Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **21 May 2019**

Public Authority: **Reading Borough Council**
Address: **Civic Office**
Bridge Street
Reading
RG1 2LU

Decision (including any steps ordered)

1. The complainant requested from Reading Borough Council (the Council) information relating to Arthur Hill swimming pool. The Council refused the request under section 43(2) (commercial interests) of the FOIA.

2. The Commissioner's decision is that the Council was not correct to apply section 43(2) to the information.

3. The Commissioner therefore requires the Council to take the following steps to ensure compliance with the legislation.

    - Disclose all of the information within the scope of first part of the information request.

4. The Council 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 to the request

5. The information requested relates to the Council's proposals to sell the Arthur Hill swimming pool. The complainant provided the Commissioner with a background to his request in the following terms:

    "*Arthur Hill Swimming Pool is located in East Reading and is owned by Reading Borough Council.*

The building and site were bequeathed to 'the Town of Reading' in 1911 by the family of Arthur Hill, a former Mayor of Reading, in his memory following his death.

The pool was a popular swimming and sports venue for the East Reading community for over 100 years until October 2016, when Reading Borough Council announced that they intended to close the pool. This triggered a major local campaign to keep the pool open, with over 2500 people signing a petition to save the pool (online version at https://www.change.org/p/reading-borough-council-savearthur-hill-swimming-pool. - does not show 600 further signatures collected on a paper version of the petition).

Despite the opposition, Arthur Hill pool was closed in December 2016. The pool continued to remain in the spotlight as a controversial local and political issue. A community bid to take over the pool under the 'community right to challenge' scheme was turned down by the Council in April 2017, and later that year the Council announced that it intended to sell the Arthur Hill Pool site. This caused further local concern, as many former pool users and East Reading residents considered that the pool had been bequeathed to the community, rather than to the Council to sell at its whim, and should therefore be retained for community use. In response the Council stated that income from the sale will be put towards construction of a new swimming pool locally.

Reading Borough Council placed the Arthur Hill property on the market in January 2018. Ten bids were received for the premises: eight from commercial interests and two from voluntary sector organisations. The bidders are known to include at least one commercial leisure provider who had planned to re-open the pool, who has been in touch with the campaign to save Arthur Hill pool.

On 16 July 2018 the Council's Policy Committee made a decision on sale of the pool and selected a buyer from among the bids received.

Request and response

6. On 23 July 2018, the complainant wrote to the Council and requested information in the following terms:

"I should be grateful if you would provide me with the following information which I am requesting under the terms of the Freedom of Information Act 2000.

1. Please provide me with a copy of the report made to the Council's Policy Committee meeting dated 16 July 2018 entitled 'Arthur Hill Swimming Pool' (agenda item 2 - closed session).

2. Please advise me of the identity of the buyer for Arthur Hill Swimming Pool as selected at this meeting of the Policy Committee.

I am aware that closed session papers are not normally released to members of the public. However, in this case I consider that a) there is a compelling public interest in release of the information, and b) as the tender process for sale of the pool is complete, and a decision on the sale has been made, commercial considerations are no longer a significant concern."

7. On 20 August 2018 the Council responded. It stated that the requested report was not for publication because it contained commercially sensitive information. With regards to part two of the request, the Council added that when contracts had been exchanged, it would then be in a position to release the identity of the purchaser. No section of the FOIA was cited as grounds for the refusal of the request.

8. On the same day, the complainant asked the Council for an internal review as he did not consider that the response complied with the FOIA.

9. On 17 September 2018 the Council provided its internal review response. At this stage it stated that the information was withheld under sections 43 (commercial interests) and, in relation to the identity of the buyer, 22 (information intended for future publication) of the FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 21 September 2018 to complain about the way his request for information had been handled.

11. The complainant asked for a decision notice in relation to his request for information. He specified in his complaint to the Commissioner that he wanted to challenge the Council's application of section 43 and the release of the *full* report relating to Arthur Hill swimming pool.

12. During the investigation the Council informed the Commissioner that following a subsequent meeting on 25 January 2019, the complainant was provided with information concerning part 1 of his request. This was a redacted copy of the report to the Council's Policy Committee meeting of 16 July 2018, relating to Arthur Hill swimming pool.

13. The Council maintained its reliance on section 43 to redact some of the information to this part of the request as it considered it commercially sensitive information. The Council also considers the appendices to the report are caught within the scope of the request and that they are exempt under section 43 of the FOIA.

14. With regards to part 2 of the request, the Council released this information – the identity of its preferred buyer for Arthur Hill swimming pool - and withdrew its application of section 22 of the FOIA. As it was no longer relied upon, section 22 is not covered in the analysis below.

15. However, the complainant noted that the information disclosed in response to part 1 of his request *"does not contain appendixes to the original report which give the rationale for the choice of bidder for the pool, and information on details of the winning bid and sale have been redacted."*

16. The following analysis therefore focuses on whether the Council correctly withheld some parts of the information within the scope of part 1 of the request, under section 43(2) of the FOIA.

Reasons for decision

Section 43 – Prejudice to commercial interests

17. 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. If the exemption is engaged, a public interest test must be carried out in order for the information to be withheld.

18. The exemption can be engaged on the basis that disclosing the information either 'would' prejudice someone's commercial interests, or, the lower threshold, that disclosure is only 'likely' to prejudice those interests. The term 'likely' is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice is more probable than not.

19. The Commissioner considers the withheld information is commercial in nature as it relates to the sale of a leisure facility by the Council.

20. 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.

21. In this case, the Council stated that it considers disclosure regarding the details of the unsuccessful bidders would be unfair to the third party organisations and prejudice their commercial interests going forward.

22. The Council explained that it has relied on section 43(2) to redact commercially sensitive information. The withheld information consists of the redacted parts of the report about Arthur Hill swimming pool and also the appendices to the report, which the Council considered is not suitable for publication because it contains information about the number, range and details of all bidders.

23. The Council considers that to disclose the information requested would also prejudice its own commercial interests. The Council explained that this is because the information is commercially sensitive and if released it would significantly weaken or could damage the Council's position regarding the sale of Arthur Hill swimming pool, as the contract for sale was not yet complete at the time of the request.

24. The Council said that disclosure regarding the details of the unsuccessful bidders is commercially sensitive as this would reveal their financial position and therefore be unfair to the third party organisations, and this would prejudice their commercial interests going forward.

25. The complainant argued that much of the information held within the appendices to the report does not relate to financial matters but to proposals for future use of Arthur Hill swimming pool, which he considers does not impact upon commercial interest. The complainant said that the Council had released information on the identity of bidders for its property on previous occasions after a sale, and he referred the Commissioner to a link as an example of this[1].

26. The complainant quoted a part of the report which had been released and he argued that *"As the Council has a robust contingency plan for selling the property if the bid with its preferred buyer falls through (i.e. offer it to the second highest bidder), it is irrelevant if information about terms offered by other buyers is released, as the second highest bidder has already placed a formal offer for the property."*

[1] http://www.reading.gov.uk/media/9173/Item-10/pdf/Item10.pdf

27. The complainant considers it difficult to understand how releasing the requested information would compromise either the business interests of the Council or the purchaser, or undermine the Council's position in closing a contract. He is of the view that there are low risks of this happening and does not believe damage would occur as a result of releasing the information. Therefore the complainant disputes the Council's handling of his information request and its reliance on section 43(2) to the withheld information and considers that the full report should be released.

28. For Section 43(2) to be engaged the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the Council alleges would be likely to occur if the withheld information was disclosed has to relate to commercial interests;

- Secondly, the Council must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests; and

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e. whether there is a real and significant risk of the prejudice occurring.

29. With regards to the first criterion, the Commissioner accepts that the harm envisaged is harm to the commercial interests of the purchaser and the parties concerned. Therefore, the Commissioner is satisfied that the first criterion is met. This is not to say that she agrees it will happen; simply that the criterion is met.

30. Regarding the second criterion, the Commissioner accepts that there is a causal relationship between the potential disclosure of the requested information and the prejudice that this exemption is designed to protect against. Disclosure would reveal the detail of all bidders, information about the level of the bid and the ranges in value. This is commercial information not previously made public. The second criterion is therefore met.

31. Thirdly, the Commissioner acknowledges that in its submission, the Council said it considered the disclosure of the requested information *'would prejudice'* the commercial interests of the parties concerned.

32. The Commissioner considers that the Council has been given sufficient opportunity to provide evidence and arguments in support of its position. When making her enquiries in this case, the Commissioner informed the Council that her general approach is to allow one further opportunity for a public authority to submit thorough arguments to justify its case, following the initial response to the requester and the internal review.

33. In this instance, the Council had been asked a number of times to submit to the Commissioner further arguments to justify its application of the exemption. It was asked to provide a copy of the un-redacted report along with a copy of the relevant appendices and to explain its reliance on section 43(2).

34. Although the Council did subsequently provide the Commissioner with a copy of the un-redacted report and the appendices to the report, the Council did so without submitting any further arguments despite being informed that these were required. Nor did the Council address the questions it was asked relating to this case. The Commissioner therefore maintains her view that the Council did not provide adequate information to support its application of the exemption.

35. When claiming that disclosure would prejudice the commercial interest of a third party, the Commissioner expects a public authority to obtain arguments from the third parties themselves. During this investigation, the Council was asked to clarify on what basis it believed that disclosure would prejudice the commercial interests of the third party organisations. It was also asked to provide copies of any correspondence the Council had had with third parties in relation to this request. The Council responded and confirmed that it had telephone contact with the purchasers of Arthur Hill swimming pool. This was regarding disclosure and it was agreed when it would disclose the identity of the purchaser. The Council said that it did not contact the unsuccessful bidders.

36. The Council has not explained how the release of the requested information would prejudice the commercial interests of the Council or the third parties (the buyer or the bidders) for Arthur Hill swimming pool.

37. In cases where a public authority has failed to provide sufficient arguments to demonstrate that exemptions are engaged, the Commissioner is not obliged to generate arguments on behalf of a public authority.

38. In this case, the Commissioner does not consider that sufficient arguments have been provided to demonstrate that disclosure would prejudice either the Council's commercial interests or the commercial interests of the third parties.

39. The Commissioner's decision is that section 43(2) of the FOIA is not engaged. In light of this conclusion, it has not been necessary for the Commissioner to go on to consider the balance of the public interests. At paragraph 3 above the Council is now required to disclose the information that was withheld under section 43(2).

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
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF