioner's decision is that Aylesbury Vale District Council has incorrectly applied both the exemption for information provided in confidence at section 41 of the FOIA and the exemption where disclosure would prejudice commercial interests at section 43(2) of the FOIA.
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Disclose the information requested at part 2a) of the request.
3. The public authority must take this step 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 11 September 2015, the complainant wrote to Aylesbury Vale District Council ('the council') and requested information in the following terms:

- 1) "Since the Waterside Theatre opened to the present day can I have a yearly breakdown of:
 - a) Management fees paid by Aylesbury Vale District Council to ATG regarding Waterside Theatre
 - b) Hire and event management fees paid by AVDC to ATG regarding the Waterside Theatre. Please give information on the event and how much it cost
 - c) Subsidy grants paid by AVDC to external groups so that they could hire space at the Waterside Theatre. Please give information on the event and how much it cost.
 - d) Business rates paid by AVDC for the Waterside Theatre/ ATG
- 2) A new management fee has now been agreed by AVDC and ATG regarding the Waterside Theatre. Please can you tell me:
 - a) The annual management fee (in £s) to be paid by AVDC to ATG to run the Waterside Theatre for the length of the new agreement.
 - b) Any other forecasted expenditure by AVDC to ATG and/or on the Waterside Theatre, including business rates, building works (eg renovation or upgrades), subsidies/ grants and hire fees over the next five years."
5. The council responded on 12 October 2015. It provided some information and said that the information requested at 2a) is commercially sensitive/confidential and not for publication.
6. On the same day, the complainant requested an internal review in relation to question 2a).
7. The council provided its internal review response on 9 December 2015. It maintained its original position citing the exemptions at section 41 and 43 of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 5 January 2016 to complain about the way his request for information had been handled. He specifically referred to the annual management fee.

9. The Commissioner has considered the application of section 41 and section 43(2) of the FOIA to the information requested at part 2a).

Reasons for decision

Section 41(1) Information Provided in Confidence

10. This exemption provides that information is exempt if it was obtained by the public authority from any other person and the disclosure would constitute an actionable breach of confidence.

Was the information obtained from another person?

11. The first step is for the Commissioner to consider whether the information was obtained by the council from any other person in order to satisfy the requirement of section 41(1)(a).
12. In his enquiries to the council, the Commissioner provided his preliminary view that the new annual management fee would not be exempt under section 41 because the contents of a contract between a public authority and a third party generally won't be information obtained by an authority from another person. He expressed his opinion that it is likely the new annual management fee was information subject to negotiation rather than information obtained from another party, and therefore asked, if the council wishes to maintain reliance on section 41, for it to clearly explain how the information has been provided by a third party.
13. The council said that its recent discussions and negotiations with Ambassador Theatre Group ('ATG') have been undertaken on the express understanding by both ATG and the council that they would remain confidential and that they would not be disclosed to any other party. It explained that its contract with ATG contains clear and explicit confidentiality obligations although these obligations are expressly stated to be subject to FOIA. The council provided the Commissioner with the relevant contract confidentiality clauses.
14. In relation to the information needing to be obtained by the council from any other person in order to satisfy the requirement of section 41(1)(a), the council stated the following:

"With respect, this is a technical pedantic argument that an ordinary member of the public and indeed most public authorities and commercial organisations will find difficult to understand. I do understand the legal argument but for most fair minded people a commercial deal negotiated in confidence is confidential and it is

immaterial that the specific information may not have been provided by one party to the other.

However, to address the argument even on this academic basis, during the negotiations there was a time when ATG provided to the council a final figure for providing the services for the remainder of the new contract term for the council to consider. Having received this information from ATG the council then agreed to it and included this information in a contract on a confidential basis."

15. The Commissioner has considered this argument. He acknowledges that during financial negotiations there will be specific points in time when one party provides a figure to another for consideration but it does not therefore follow that such information has not been subject to negotiation and has been obtained by the council from any other person in order to satisfy the requirement of section 41(1)(a).
16. Despite the council's argument it is clear to the Commissioner that the new management fees have been subject to negotiation. The council's response to the Commissioner in relation to section 43(2) clearly states that the new management fees were agreed after negotiations had taken place and the council's publically available minutes¹ of a meeting where the contract review was discussed state that the financial terms were 'jointly proposed by the Council and the Ambassador Theatre Group', refer to 're-negotiation of the lease and terms of the management agreement' and describe how such negotiations were conducted.
17. The Commissioner's publically available guidance on 'Information provided in confidence (section 41)'² uses the Tribunal case of *Department of Health v ICO*³ to demonstrate that the terms of a contract will have been mutually agreed by the respective parties, rather than provided by one party to another. In that case the Tribunal stated the following:

¹ <http://democracy.aylesburyvaledc.gov.uk/documents/g1804/Printed%20minutes%2001st-Sep-2015%2018.30%20Cabinet.pdf?T=1>

² <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

³ Appeal number EA/2008/0018, 18 November 2008

"If the Contract signifies one party stating: "these are the terms upon which we are prepared to enter into a Contract with you" by the acceptance of that Contract the other party is simultaneously stating "and these are the terms upon which we are prepared to enter into a Contract with you". Consequently the Contract terms were mutually agreed and therefore not obtained by either party." (Para 34)

18. For the above reasons the Commissioner does not consider that the new annual management fees have been provided to the council by a third party. Therefore the exemption at section 41 cannot apply in this case. As such the Commissioner has not gone on to consider whether the disclosure would constitute an actionable breach of confidence.

Section 43(2) – Prejudice to Commercial Interests

19. Section 43(2) of the 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.
20. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43⁴. 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."
21. In this instance the council has applied section 43(2) to new annual management fees it will be paying to ATG for ATG to run the Aylesbury Waterside Theatre. The Commissioner considers that the requested information does fall within the remit of section 43(2) FOIA.
22. 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.

⁴ https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

23. In its submission to the Commissioner, the council said that it is relying on the lower threshold of likelihood, that being that disclosure 'would be likely to' have a prejudicial effect.
24. The Commissioner has considered how any prejudice to commercial interests would be likely to be caused by the disclosure of the redacted 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.
25. The council said that disclosure of the withheld information would be likely to prejudice ATG's commercial interests and that the likelihood of that harm occurring is significant.
26. When claiming that disclosure would prejudice the commercial interests of a third party, the Commissioner expects a public authority to obtain arguments from the third parties themselves. In his enquiries to the council, the Commissioner asked the council to clarify on what basis it has established that disclosure of a third party's interests may occur and to provide copies of any correspondence the council has had with third parties in relation to this request.
27. As stated in its internal review response, the council said that it had consulted with ATG about the effects of any disclosure and that ATG expressly stated on 5 November 2015 that it considers releasing the management fees information would:
 - "assist competitors and significantly prejudice ATG's commercial interest and operation at the Waterside Theatre and elsewhere;
 - seriously damage their ability to compete nationally for other venue management opportunities;
 - reduce their capacity to commercially negotiate in subsequent tender processes;
 - private bidders, such as ATG, would refrain from further partnerships with public organisations, and
 - the resulting loss of private investment into public facilities is clearly not in the public interest."
28. In its response to the Commissioner, the council also said that it asked ATG again to explain why disclosure of the withheld information would be likely to damage their commercial interests and it provided the following reasons:
 - Disclosure would cause a specific detriment because it will unfairly assist competitor operators and prejudice future tender situations, both in relation to the Waterside Theatre and other venues nationally.

- It is regularly invited by UK local authorities to tender for venue management contracts, and is currently involved in five tenders or re-negotiations, and disclosure of the management fee in this case would be seriously prejudicial to its commercial interests, and provide unfair advantage to its competitors.
 - There is a public interest in maintaining confidentiality so that ATG and other third parties will in the future be prepared to make commercial concessions in confidential negotiations with public authorities that they would not otherwise be prepared to make if they knew that the details of any concessions made would be disclosed to its commercial competitors. If public authorities are going to be able to secure "best value" in commercial negotiations then, as in the private sector, they need to be able to assure potential providers of services that the details of a proposed fee will not be disclosed to competitors.
29. The council also said that the level of competition in the leisure and recreational management industry is intense and it has taken this into account in deciding if releasing the withheld information at this time would harm ATG's commercial interests. It said that ATG are in the market and it must take ATG's representations about the likelihood of commercial prejudice occurring seriously. It explained that ATG has no reason to object to disclosure if no commercial harm would be likely to occur so it has to give weight to ATG's stated objections and it has no market or other intelligence which leads the council to a different conclusion.
30. The Commissioner's guidance on 'The Prejudice Test'⁵ states that;
- "If an authority claims that prejudice would be likely to occur they need to establish that
- there is a plausible causal link between the disclosure of the information in question and the argued prejudice; and
 - there is a real possibility that the circumstances giving rise to prejudice would occur, ie the causal link must not be purely hypothetical; and
 - the opportunity for prejudice to arise is not so limited that the chance of prejudice is in fact remote."

⁵ https://ico.org.uk/media/for-organisations/documents/1214/the_prejudice_test.pdf

31. The Commissioner does not consider that the explanations given by the council (at paragraphs 27-29) sufficiently demonstrate a causal link between the disclosure of the withheld information and the prejudice to commercial interests. The following reasons given do not relate to ATG's commercial interests:
- The resulting loss of private investment into public facilities is clearly not in the public interest.
 - Private bidders, such as ATG, would refrain from further partnerships with public organisations.
 - The ability of public authorities to be able to secure "best value" in commercial negotiations.
32. In relation to the argument that the level of competition in the leisure and recreational management industry is intense, the Commissioner notes that in the aforementioned council's publically available minutes⁶, it states that there were only one or two comparable theatre management companies in the market place and ATG was accepted as the market leader and was also the largest theatre management company in the world. The council appear to have provided an argument which is inconsistent with information about the situation available on its website.
33. The remaining explanations are couched in general terms. The Commissioner considers that each contract between a public authority and a theatre management company will have various different factors to take into account, such as the size of the theatre and how established it already is (at the time of the contract review, the theatre in this case had been operating for 4-5 years).
34. Whilst the Commissioner can follow the general chain of consequences identified, he does not consider that the council has linked such consequences to the specific circumstances of the case and does not consider that the arguments presented are sufficiently detailed to demonstrate the adverse effect. He considers that the arguments, whilst identifying possible effects, fails to make these effects sufficiently concrete and fails to identify the causal link. He considers that it is for public authorities to fully explain the relevant causes and effects.

⁶ <http://democracy.aylesburyvaledc.gov.uk/documents/g1804/Printed%20minutes%2001st-Sep-2015%2018.30%20Cabinet.pdf?T=1>

35. The Commissioner considers that the council has been given sufficient opportunity to provide evidence and arguments in support of its position. When making his enquiries in this case, the Commissioner informed the council that he will give a public authority one opportunity to justify its position to him before issuing a decision notice. In cases where a public authority has failed to provide sufficient arguments to demonstrate that exceptions are engaged, the Commissioner is not obliged to generate arguments on a public authority's behalf or to provide the causal link. The lack of sufficient arguments from the council has led the Commissioner to the conclusion that section 43(2) of the FOIA is not correctly engaged in this case.

Right of appeal

36. 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

37. 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.
38. 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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