

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 20 September 2018

**Public Authority:** London Borough of Lambeth Council

**Address:** Southwyck House  
Moorland Road  
Brixton  
London  
SW9 8UR

#### **Decision (including any steps ordered)**

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1. The complainant has requested information in relation to the Community Asset Transfer of Carnegie Library. The public authority has relied on the exemption at section 43(2) FOIA to withhold the requested information.
2. The Commissioner's decision is that the public authority was not entitled to rely on section 43(2) FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the withheld information.
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.

## Request and response

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5. On 8 October 2017 the complainant submitted a request for information to the public authority in the following terms:

“This is a request under the Freedom of Information legislation and relates to Carnegie Library.

Please send us the following as email attachments:

1. The business plan and any supporting documents submitted to the Council by Carnegie Community Trust.
  2. The detailed evaluations of the said plan and the business plan submitted by Carnegie Library Association, together with the document or documents setting out the scoring system used in the evaluations.
  3. The amounts paid by the Council to architects and other advisers in connection with Carnegie Community Trust and its two predecessors, that is, Carnegie Shadow Trust Board and Carnegie Project Group, including for each payment its date and the service provided.”
6. On 12 October 2017 the complainant requested that searches for information held within the scope of parts 1 and 2 above should be restricted to the past 12 months from the date the business plans were submitted.
7. The public authority responded on 6 November 2017. It disclosed the information held within the scope of part 3 of the request. It explained that it was withholding “information pertaining to Pricing Mechanism” but did not specify whether this related to part 1 or 2 of the request or both.
8. On 8 November 2017 the complainant requested an internal review of the public authority’s decision.
9. The public authority wrote to the complainant with details of the outcome of its internal review on 6 December 2017. It upheld the original decision and clarified that the exemption at section 43(2) had been applied to information held within the scope of parts 1 and 2 of the request.

## Scope of the case

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10. The complainant contacted the Commissioner on 11 January 2018 to complain about the public authority's handling of the request, specifically the decision to withhold the information held within the scope of parts 1 and 2 of the request.
11. However, during the course of the Commissioner's investigation, the public authority notified the Commissioner that the business plan and associated documents requested in part 1 of the request was published in January 2018.
12. However, despite requests by the Commissioner to the public authority on a number of occasions to advise the complainant that it had since published the information held with respect to part 1 of his request, the public authority did not do so until 25 July 2018 when the investigation had progressed to an advanced stage.
13. Following that notification, the complainant contacted the Commissioner to dispute the public authority's position that it had published all of the information held within the scope of part 1, namely, the business plan and any supporting documents submitted by Carnegie Community Trust.
14. On 6 August 2018, after the Commissioner had forwarded the supporting evidence provided by the complainant in support of his view, the public authority revised its position to say that it held additional information within the scope of part 1 of the request. However, it considered that information exempt on the basis of section 43(2) FOIA.
15. On 6 September 2018, the complainant decided that he no longer wished to pursue a determination with respect to the additional information identified by the public authority within the scope of part 1 of his request and advised the Commissioner to issue a decision in respect of part 2 of his request only.
16. The scope of the decision therefore remained restricted to whether the public authority was entitled to rely on the exemption at section 43(2) FOIA to withhold the information held within the scope of part 2 of the request only.
17. To be clear, on 6 September 2018, the Commissioner had not considered the application of section 43(2) to the additional information identified within the scope of part 1 of the request and was therefore not in a position to make a decision on its application then and indeed at the time of issuing this notice.

## Reasons for decision

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### The withheld information

18. The public authority explained that the request relates to evaluation of tenders for the Community Asset Transfer of Carnegie Library. Community Asset Transfer is the transfer of management and/or ownership of public land and buildings from its owner, usually a local authority, to a community organisation such as a Development Trust, a Community Interest Company or social enterprise for less than market value in order to achieve a local social, economic or environmental benefit. Carnegie Community Trust (CCT) and Carnegie Library Association (CLA) both applied for the Library to be transferred to their ownership and management.
19. The withheld information comprises of evaluations of business plans submitted by CCT and CLA pursuant to their applications. Each business plan was initially evaluated on behalf of the public authority by Price Waterhouse Cooper (PWC) and subsequently by a finance panel led by the public authority.

### Application of exemption

20. Section 43(2) states<sup>1</sup>:

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

### Public authority's submissions

21. The Commissioner has summarised the public authority's arguments in support of the application below. It is necessary to mention however that despite specific questions to the public authority by the Commissioner, its position in respect of key elements of the exemption have not been fully articulated and have instead been left to the Commissioner to deduce.

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<sup>1</sup> The full text of section 43 is available here:  
<http://www.legislation.gov.uk/ukpga/2000/36/section/43>

22. The Commissioner understands the public authority considers that disclosure of the withheld information would be likely to prejudice its commercial interests, and those of CLA and PWC.
23. With respect to the likelihood of prejudice to its commercial interests, the public authority argued that the award of an asset of community value is analogous to the awarding of a contract for other services. In both cases the public authority is required to decide on the best party to award the contract or service. This is based on information provided by the prospective supplier and on any other analysis commissioned or used in the decision making process. The scenario in this case is comparable to evaluation of tenders submitted by various companies for a particular contract. It therefore suggested that disclosure could lead to the public authority receiving less favourable terms from bidders. It further suggested that disclosure could damage the public authority's commercial reputation as it could be seen to be influencing the competition by publishing information that could help other bids. It explained that it was still in the process of reviewing the "relevant documentation" and argued that it could be harmful to disclose the withheld information at this stage as to do so may undermine ongoing discussions.
24. With respect to the likelihood of prejudice to CLA's commercial interests, the public authority explained that the information held in relation to CLA is detailed and refers specifically to CLA's business plan and associated information it provided. The public authority argued that disclosure of this information would give CLA's competitors for the asset transfer an unfair advantage. It had taken this view without consulting with CLA "as the information held would not usually be disclosed to them."
25. With respect to likelihood of prejudice to PWC's commercial interests, the public authority explained that PWC have advised<sup>2</sup> it that their evaluation reports containing their methodology, question sets, risk assessment tool, scoring system and judgement evaluations are the intellectual property of PWC and are commercially sensitive. It therefore argued that disclosure could have a chilling effect on any future discussion about similar community transfer decisions as it could mean the public authority is less able to fully discuss or consider the issues. It

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<sup>2</sup> The public authority did not provide the Commissioner with copies of any related correspondence from PWC to the public authority.

is also important to protect the commercial interests of third parties used by the public authority.

26. With respect to the balance of the public interest, the public authority acknowledged that disclosure of the withheld information would increase public understanding in relation to the asset transfer. More generally, there is a public interest in transparency and accountability in relation to how the public authority spends public money.
27. It however argued that it is in the public interest to protect the public authority's decision making process. Premature disclosure would undermine the process. It further argued that it is in the public interest not to prejudice the public authority's and or third parties negotiation capabilities.

#### Complainant's submissions

28. The complainant provided the following submissions in support of his position:

"Friends of Carnegie Library have been campaigning to keep the library open in a viable form since 1999. Lambeth closed the library at the end of March 2016 but now plan to reopen a much reduced version of it 11 weeks before the London Borough elections due in May 2018.

Lambeth are intent on what they describe as 'transforming the way universal services are delivered' and as part of this they plan to make an Asset Transfer of the library building or part of it, that is, they would dispose of the property concerned by granting a rent-free lease. Lambeth initiated this process by setting up a body called the Carnegie Project Group, which later morphed into a Shadow Trust Board and then the Carnegie Community Trust CIO.

The Friends and other groups connected with the library set up the Carnegie Library Association CIO and it then applied to Lambeth for the Asset Transfer. Lambeth considered, or at least purported to consider, competing bids for the Transfer from the Trust and the Association. The Council rejected both bids but said it would nevertheless continue discussions with the Trust with a view to making the Transfer to the Trust....."

#### Commissioner's analysis

29. The Commissioner has first considered whether the public authority was entitled to engage the exemption.

30. The Commissioner has set out below a number of pertinent factors which the public authority has failed to address.
31. It would appear that apart from the business plan submitted by the group represented by the complainant (i.e. CLA), the only other business plan was submitted by CCT, a group created from a body originally set up by the council. The public authority has not addressed the question of whether it was/is considering any other proposals and or business plans in relation to the asset transfer.
32. The complainant is clearly aware that disclosure would reveal the evaluations of CLA's business plan. It is therefore unclear why the public authority did not consult the complainant pursuant to the application of section 43(2) to the evaluations of CLA's plan. It is not far-fetched to assume that the evaluations of their plan have been released to CLA. The public authority has not addressed the question of whether it has provided CLA with copies of the evaluations of its business plan.
33. The Commissioner has considered whether the test necessary to engage the exemption has been met.
34. Engaging a prejudice-based exemption such as section 43(2) involves the steps outlined below.
35. The public authority must identify the applicable interests within the relevant exemption. This requires the public authority to show that the prejudice it is envisaging affects the particular interest that the exemption is designed to protect.
36. It must identify the nature of the prejudice. This requires the public authority to show that the prejudice is real, actual or of substance. In other words, it is not trivial or insignificant. It must also be able to demonstrate that there is a causal link between the disclosure and the prejudice claimed.
37. Finally, it must decide on the likelihood of the occurrence of the prejudice i.e. whether disclosure "would" prejudice or "would be likely to" prejudice.
38. The Commissioner is satisfied that the public authority has correctly identified the likelihood of prejudice to its commercial interests and those of CLA and PWC as a prejudice that section 43(2) is generally designed to prevent. However, for reasons explained below, she is not persuaded that the prejudice envisaged is of substance.
39. The Commissioner considers that the term "would be likely to prejudice" means the chance of prejudice being suffered should be more than a

hypothetical possibility; there must have been a real and significant risk. The question therefore is whether disclosure of the withheld information would pose a real and significant risk to the commercial interests of the public authority, CLA and PWC.

40. The Commissioner does not consider that in the circumstances, the community asset transfer of Carnegie Library is analogous to considering bids for a contract for services. There is no evidence to suggest that the public authority is considering any other business plan apart from that submitted by CCT, a group created from a body originally set up by the council. It would also appear that the asset transfer would be made on the basis of a rent-free lease. It is therefore difficult to see how there could be any substantive prejudice to the commercial interests of the public authority and of CLA (if indeed there were any) from disclosure. There is no strong evidence that the public authority is considering any competing bids. In addition, there is nothing to suggest that CLA is concerned about the public authority disclosing the evaluations of its business plan. Consequently, there is very little evidence to support the view that disclosure would pose a real and significant risk to their commercial interests.
41. Clearly the PWC's evaluations reflect its methodology and is of commercial value to it. However, the question is whether disclosure would pose a real and significant risk of prejudice to its commercial interests. The Commissioner is not persuaded that it would. It is highly likely that PWC has conducted many similar evaluations on behalf of local authorities and other public bodies. Therefore, the methodology of its evaluations is hardly going to be revelatory. PWC will be well aware that public authorities simply cannot guarantee that evaluations conducted by PWC on their behalf would not be released into the public domain. PWC is therefore highly likely to have taken necessary steps to ensure that it does not reveal commercially sensitive information regarding its methodology in its evaluations. In the Commissioner's view, the evaluations do not reveal information which she considers would pose a real and significant risk of prejudice to PWC's commercial interests.
42. The Commissioner has therefore concluded that the public authority was not entitled to engage the exemption and for that reason she has not considered the balance of the public interest.



## **Right of appeal**

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43. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

44. 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.
45. 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.....**

**Terna Waya**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**