

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 April 2018

Public Authority: Mid Devon District Council

Address: Phoenix House
Phoenix Lane
Tiverton
EX16 6PP

Decision (including any steps ordered)

1. The complainant has requested information relating to the formation of a private limited company subsequently known as 3 Rivers Developments Ltd. Mid Devon District Council disclosed some information and withheld other information under the exemptions for commercial interests (section 43(2)) and legal professional privilege (section 42).
2. The Commissioner's decision is that Mid Devon Council failed to disclose information within the statutory time limit and breached section 1(1) and section 10(1) of the FOIA and, in respect of the withheld information, it failed to demonstrate that section 43(2) is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld under section 43(2).
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. Nationally, a significant number of local authorities have or are now creating a 'special purpose vehicle' ("SPV") against the backdrop of the austerity programme. A property SPV is a legal entity which is created solely to facilitate, deliver, commission and ultimately rent/sell properties onto the open market. There are a number of reasons for implementing a SPV including commercial benefit, unlocking stalled development sites, meeting corporate priorities, and creating a financial return to mitigate government grant reductions.
6. The complainant explained to the Commissioner that there had been a proposal to build housing opposite his property and the applicant had been 3 Rivers Developments Ltd. The complainant said that plans for the property development pre-dated the incorporation of the company and he had general suspicions and was concerned about a potential conflict of interest.

Request and response

7. On 25 May 2017, the complainant wrote to Mid Devon Council (the "council") and requested information in the following terms:

"Please provide me with all the information the Council holds regarding the formation of the private limited company subsequently known as 3 Rivers Developments Ltd.

All information to include reports, meeting minutes, emails and notes by officers and elected members".
8. The council 26 June 2017. It said that some information was exempt under section 43(2) – the exemption for prejudice to commercial interests. The council also withheld information under the exemptions under section 42 (Legal professional privilege) and section 22 (Information intended for future publication).
9. The complainant wrote to the council to request an internal review on 28 June 2017.
10. Following an internal review the council wrote to the complainant on 26 July 2017. It acknowledged that its initial response was late and failed to be sent within the statutory time limit. It withdrew its reliance on section 22 and said that it should have claimed the section 21 exemption (information reasonably accessible elsewhere). It also confirmed that it wished to maintain its reliance on section 43(2) to

withhold most of the information. The council also disclosed some information to the complainant.

11. On 3 August 2017 the council sent a further response in which it confirmed that it considered that the public interest favoured maintaining its reliance on section 43(2) to withhold information.

Scope of the case

12. On 7 August 2017 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 her investigation would consider whether the council responded to the request and the internal review in time and whether it had correctly withheld information under the exemption in section 43(2).
14. The complainant confirmed that they were content for the Commissioner to exclude the information withheld by the council under section 42 and section 21 from the scope of her investigation.

Reasons for decision

Section 1 – duty to provide information held

15. Section 1(1) of the FOIA requires public authorities to confirm or deny whether information specified in a request is held and, where it is, to provide it to a requester. Section 10(1) of the FOIA requires public authorities to comply with section 1(1) promptly and not later than 20 working days of the date of receipt of the request.
16. In this case the request was submitted on 25 May 2017 and the council issued its response on 26 June 2017. As the council acknowledged in its internal review, this did not comply with the statutory timescale.
17. The Commissioner further notes that the council disclosed additional information falling within the scope of the request to the complainant during the course of her investigation. As such, she has concluded that, in its handling of the request, the council breached section 1(1) and section 10(1) of the FOIA.

Section 43(2) – commercial interests

18. 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.
19. The council has withheld the following documents (in part or in full) under section 43(2):
 - Shareholder's Agreement
 - Draft Business Plan Cabinet item 30/03/2017 Minute 182 and Appendix
 - Various emails and attachments

Commercial Interests

20. "Commercial interests" in the context of this exemption encapsulates a wide variety of activities.
21. In this case the withheld information relates to the formation of a private limited company – 3 Rivers Development Ltd. (the "Company").
22. Having considered the withheld information the Commissioner is satisfied that it relates to a commercial activity.

Likelihood of Prejudice Occurring and Affected parties

23. 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 affect one or more parties.
24. 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.
25. 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).
26. 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).

27. In this case the council has stated that disclosure of the information would be likely to prejudice its own interests and that it would prejudice the interests of the Company.
28. In relation to its own interests, the council simply stated that the information is commercially sensitive and disclosure would be likely to prejudice its commercial interests.
29. In relation to the prejudice to the Company, the council has stated:

"The prejudice for the Company to the identification of the questions the Company is considering in terms of how it will manage its commercial affairs – including funding, ideas and options which may be rejected, modified or taken forward and the reasons for doing so. As the Company will be a trading company in the market, it has an interest in maintaining its commercial information private. The Company has confirmed that it is not content for the information to be shared for these reasons."
30. In its submissions to the Commissioner the council reaffirmed its position, stating that, as it is competing on an equal footing with commercial organisations, the release of information would prejudice the Company's commercial interests.
31. The Commissioner considers that the arguments provided by the council suggest that it considers that the fact that information is commercial in nature is sufficient grounds for engaging the exemption.
32. However, even where the lower threshold for engaging the exemption is being relied upon (that disclosure would be likely to result in prejudice) authorities need to identify specific harm, link it to specific information and explain how disclosure would cause the ascribed harm. In this case, the council's arguments are entirely generic in nature and suggest that consideration has not been given to the details of the information or the specific effects of disclosure. The Commissioner is left with the impression that the council has sought to withhold the information on an entirely general basis.
33. In cases where an authority has failed to provide adequate arguments in support of the application of exemption the Commissioner does not consider it to be her responsibility to generate arguments on its behalf.

34. In this instance the Commissioner considers that the council has had ample opportunities to justify its position, including at the time of its initial response, at the internal review stage and during her investigation. On the basis of the available evidence, the Commissioner has concluded that in respect of all the withheld information, the council has failed to demonstrate that section 43(2) is engaged.

Other matters

35. Although they do not form part of this notice the Commissioner would like to note the following matters of concern.
36. At the outset of her investigations under section 50 of the FOIA the Commissioner asks public authorities to review their handling of a request as it can often be that, with the passage of time, it is appropriate for a revised position to be taken.
37. One of the benefits of this review can be that information previously withheld can be disclosed to a complainant negating the need for formal investigation and delays being incurred.
38. In this case the council disclosed additional information to the complainant during the Commissioner's investigation. This is to be welcomed, however, the Commissioner has concerns that the council might not have given proper consideration to its application of exemptions at the time of the request.
39. The Commissioner would like to remind public authorities of the importance of ensuring that information is only withheld where there are specific, defensible grounds for applying exemptions.
40. In addition to having regard for the Commissioner's guidance in this regard, authorities should also ensure that they follow the recommendations of the codes of practice issued under section 45 and section 46 of the FOIA, which set out the best practice in relation to the handling of requests and the recording and retention of information¹.

¹ The codes of practice are available online here:
<http://webarchive.nationalarchives.gov.uk/20150603184623/https://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/code-of-practice>

Right of appeal

41. 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

42. 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.
43. 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
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF