Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **21 January 2019**

Public Authority: **West Berkshire Council**
Address: **Council Office,**
Market Street,
Newbury,
Berkshire,
RG14 5LD

Decision (including any steps ordered)

1. The complainant has requested information relating to a lease agreement between the Council and the West Berkshire Muslim Centre. The council provided some information however it refused to disclose other information on the basis that Regulation 12(5)(e) applied (commercial confidentiality). During the course of the Commissioner's investigation however the council reconsidered the information and applied section 43(2) (commercial interests) and section 40(2) (personal data) to the information. The complainant did not ask the Commissioner to consider the application of section 40(2) to the information and so she has not considered this further.

2. The Commissioner's decision is that the council was correct to apply section 43(2) to the information.

3. The Commissioner does not require the council to take any steps.

Request and response

4. On 22 March 2018 the complainant wrote to the council and requested the following information:

> *"Please will you supply me all information held on the new (D1 - Non-residential institutions) for a period of 3 years to the Muslim Community. Space within the building currently used for education purposes will be vacated and used by the Muslim Community for prayer, Ramadan activities, community activities, youth club, social activities, Islamic Education - Riverside Community Centre Rosemoor Gardens Newbury Berkshire RG14 2FG*
>
> *Ref. No: 17/01547/CERTP under the rules and law of "Freedom of information"*
>
> *This should include but is not limited to the following:-*
>
> *1. Terms and conditions of the lease?*
> *2. How long is the lease?*
> *3. How much per annum is the lease? How much rent will they pay?*
> *4. Are religious activities permitted in a council building? (Friday afternoon prayers etc)?*
> *5. Will matters related to religious issues as well as solving their matrimonial problems be conducted in this building (Islamic Sharia Council)?*
> *6. What consultation was under taken with other local people?*
> *7. Who (person, persons) decided this application was suitable for this building and that it could go ahead?"*

5. The council responded on 18 April 2018. It said that it was extending the date to respond under section 10(3) of the FOI Act to 23 May 2018.

6. The complainant then wrote further to the council on 19 April 2018. He requested the following information:

> *"1. Firstly, please provide the documentation underlying your decision to apply this exemption: what was the nature of the information and how was it commercially sensitive? Whose interests are prejudiced?*
> *2. Secondly, this should identify any information that might not be commercially sensitive. Is the name of the report commercially sensitive? Its authors? Its table of contents?*
> *3. Please provide a full detailed explanation of your decision and how you weighed public interest against commercial sensitivity*

4. Please provide the documents which those arguments don't cover (a contents page, for example, should not be deemed commercially sensitive)
5. Quote decisions and guidance which supports your request."

7. The council responded on 23 May 2018. It provided the following response:

- It provided a redacted copy of the lease in response to parts 1-4 of the request. It redacted information applying Regulation 12(5((e) (commercial confidentiality) and Regulation 13(1) (personal data). The redactions included the annual rent and some of the terms and conditions agreed between the parties. Thus, information which would respond to parts 1 and 3 of the request were withheld under Regulation 12(5)(e).
- The lease confirmed that the duration would be 12 months, responding to part 2 of the complainant's request.
- The disclosed section of the lease confirmed that the property could be used for *'A meeting hall for imparting the traditional and commonplace teachings of the Muslim faith and its values as endorsed by the British Muslim Council'.* This responded to the information falling within part 4 of the request
- It said that information in respect of part 5 of the request was not held.
- It said that there had been no requirement for a consultation as it was a short term lease in response to part 6.
- It provided the complainant with a link to its planning portal for information on the planning application in response to part 7. This link includes the decision document which includes the name of the decision maker. This responds to part 7 of the complainant's request. It also provides a recommendation as regards the application.

8. Effectively, the council provided the complainant with responses to parts 2, 3, 4, 5 and 6 of his request, but it withheld information relating to parts 1 and 3 on the basis that this was commercially confidential.

9. Following an internal review the council wrote to the complainant on 22 June 2018. It maintained its initial response.

Scope of the case

10. The complainant contacted the Commissioner on 22 June 2018 to complain about the way his request for information had been handled.

11. His complaint was that *"I am sure information in regards to financial matters for other leases and council buildings have been disclosed in the past. Financial information should be readily available to ensure equality, fairness and even-handedness for other groups and organisations".*

12. The Commissioner considers therefore that the complaint is that the council was not correct to withhold the information under section 43.

13. During the course of the Commissioner's investigation the council decided that it could disclose an address which had initially been redacted from the lease which it had subsequently found to be already within the public domain.

14. The Commissioner therefore notes that the remaining information to be considered are the withheld sections from the lease which was disclosed to the complainant which respond to parts 1 and 3 of the request, together with his overall request for all information relating to the lease agreement. Parts 2, 4, 5, 6, and 7 were responded to by the council. The complainant did not raise any specific issues with the council's response to these parts of his request in his complaint to the Commissioner and so these have not been considered further in this notice.

15. Effectively the remaining questions asked by the complainant would be answered by a disclosure of the unredacted copy of the lease. The Commissioner has therefore focused her attention on the redactions made by the council within this document in her decision notice.

16. The Commissioner notes that one document withheld with the lease is a building condition survey carried out by a third party for the council. She notes that this does not fall within the scope of the complainant's request, nor is the redaction raised in the complainant's request for review. She further notes that this document does not relate to the financial aspects of the agreement, which the complainant identified as his central concern in his complaint to the Commissioner. She also notes that this document does not relate to any of the 7 further parts of his request. She has not therefore considered this information within this decision notice.

17. She further notes that the complainant did not raise an issue with the council's application of section 40(2) to an individual's name within the lease. She has therefore not considered the application of this exemption to the name within the lease in this decision notice.

Reasons for decision

Is the information environmental information?

18. Environmental information is defined in Regulation 2 of the EIR as:

"*environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –*

(a) "the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);"

19. The withheld information relates to a short term lease for the first floor of a building to a charity. The building is in community use, and the lease does not require any specific changes to the footprint of the building or to the surrounding area. On this basis the Commissioner considered that the information is not environmental information and the request should have been considered by the council under the terms of the Freedom of Information Act. She therefore telephoned the council on 19 December 2018 and asked it to consider this point. The council said that the lease was initially part of a planning application which had been submitted, but that this was no longer under consideration. Therefore, in retrospect, it agreed that the request, when considered in isolation from the planning application, was not a request for environmental information.

20. The council therefore agreed that the information was not environmental information and applied section 43(2) of FOIA to continue to withhold it. The Commissioner has therefore considered the application of this exemption to the withheld information.

Section 43(2)

21. 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.

Would a disclosure of the information prejudice the council's commercial interests?

22. The Commissioner considers that to satisfy this element of the exemption, disclosure would have to prejudice the commercial interests of any party, including the council.

23. The term 'commercial interests' is not defined in the FOIA; however, the Commissioner has considered her guidance on the application of section 43. This comments that:

"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."[1]

24. In this case the withheld information relates to sections from a short term commercial lease agreed between the council and the West Berkshire Muslim Centre. The council argues that a disclosure of the information would be likely to prejudice its negotiating position in future negotiations.

25. The Commissioner therefore considers that the council has correctly identified section 43(2) as the relevant exemption to consider as the issue which it has concerns about relate to the commercial interests of the council.

The nature and likelihood of the prejudice occurring

26. In the Commissioner's view, it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish that on the balance of probabilities, some harm would be caused by the disclosure. In accordance with various decisions heard before the Information Tribunal, the Commissioner interprets *'would' to mean 'more probable than not'.*

27. The council argues that the information should be withheld in order to protect the council's own commercial interests. It said that if the terms of the lease were to be disclosed it would affect the council's position when negotiating the terms of leases for properties (including this one) in the future. It argues that the likelihood that that could occur is such that a disclosure of the information would affect its commercial interests.

28. It argues that the current lease is a short term lease, and therefore the likelihood of the council needed to seek a tenant for the same property in the future is high. It also pointed out that it has similar properties where it may decide to offer leases in the future. It argues that in renegotiating the lease for this, or other similar properties, a disclosure of this information would prejudice its negotiating position.

[1] https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf

29. In essence, its argument is that if the withheld information were to be disclosed, third parties seeking similar leases could seek to use the information as leverage when negotiating their own agreement with the council in the future. However terms should be negotiated between parties on a level playing field, and market forces should be the beginning point for negotiating any lease.

30. It provided further information to the Commissioner describing how a disclosure of this information would prejudice its future bargaining position. The Commissioner is not able to elaborate upon this within this decision notice as the arguments relate directly to the withheld information.

31. The Commissioner notes also the fact that the current lease is a short term lease, and that the council owns similar properties which it might decide to lease out in the future. This heightens the likelihood that negotiations may occur in the future, and the council's arguments regarding the disclosure of the information would then be likely to impact upon these negotiations.

32. Having considered the council's arguments, the Commissioner is satisfied that a disclosure of the information would be likely to prejudice the council's commercial interests and that such prejudice would be likely. She has therefore decided that the exemption in section 43(2) is engaged.

33. The Commissioner's decision is therefore that the council was correct to engage section 43(2) to the information which it has withheld under this exemption in this case. She has therefore gone on to consider the public interest test required by section 2 of the Act.

The public interest

34. The public interest test required by the Act is set out in section 2(2). The test is whether *"in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information".*

The public interest in the information being disclosed.

35. The complainant argues that information in regards to financial matters for other leases and council buildings has been disclosed in other cases previously. He further argues that financial information should be readily available to ensure equality, fairness and even-handedness for other groups and organisations.

36. The Commissioner considers that there is a general public interest in creating transparency on the deals and financial contracts which public authorities enter into. It is only through transparency that public spending, and public finances can be understood and the public authorities held to account for their actions and the value for money which their decisions bring.

37. The Commissioner notes that the property was empty following a decision by the council to close a pupil referral unit which used to use the property. The decision was reported to have been taken by the council on the basis of cost cutting, and the council is reported to have argued that making changes to the way it ran the Pupil Referral service would save it £1.1 million[2]. The public interest in knowing the amount which the council would receive from this lease is therefore increased given the previous history of this property.

38. The complainant is correct in stating that financial details have been disclosed in response to other requests regarding other leases. However, each case has to be considered on its own merits, taking into account all of the circumstances of the individual case. In this case the council has demonstrated that a disclosure of this information would have an adverse effect upon its negotiating position in future negotiations, and this needs to be balanced against the public interest in the disclosure of the information.

    The public interest in the exemption being maintained

39. The council identified public interest factors in favour of the information being withheld. These included:

    (i) It would prejudice to the Council's commercial interests by disclosing information in relation to the lease.

    (ii) It would prejudice the Council's ability to achieve best value for money in future agreements.

    (iii) Disclosure may deter community groups from negotiating a lease with the Council, as there is a presumption of confidentiality.

[2] https://www.newburytoday.co.uk/news/news/18844/more-cuts-to-the-most-vulnerable-school-pupils-put-forward.html

(iv) Disclosure of the financial information would undermine confidentiality and the relationship of trust with any future community groups seeking to negotiate a short term lease with the Council.

Conclusions

40. The Commissioner has considered the above. She firstly gives little weight to the argument that disclosure of the information would have the effects outlined in points (iii) and (iv) of the councils arguments above. The FOI Act has been in place for over 10 years, and organisations entering into contracts with public authorities will be fully aware that the authority must abide by their obligations under the information access regimes. They will understand that some information may need to be disclosed by public authorities in order for them to comply with the requirements of the legislation. Additionally, the Commissioner notes that the prejudice identified by the council is to its own commercial interests, not to the West Berkshire Muslim Centre's.

41. The complainant argues that he wishes access to the information in order to ensure equality, fairness and even-handedness for other groups and organisations. The Commissioner acknowledges the complainant's arguments have merit. However, the withheld information only relates to one property and does not provide any details as to the negotiations or decisions which were made leading up to the lease being agreed. The Commissioner notes therefore that a disclosure of this information on its own would be unlikely to allow the complainant to identify the full circumstances of the decisions taken surrounding the award of the lease in this case. Additionally, even if this information were to be disclosed, the complainant would not be able to determine whether the lease is fair and equal in the terms he suggests as he would not know the terms agreed by the council with other voluntary groups in that, or any other, council property. He would require further information on other similar leases in order to compare and determine this.

42. A disclosure of the information would not therefore provide the complainant with the information which he wants for the purposes he has stated. In order to determine whether the council has acted fairly in agreeing the terms of this lease further information relating to other leases in agreed in similar circumstances would be required.

43. Having said this, the Commissioner recognises that the complainant's argument is essentially that greater transparency allows the public a better opportunity to identify whether inequality might be taking place, and she affords some weight to the point. The public interest in creating greater transparency is a strong argument for the disclosure of information, including making the council more accountable for its decisions and its financial decision making.

44. Nevertheless this public interest needs to be balanced against the adverse effect which a disclosure of information might have on the ability of the council to make decisions, carry out its functions and achieve best value for money in the future. The Commissioner considers that it not correct to consider that arguments surrounding transparency should justify the disclosure of commercial information on all occasions. That argument would effectively create a blanket argument, even where there are significant risks to the commercial interests of public authorities (and therefore the public purse).

45. The council has submitted arguments as to why the core details of the lease should be withheld in this case. Its arguments are valid given that the lease in question is a short term lease and is likely to need to be renegotiated in the near future. The council has disclosed other information relating to the lease and has withheld only the information which it considers could impact upon its future negotiations. This includes the price per annum, and other terms and conditions of the lease. The Commissioner recognises however that these details are the information which the complainant or the public would need in order to assess whether the lease is fair as suggested by the complainant. It would also provide a better picture of its overall decisions regarding the property, included the stated savings in closing the pupil referral unit which used to use the property.

46. There is public interest in the council achieving best value for money in its agreements, and it has put forward substantive arguments for its view that a disclosure of the withheld information would prejudice its future negotiations. If the council is placed at a disadvantage in any future negotiations it may not be able to agree the best deal it otherwise could. There is a public interest in allowing negotiations to take place on a level playing field, and the Commissioner has accepted the council's argument that a disclosure of this information would have an effect upon this in future negotiations. This could result in money being lost to public funds which could otherwise be used by the council to carry out its functions.

47. The Commissioner considers that where a disclosure of information risks prejudicing the ability of an authority to obtain best value this has to be borne in mind and will result in situations where the public interest rests in information being withheld. This is such a case.

48. The Commissioner accepts that disclosure of the withheld information would be likely to prejudice the commercial interests of the council. There is a significant public interest in avoiding that outcome; enabling the Council to maximise its commercial interest is in the public interest as this assists it in the provision of public services. This is a valid factor in favour of maintenance of the exemption

49. The Commissioner has therefore decided that in this case the public interest in the exemption being maintained outweighs that in the information being disclosed in this case. The council was therefore correct to apply section 43(2) in this case.

Right of appeal

50. 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

51. 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.

52. 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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