

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 02 March 2020

Public Authority: University Hospitals of Derby and Burton NHS Foundation Trust

Address: The Royal Derby Hospital
Uttoxeter Road
Derby
DE22 3NE

Decision (including any steps ordered)

1. The complainant made a freedom of information request about D-Hive and the cancellation of Derby Sound. The University Hospitals of Derby and Burton NHS Foundation Trust (the Trust) refused the request under the section 43(2) (commercial interests) exemption.
2. The Commissioner's decision is that the Trust has not successfully applied Section 43(2) of the FOIA. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information.
3. 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

4. On 2 July 2019 the complainant requested the following items of information:

'I write to request information concerning D-Hive, a subsidiary of UHDB, which meets the definition of a "publicly-owned company" as per the Information Commissioner's Office guidelines.'

I would like to request the following information:

1. *The business plan proposed to UHDB when D-Hive was conceived, in its current form, three years ago.*
 2. *The business plan proposed by D-Hive, and presented to UHDB, regarding the music festival Derby Sound.*
 3. *The costs to D-Hive to date, broken down by category if possible, of organising Derby Sound*
 4. *The losses incurred by D-Hive as a result of the cancellation of Derby Sound*
 5. *Any market research undertaken by D-Hive in connection with Derby Sound'*
5. On 3 July 2019 the Trust provided a redacted presentation in answer to Q1; explained that D-Hive Limited was a private entity and did not fall under FOIA for Q2 and Q5; and refused to provide the requested information for Q3 and Q4 citing section 43, commercial interests.
 6. The complainant requested an internal review on 1 August 2019. He stated that as a wholly-owned subsidiary of the Trust, D-Hive does fall within the remit of FOIA. He also disputed the use of section 43 as *'the information requested relates to Derby Sound, a historical commercial project which has now ended, it is not clear how releasing the information would prejudice the commercial interests of D-Hive or the Trust'* and referred to the public interest test.
 7. The Trust sent the outcome of its internal review on 28 August 2019 citing section 43 to Q2, Q3 and Q4:

'For this project, D-Hive worked with third parties who operate within the industry as part of their day to day business; these third parties are not publicly owned and, therefore, not subject to the Freedom of Information Act.

In determining whether this information could be released, the opinion of these third parties has been sought and all have advised that release of information could impact their businesses. It is not possible to analyse by category; given the narrow nature of the project; furthermore, release of total costs would also signal key commercial terms involved.'

8. For Q5 it stated that:

'No such document exists. Information gleaned from various sources was used to populate a model that was used within the business case for decision making purposes. This model and business case contained the cost information described above; therefore, it will not be disclosed.'

Scope of the case

9. The complainant contacted the Commissioner on 30 August 2019 to complain about the way his request for information had been handled.
10. The Commissioner has focussed her investigation on whether the Trust correctly applied the exemption under section 43(2) of the FOIA to the withheld information at Q2, Q3, Q4 and Q5.

Reasons for decision

Section 43(2) - Commercial interests

11. Section 43(2) of 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. The exemption is subject to the public interest test which means that even if it is engaged account must be taken of the public interest in releasing the information.
12. 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.
13. For section 43(2) to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the Trust alleges would be likely to occur if the withheld information was disclosed has to relate to the commercial interests;
 - Secondly, the Trust 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.

Commercial interests

14. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner has considered the meaning of the term in her

awareness guidance on the application of Section 43. (<https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>.) This comments that:

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."

15. The Trust has explained in some detail to the Commissioner that as part of this project (the music festival Derby Sound) there were a number of third party private organisations, who all operate in an extremely competitive environment and disclosure would be likely to prejudice the commercial interests of one or more of these private third parties.
16. For example, the venue for the project was Derbyshire County Cricket Club and it runs a number of large scale concert style events at its stadium each year. It has successfully staged Boyzone, Elton John and Little Mix. Disclosure of the commercial arrangements for the music festival Derby Sound would be likely to affect future planning and negotiations for future concert style events.
17. The Commissioner is satisfied that the actual harm alleged by the Trust relates to the commercial interests of these third parties. Accordingly, she is satisfied that the first criterion is met.

Causal link

18. When investigating complaints which involve a consideration of prejudice arguments, the Commissioner considers that the relevant test is not a weak one and a public authority must be able to point to prejudice which is "real, actual or of substance" and to show some *causal* link between the potential disclosure and the prejudice.
19. When a public authority is claiming that disclosure of requested information would prejudice the commercial interests of a third party the Commissioner follows the findings of the Information Tribunal decision in the case *Derry Council v Information Commissioner [EA/2006/0014]*. This confirmed that it is not appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Instead, arguments advanced by a public authority should be based on its prior knowledge of the third party's concerns.
20. In this case the Trust has provided the Commissioner with evidence of dialogue with the companies concerned and from this it is clear that the reasons for applying the section 43 exemption reflect the genuine concerns of the third parties. The Commissioner will only provide a

summary of some of those details in this decision notice to avoid the possibility of inadvertent disclosure.

21. The Trust has had further dialogue with these third parties and explained that:
 - The Cricket Club has recently announced another concert for the upcoming summer and disclosed to the Trust that it has reached a better commercial arrangement than it had for the Derby Sound event. The Cricket Club believed that it could not have achieved this if the Derby Sound arrangements had been disclosed by the Trust.
 - Other third parties, including the performers, confirmed that this is their core business and disclosing their fee structure and business model to both competitors and promoters would almost certainly prejudice their commercial interests.
22. The Commissioner is satisfied that based on the arguments presented by the Trust, there is a causal link between the requested information and the commercial interests of the third parties.

Likelihood of prejudice

23. In *Hogan and Oxford City Council v the Information Commissioner* [EA/2005/0026 and 0030] the Tribunal said:

“there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not.”(paragraph 33)

24. In this case, the Trust has confirmed that it is relying on the lower threshold to engage the exemption. The Trust has argued that disclosure would be likely to prejudice its own commercial interests: *‘disclosure would result in third parties being not prepared to engage with the Trust or its subsidiary network in the future. During this discussion it was agreed that whilst an event such as this was unlikely to be staged in the future, it was not impossible should the right opportunity come along.’*
25. The Commissioner’s view is that “would be likely to” places an evidential burden on the public authority to show that the risk of prejudice is real and significant.
26. The Trust has identified parts of the fee structure and commercial arrangements that would be likely to prejudice the commercial interests of the third party private organisations. It also considered that disclosure of the total cost by category was not possible: *‘there were not*

enough categories of cost to absorb the commercially sensitive elements. Essentially only 4 categories existed; venue, artist, marketing and production; in 3 of these categories, there was only a single party.'

27. Although the Commissioner notes that the Trust has argued that disclosure would be likely to prejudice its own commercial interests, she is not convinced that she has been provided with strong supporting arguments. The Commissioner considers that there are stronger arguments that support the commercial interests of the third party private organisations.
28. The Commissioner has been provided with the withheld information. It consists of 2 spreadsheets: 'Concert 2019 Business Case Costings' (Q2) and 'Derby Sound Cost by Category' (Q3 and Q4). She queried whether this was the only withheld information and was advised that it was.
29. In response to the Commissioner's queries, the Trust confirmed that there were no marketing documents for Q5: *'We didn't produce a document based on the market research. D-Hive did desktop based research to gauge the price point of other similar events, the types of venues and likely attendance, where else the artists were playing and what ticket price they commanded, what equipment would be needed, what permits might be needed and other costs such as insurance/PRS etc. The information we gleaned doing this was fed into the Forecast spreadsheet directly and in quite a granular fashion.'*
30. The Trust also confirmed that the spreadsheet 'Concert 2019 Business Case Costings' (Q2) was the final version and showed the entire forecasted income and costs. The spreadsheet 'Derby Sound Cost by Category' (Q3 and Q4) was *'manufactured out of ledger data to show the costs ultimately incurred... This represented total loss and in the way it was presented, answered 2 of the points.'* Therefore, the Commissioner considers that the spreadsheet 'Derby Sound Cost by Category' refers to both the costs and the losses incurred by D-Hive as a result of the cancellation of Derby Sound. (Q3 and Q4)
31. The Commissioner asked where these losses had been reported. The Trust responded *'the losses have all been accounted for in the accounts for the year ended 31st March 2019, which have been submitted to companies house. The costs will not necessarily be highlighted or identified themselves but are contained within the overall profit/loss of the company.'*
32. In summary, the Commissioner notes that the withheld information only relates to 3 parts of the request, (Q2, Q3, and Q4), and accepts that there is no withheld information on any market research (Q5) for the music festival.

33. She is satisfied that the spreadsheets would be likely to be of use to competitors of the third parties by providing insight into the general fee structure and commercial arrangements for the music festival Derby Sound.
34. This is not in itself a reason not to disclose the information under FOIA. However, it does indicate the importance that the Trust and the third parties attach to this information and the prejudice that would be caused if it was disclosed.
35. For all of these reasons the Commissioner has found that the section 43(2) exemption is engaged and therefore she has now gone on to consider the public interest test.

Public interest test

36. Section 43(2) is a qualified exemption which means that even where the exemption is engaged, information can only be withheld where the public interest in maintaining that exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

37. The complainant argued that as the information requested relates to Derby Sound, a historical commercial project which has now ended, it is not clear how releasing the information would prejudice the commercial interests of D-Hive or UHDB:
 - The release of the information would enable the public to better scrutinise the public monies spent
 - The release of the information would inform the public of the activities carried out on their behalf

Public interest arguments in favour of maintaining the exemption

38. The Trust *'concluded that the information would likely be used for an opinion based article that would be negatively slanted towards the failure of this particular project (and its impact on public finances) without reference to the full benefits provided by the Trust and its subsidiaries wider commercial activities. A recent board paper submitted towards the end of 2019 states the total annual benefit to the Trust of its subsidiary network of £2m per annum. It is clearly not acceptable to withhold information based of not wanting a negative article published but on balance, it was agreed that disclosure was not in the public interest as it would give rise to putting at risk the annual benefit the Trust currently derives.'*

Balance of the public interest arguments

39. The Commissioner considers that there is always some public interest in the disclosure of information. This is because it promotes the aims of transparency and accountability, which in turn promotes greater public engagement and understanding of the decisions taken by public authorities.
40. There is a public interest in protecting the commercial interests of the private third party organisations (venue, artist, marketing and production) and ensuring that they are able to compete fairly in the future. Companies should not be disadvantaged as a result of doing business with the public sector.
41. However, the Commissioner notes that the figures provided in the spreadsheets (the withheld information) relate to general terms and do not reveal the level or quality of the activity provided.
42. For example, the music festival was cancelled due to poor ticket sales which might indicate poor market research or poor marketing of the event. But, the figure for 'marketing' does not reveal any detail about the level of work done as research, or whether the marketing was on local radio or through newspapers etc.
43. As the work or range of activities for each general category will vary significantly from one music event to another the figure itself will be of less use to a competitor of the private third party organisations.
44. It is also clear that the cancelled event ended up as a cost to the Trust. This is significant to the balance of the public interest test and strongly increases the public interest in favour of disclosure.
45. The Commissioner has therefore weighed the benefits of the disclosure against the prejudice to the private third party organisations.
46. The Commissioner notes that the Trust considers that news of this failure may overshadow other good news about the Trust but the Commissioner considers that it is in the public interest to understand the failure of the music festival.
47. In conclusion, therefore, the Commissioner has decided that in all the circumstances of the case, the public interest in maintaining the section 43(2) exemption does not outweigh the public interest in disclosure.

Other Matters

48. Although they do not form part of this decision notice, the Commissioner would draw the Trust's attention to the following point.
49. The Commissioner reminds the Trust that she is able to view all the withheld information as part of her investigation, and although this was provided directly from the business area to the Commissioner, it was not provided to the FOIA team within the Trust itself. Therefore, the Commissioner was not able to engage fully with the FOIA team. In future, it may be more appropriate for the business area to also provide the withheld information to the FOIA team so that there is a complete understanding throughout any investigation.

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@justice.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

Pamela Clements
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