

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 November 2018

Public Authority: Liverpool City Council
Address: Cunard Building
Water Street
Liverpool
L3 1AH

Decision (including any steps ordered)

1. The complainant requested from Liverpool City Council (the Council) information regarding the proposed closure of Dale Street and Old Haymarket car parks.
2. The Commissioner's decision is that the Council has correctly cited section 43(2) (commercial interests) of the FOIA as the balance of the public interest favours maintaining the exemption. Therefore, the Commissioner does not require the Council to take any steps as a result of this decision.

Request and response

3. On 25 October 2017 the complainant wrote to the Council and requested information in the following terms:

"The Parking Matters report on the Victoria Street Car Park proposed the closure of both the Dale St and Old Haymarket car parks. The following location –

<http://councillors.liverpool.gov.uk/documents/s200827/Victoria%20Street%20Car%20Park%20RTC39.pdf> - quotes "On reviewing the business case, the view is that the Dale Street car park serves a demand from the University and should remain open.

The emerging Liverpool City Centre Transport Plan promotes the Old Haymarket car park as the preferred site for the City Bus Hub and on this basis the Old Haymarket car park would be closed down. This will result in a small reduction in income in the future". I require - - All information regarding this business case and how this conclusion was made. - The profit from each year in the past decade for both the Old Haymarket and Dale St car parks. - All information regarding the proposed Old Haymarket Bus Hub including any other sites that have been proposed and how the Liverpool City Centre Transport Plan have chosen this site."

For ease of reference, each request has been numbered separately:

- (i) "I require - All information regarding this business case and how this conclusion was made.*
 - (ii) The profit from each year in the past decade for both the Old Haymarket and Dale St car parks.*
 - (iii) All information regarding the proposed Old Haymarket Bus Hub including any other sites that have been proposed and*
 - (iv) How the Liverpool City Centre Transport Plan have chosen this site."*
4. On 21 February 2018 the Council issued a refusal notice and advised the complainant that the Council held some of the information requested but not all of it. The Council explained that in accordance with the application of section 43(2) (commercial interests) of the FOIA it had not provided all of the information requested.
 5. In response to part (i) of the request, the Council confirmed that there is no business case for the development of Old Haymarket car park. The Council cited section 43(2) of the FOIA to withhold information which relates to a report entitled "*Victoria Street, Liverpool Strategic review of the business case for the development of a multi storey car park – prepared on behalf of Liverpool City Council*".
 6. The information which the Council disclosed consisted of a table showing the direct income from parking for Dale Street and Old Haymarket car parks for the available financial years from 2008/09. This was in response to part (ii) of the request. In response to parts (iii) and (iv) of the request, the Council provided a written explanation.
 7. On 22 February 2018 the complainant requested an internal review regarding the citing of section 43(2) in response to part (i) of the request.

8. On 20 April 2018 following an internal review, the Council wrote to the complainant and maintained its position to refuse to release the information under section 43(2) of the FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 26 April 2018 to complain about the way his request for information had been handled.
10. The complainant clarified the parts of his request which he considered to be incomplete. He confirmed the information he required related to part (i) of his request and he did not raise concerns relating to any other part of his request when he contacted the ICO.
11. Given this clarification, the following analysis therefore focuses on whether the exemption at section 43(2) of the FOIA was cited correctly to the information withheld in response to part (i) of the request. The withheld information consists of a report entitled "*Victoria Street, Liverpool Strategic review of the business case for the development of a multi storey car park – prepared on behalf of Liverpool City Council.*" This report had been drafted by a specialist consultancy on behalf of the Council and it consists of information relating to the development of a multi-storey car park on the site of the Council's Victoria Street surface car park.

Reasons for decision

Section 43 – commercial interests

12. The Council applied section 43(2) to the withheld information. Section 43(2) of the FOIA states that information is exempt if its disclosure 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.

13. The Commissioner states in her Section 43 – Commercial Interests Guidance¹:

"A commercial interest relates to a person's ability to participate competitively in a commercial activity. The underlying aim may be to make a profit however it could also be to cover costs or to simply remain solvent."

14. The Council stated that the commercial interest in this case is to cover costs in terms of the Council's parking services. She considers the withheld information is commercial in nature as it relates to a process with commercial elements – the transport plan within Liverpool city centre.
15. Having determined that the information is commercial in nature, the Commissioner has gone onto consider the prejudice which disclosure would or would be likely to cause and the relevant party or parties that would be affected.

The nature and likelihood of the prejudice occurring

16. The Council stated that the off-street car parks market is operated by both local authority and private enterprises. Therefore, the release of confidential information would allow private operators to determine how the Council makes business decisions in relation to car parks. This, the Council said, would prejudice its commercial interests.
17. The Council explained that in order to operate effectively in this market, it is required to undertake studies which informs both its decision making process and future planning as well as ensuring public funds are spent and protected appropriately.
18. The Council said that disclosure of the withheld information would adversely affect its position in relation to its competitors, if the Council has to share information such as its commercial assumptions and feasibility studies.
19. The Commissioner acknowledges that the Council's arguments are that disclosing the information could cause commercial damage against the Council. The argument that disclosure may provide any party with a competitive advantage or disadvantage is one that the Commissioner accepts can be valid.

¹ <https://ico.org.uk/media/1178/commercial-interests-section-43-foia-guidance.pdf>

However, the Commissioner must be convinced that disclosing the specific information in question would have this prejudicial result.

20. The complainant disputed the Council's application of section 43(2) of the FOIA to his request as he did not accept that disclosure of this information would be likely to result in prejudice to commercial interests. He believed that some of the information may not be covered by the exemption and therefore it should be disclosed.
21. The Commissioner has viewed the information, which is the report drafted on behalf of the Council and relates to the business case for the proposed development. She acknowledges that this information comprises the commercial and intellectual property of the Council, Liverpool City Region Combined Authority (LCRCR) and external consultants. The Council had explained that this was produced using specialised commercial methodologies by external consultants and on the basis that these were not for disclosure.
22. The Commissioner notes that the information reveals the Council's financial position with third parties in relation to the separate developments - the car parks in question. The prejudice would occur to the Council and the Commissioner accepts that the prejudice identified, would be likely to occur due to the fact that the impacts would be direct in terms of the ability of the Council and LCRCA to procure and undertake such studies. The Commissioner also accepts that disclosure of the information would compromise the Council's ability to source and commission any similar advice, analysis and assessment activities in the future.
23. In order to accept the exemption is engaged, the Commissioner usually requires evidence of a causal link between the information in question and the alleged prejudice argued. This is easier to argue where an issue is ongoing, such as retendering or negotiating a new commercial contract or deal. Whilst the Council has not specifically provided evidence of this, the Commissioner considers it is reasonable to assume that, given the work of the Council, there is a need to engage with private operators.
24. Therefore, it can be argued that disclosing the withheld information will have a likely impact on future business decisions. The withheld information was produced, the Council confirmed, on the basis that the methodology and the information it contains are commercially sensitive and that it would not be shared with third parties.

25. The Commissioner accepts that the information would show the Council's financial position, its commercial assumptions and feasibility studies. Also, the disclosure of the information would have a negative effect on the Council's position within the commercial market.
26. The Commissioner recognises that if information of this nature were to be disclosed during ongoing negotiations, the Council's ability to be able to commission and source specialist support and advice would be impaired. This would result in an impact on decision-making and the ability of the Council to make fully informed decisions.
27. The Commissioner is satisfied that the nature and likelihood of the prejudice envisaged to the commercial interests of the Council fall within the scope of the exemption provided by section 43(2). She is also satisfied that there is a causal link between the disclosure of the withheld information and the likely prejudice caused to the third parties. Given the above considerations, the Commissioner finds that the likelihood of the prejudice reaches the threshold of real and significant, and so she concludes that disclosure of the withheld information would be likely to result in prejudice to the commercial interests of the Council. The Commissioner therefore finds that the exemption provided by section 43(2) is engaged.

Public interest test

28. Having found that the exemption is engaged, the Commissioner has gone on to consider the public interest factors in favour of disclosing the withheld information and of maintaining the exemption.

Public interest arguments in favour of disclosing the withheld information

29. The Council considered the transparency of the process with which it evaluates options and the level of public interest in disclosure. It recognises the public interest in promoting accountability and transparency in the spending of public money and the way the Council conducts its business.
30. The Council also considered the factors associated with the public interest test. It said that evidence of media articles, public meetings and comments from politicians demonstrates an interest by the public and to the public. However, the Council is of the view that these do not constitute evidence of valid public interest that would amount to a factor here.

31. The Commissioner recognises that there is a significant public interest in disclosure of information about what the Council's plans are for the city centre and how this will impact on the area. Also, in terms of how the Council is spending public money.

Public interest arguments in favour of maintaining the exemption

32. The Council confirmed that the withheld information does comprise throughout its entirety, information of a proprietorial and intellectual property nature unique to the provider. It said that if disclosed, this could place the Council at a commercial and financial disadvantage. It added that the disclosure of information of this type would compromise the Council's ability to source and commission any similar advice, analysis and assessment activities in the future.
33. The Council argued that commercial detriment would have a substantial negative impact on the Council. It said that one element of this relates to the requirement on it to be able to procure specialist technical and research providers to undertake studies. Significant elements of the activities and work conducted by such third parties is of a nature so as to attract intellectual property rights in terms of content, form and methodology.
34. The Council stated that it is also required to protect public funds, therefore its commercial activity is directly in the public interest. It argued that the public would not expect the Council to release commercially sensitive information to the world at large. The Council considered that this is not an appropriate way in which to do business in the commercial world, it would have a negative effect on the Council's investment and budget strategy and longer terms plans for the sustainability of the Council itself.
35. The Council expanded further and said that an additional element of prejudice arising from any disclosure would be to substantially delay and impair the ability of the Council to undertake planning and design works associated with the proposed new Bus Hub. It said that given that proposals are prior to the commencement of tender processes, any disclosure of materials referenced within its original response, would substantially prejudice the ability of the Council to secure the most commercially and financially advantageous solution.
36. The Council reported that part of that process is ongoing at the present time and as the project is progressed, proposals will be developed and be the subject of public consultation as well as consideration through the formal planning process.

37. The Council confirmed that "*information will be generated as proposals are worked up and progressed for the Old Haymarket site.*" It explained that a significant element of that process will include public consultations and as work on proposals advances, more information will be generated and placed in the public domain. However, the Council said that this information is not extant at this stage.

Balance of the public interest arguments

38. The Commissioner recognises that there is a strong and legitimate public interest in the openness and transparency of public authorities with regard to their decision-making processes. In particular, there will be a public interest in knowing more about what the Council's plans are for the city centre. Specifically, in terms of how this will impact on that area and in terms of how the Council is spending public money.
39. On balance and in particular because the withheld information relates to a process that is ongoing, the Commissioner considers that the public interest in disclosure of the withheld information is outweighed by the public interest in maintaining the section 43(2) exemption. The Council was not, therefore, obliged to disclose the requested information.

Right of appeal

40. 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

41. 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.
42. 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

Ben Tomes
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