

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 November 2020

Public Authority: Plymouth City Council

Address: Ballard House
West Hoe Road
Plymouth
PL1 3BJ

Decision (including any steps ordered)

1. The complainant requested from Plymouth City Council ("the Council") information regarding the Gormley sculpture. The Council withheld the requested information under section 43(2) (commercial interests) and subsequently applied section 40(2) (third party personal data) of the FOIA to the request.
2. The Commissioner's decision is that the Council correctly applied section 43(2) of the FOIA. Therefore, she has not gone on to consider the application of section 40(2) of the FOIA.
3. The Commissioner does not require the Council to take any steps as a result of this decision.

Request and response

4. On 28 February 2020, the complainant wrote to the Council and requested information in the following terms:
"Dear Chief Executive, what is the specific cost of the Gormley statue (in terms of design, construction and installation) due to be erected on West Hoe, and funded from the PCC "Box" £40 Million initiative?"
5. On 6 March 2020 the Council responded and withheld the requested information under section 43(2) (commercial interests) of the FOIA.

6. On 5 April 2020 the complainant asked the Council for an internal review.
7. On 4 June 2020 the Council provided its internal review response. The Council maintained its original position to withhold the information under section 43 (2) of the FOIA, and it also provided the complainant with details of the public interest test which it had conducted.

Scope of the case

8. The complainant contacted the Commissioner on 19 June 2020 to complain about the way his request for information had been handled. Specifically, the complainant argued the Council's application of section 43(2) of the FOIA and believed that it had been inappropriately applied to his request.
9. During the course of the Commissioner's investigation of this case, the Council also considered that section 40(2) of the FOIA applied. The following analysis focuses on whether the exemptions at sections 43(2) and 40(2) of the FOIA were cited correctly to the information requested.

Reasons for decision

Section 43(2) – prejudice to commercial interests

10. 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.
11. The exemption can be engaged on the basis that disclosing the information either "*would*" prejudice commercial interests, or the lower threshold that disclosure "*would be 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 would be more probable than not.
12. For the Commissioner to accept that prejudice *would* result, she must be satisfied that this outcome would be more likely than not. The Council considered that disclosure of the requested information "*would be likely*" to prejudice its own commercial interests as well as The Box museum and gallery and the artist – Antony Gormley.
13. The withheld information is the price paid by the Council for the sculpture by Antony Gormley – "Look II".

14. The Commissioner notes from viewing the local media reports, that "The Box" is Plymouth's new museum, art gallery and cultural centre. "Look II" is the large-scale sculpture by world-renowned artist Antony Gormley. The work is located on West Hoe Pier, Plymouth.
15. The Council stated its position that the information sought is the price which it paid for the sculpture. It believes that disclosure of this information would be likely to prejudice the commercial interest of the Council, The Box, and Antony Gormley. The Council provided the Commissioner with the withheld information which it considered commercial sensitive.
16. The Council also believes that disclosure would be likely to prejudice the financial interest of the Council. It explained that *"contracts relating to art commissions are very different to those with which a public authority would procure more standard goods and services."* The Council stated that *"in the case of a commissioned piece of art, such as Look II, the parties' rights and obligations do not end with the installation of the art work and payment being made. The terms of the contract persist beyond that point and on the artist's death his rights and obligations under the contract will pass to his estate."*
17. The Council further explained that the contract for Look II, signed by the Council, includes a confidentiality clause covering all of the contractual terms including the "Acquisition fee". It said that whilst the title to the work has passed from the artist to the Council, and the sculpture is now on display, a material breach of the contract, particularly the price of the Look II, would likely result in one or both of the following outcomes:
 - Legal action by the artist against the Council.
 - The removal of the work from display and return to the artist.
18. The Council considers that these outcomes would result in financial losses arising from costs and damages. It would also cause loss of the financial outlay expended by the Council in preparing the display site, and the costs of installing the sculpture.
19. The Commissioner accepts on the basis of this reasoning that the information is commercial in nature. The next step is for the Commissioner to consider the prejudice which disclosure would or would be likely to cause and the relevant party or parties that would be affected.

20. For Section 43(2) to be engaged three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to commercial interests;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the withheld information 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, meaning whether there is at least a real and significant risk of the prejudice occurring.

21. With regards to the first criterion, the Commissioner accepts that the prejudice envisaged would likely be to the commercial interests of the Council, The Box, and Antony Gormley. 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.

22. The Council stated that disclosure of the information would likely cause damage to its reputation, and hamper its ability to secure future grant funding for works of similar stature or arts programmes. The Council explained that if the Council breached a contractual clause, in this case, the price of a commissioned piece of artwork, the possibility of attracting other artists of calibre to work with the city, would be remote. The Council said that all artists working with them require confidentiality clauses in their contracts, and that this is a standard requirement within this particular market. Without this, artists would not agree to do business with a public authority.

23. The Council considers that it would be unlikely that The Box would be able to continue to attract artists of repute and collections of import to the city, if the information was disclosed. It said that the detrimental impact on the city's plans to bring programmes of cultural significance and benefit to Plymouth, will likely result in the Council and The Box being unable to continue to attract the grant income necessary to fulfil these aims.

24. The Council stated that disclosure of the information would undermine the cultural and commercial viability of The Box. This is because it would damage *"the credibility of The Box as a cultural organisation and the Council as a trustworthy partner to do business with."* It explained that the Council's success of its major investment will rely heavily on its credibility, which in turn is dependent upon the Council's ability to meet all of the commitments it agrees to within its contracts.
25. The Council said that *"confidentiality clauses are an integral component of contracts with artists within the cultural sector"*, and that *"failure to comply with such a clause will deter other artists from working with the city and The Box."* The Council considers that without these business and cultural relationships, *"the likelihood of The Box bringing high quality art to the city will prove difficult, and The Box will not be able to programme exhibitions with noteworthy artists and fulfil its cultural role for the city."* The impact on this would be that The Box would struggle to be a successful cultural attraction.
26. Disclosure of the information, the Council said, would be likely to negatively affect its reputation for negotiating future private contracts in other areas of business. Specifically, contracts that are price sensitive or contain confidential terms. Breaching contractual terms which consists of information that a supplier regards as commercially sensitive to warrant protective clauses, would negatively affect the Council's reputation as a trustworthy partner to do business with. The partners would be deterred to use the Council for business purposes, due to the Council's apparent inability to meet its contractual obligations to protect sensitive information, that they consider to be of commercial value to competitors or other potential customers.
27. The Council considers that disclosure of the information would be likely to prejudice the commercial interests of Antony Gormley. It explained that it presents a real and significant risk of prejudice to his ability to effectively negotiate terms with other parties in the future. The Council said that *"within the art market, the monetary value of an individual piece of art, is a direct determinant of the monetary value placed on other pieces of work by the same artist. The price of a commissioned piece of art, can determine the value placed on future works by the same artist and therefore the price that can be commanded for them."*
28. Having considered the arguments, together with the withheld information, the Commissioner is satisfied that the Council demonstrated that a causal relationship exists between the potential disclosure of the information being withheld, and the prejudice to its commercial interest. Therefore, the Commissioner considers that the second criterion has also been met.

29. Turning to the third criterion, the Council said that the consequences of releasing the information would be likely to result in; a loss of commercial opportunities, damage to the Council's reputation for negotiating future private contracts, and hinder its ability to secure future grant funding. The Council considers that there is a real and significant risk of the prejudice occurring, and the detrimental impact on the city's plans in providing programmes of culture to Plymouth, will likely result in the inability for the Council and The Box to attract the necessary grant income.
30. The Commissioner has considered these details and she believes that the Council has clearly demonstrated that the disclosure of the information, would be likely to have a detrimental impact on its commercial activities; specifically, that loss of revenue would be likely to occur through a wider loss of confidence in its ability to provide its planned programmes. The Commissioner accepts that this would be likely to prejudice the Council's commercial activities in this area.
31. The Council stated that the price paid for the sculpture, reflects Mr Gormley's wish to respond to the Council's proposal for the Mayflower 400 commemorations, and to bring art to a wider audience in Plymouth. The Council considers that the disclosure of the price would enable prospective clients of Mr Gormley, to argue commercial precedent in their negotiations with him for future pieces of his work. This, it said, would potentially undermine the value of his art in the public and private realms worldwide.
32. The Council reported that through correspondence from his legal counsel, Mr Gormley had strongly objected to the disclosure of the price paid for his sculpture. He said that it will likely negatively impact his future commercial negotiations.
33. The Commissioner has considered these details and she believes that the Council has clearly demonstrated that the disclosure of the information, would be likely to have a detrimental impact on its commercial activities; specifically, upon the Council's ability to purchase goods and to support art in the public realm. Also, she has considered the financial loss that would arise from costs and damages if legal action was taken by Mr Gormley, against the Council in breach of confidentiality – the confidentiality agreement. The Commissioner accepts that this would be likely to prejudice the Council's commercial activities in this area.

34. In light of the Council's submissions, it is clear that disclosing the withheld information could result in undermining its cultural and commercial viability. By knowing the cost of the sculpture, this could damage the credibility of the Council. The price was negotiated in confidence and in good faith, and disclosure would undermine Mr Gormley's future negotiating position with other patrons, collectors and clients. The Commissioner is of the view that it would not be fair to disclose information that would disadvantage a public authority to secure future grant funding for similar works or art programmes, or third parties in future pricing negotiations.
35. Having viewed the withheld information and considered the arguments made, the Commissioner accepts that prejudice to the commercial interests of the Council and of third parties, would be more likely than not to result through disclosure of the information in question. She therefore finds that disclosure would result in prejudice to the commercial interests of the Council and third parties, and on this basis, section 43(2) of the FOIA is engaged.

Public interest test

36. 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. Although the Commissioner has found the section 43(2) exemption is engaged, the information may still be released if the public interest in disclosing it outweighs the public interest in maintaining the exemption.

Public interest arguments in favour of disclosure

37. The complainant argued that; *"A principal local authority such as Plymouth, should therefore routinely make available financial information in enough detail to allow the public to see where money is being spent, where a council or department is, or has been, planning to spend it and the difference between the two."* The complainant believes that disclosure of commercial information can make public authorities accountable for how they spend public money *"especially at times of significant cutbacks."* He further argued that people would have a better understanding of how public money is spent, and that this would gain people's confidence in the integrity of the Council and in its ability to effectively allocate public funds. The complainant said that it may alternatively, enable the public to make informed challenges to the Council's spending of public money.

38. The complainant raised the fact that the Council had previously published the cost of two other public statues erected in Plymouth in the past two years, and he therefore argued the Council's refusal to disclose the cost of the Gormley statue. The complainant considers that *"the artist, his work, his potential costs and his actual costs are all part of the public information arena."* He said that it is concerning that the Council will not reveal how much of public money it had committed to this statue.
39. The complainant believes that the Council should be transparent on this issue since it is the public of Plymouth that are paying for the statue. He said that the planning consent should either be denied and the project cancelled or the Council should publish and justify the expenditure.
40. The Council said that it recognises that disclosure of the information requested would serve the public interest by; ensuring that the Council is transparent in its dealings with the people its accountable to, promoting a better understanding of how the Council makes use of public resources in bringing art and cultural initiatives to the city. Also, to enable the people of Plymouth to understand the relative priorities of the Council and how this is reflected in its spending. Especially, the Council said, at a time of austerity, when there is a greater general interest in public finances. The Council also recognises that disclosure would promote engagement between the Council and the electorate that have an interest in decision-making by the bodies they elect.
41. The Commissioner recognises that there is a significant public interest in disclosure of information concerning art and cultural initiatives in the city. Specifically, with regards to the Council's use of public resources and in its decision-making. The Commission acknowledges that in this case, there is a public interest in knowing the price paid for the sculpture.

Public interest arguments in favour of maintaining the exemption

42. The Council considers that disclosure of the requested information would be likely to result in a significant cost to the public purse due to a number of reasons. It said that due to:
 - *"The cost of potential legal action against the Council for breach of the confidentiality clause in the contract with the artist, and consequential damages.*

- *The loss of the significant funds that it has expended in bringing Look II to the city, including the cost of readying the site on which the sculpture is currently displayed, and the cost of installation, should the Council be required to return Look II to the artist as a consequence of any dispute.*
 - *The loss of revenue and reputation for The Box museum and gallery in which the Council has already invested £46 million and which would no longer be able to fulfil its purpose as a location for high quality contemporary art exhibitions, artist commissioners and major touring shows.*
 - *The loss of the anticipated tourism and consequent economic benefits to the city that was an essential component of the rationale for the creation of The Box and the acquisition of Look II."*
43. The Council also considers disclosure would be likely to result in a significant detriment to its cultural life. It said that it is in the public interest that The Box's ability to exhibit and procure quality pieces of art and attract touring shows of high calibre is not impaired. The Council stated that public art continues to be a significant part of life in the city of Plymouth, and that public art is a recognised contributor towards the city. It said that it educates, attracts tourism, generating income for the city, and increases its reputation as a good place to live and to work.
44. The Council argued that disclosure of the requested information would be likely to damage The Box's reputation as a trustworthy partner for artists to work with, and also hamper The Box's ability to attract artists of repute to the city. The Council further argued that it would be likely to negatively affect The Box's ability to secure grant income to fund future cultural programmes and art work.
45. The Council said that it would be likely to hinder the Council in competing with other public sector organisations against which it will appear to be a less attractive proposition. The Council considers that it would also hinder the Council in its *"ability to compete on an even footing with the private sector, who are not obliged to disclose this information, and can provide complete assurance that their contract terms will not be disclosed."*
46. The Council is of the view that it is in the public interest that it continues to be able to procure quality goods and services for fair prices. Also, in providing the citizens of Plymouth with value for money. In order to do this, the Council believes that it needs to be considered a trustworthy partner by those it wishes to do business with. External organisations and individuals will cease to do business with the Council if it is seen to be detrimental or a risk.

47. The Council's business reputation would be damaged and its negotiating ability impaired, the Council said, if confidential contractual information was disclosed. It explained that this would prevent the Council from obtaining the most favourable terms with those potential suppliers of goods and services still willing to do business with the Council.
48. The Council considers that disclosure would likely distort the market for Antony Gormley's work. The Council confirmed that having consulted with Antony Gormley on this, his position is that the price of Look II is a matter of commercial sensitivity. This is because disclosure would likely prejudice his ability to negotiate terms with other businesses in the future.
49. The Council accepts that there is a public interest in the transparency of local government, and that the Council must be accountable to its citizens as well as the right to be given an understanding of the money it spends. However, the Council stated that it does publish its financial information in accordance with the Transparency Code. It also said that the Council routinely requests feedback from its customers, and that it consults with Plymouth citizens on its plans and strategies.
50. The Council argued that it has been open and transparent about its total financial commitment to the "Destination Plymouth" and the "Mayflower 400" capital programme. The Council informed the Commissioner that it had disclosed to the complainant in a previous FOI request, details of the consultation that took place and the budget for this programme. It said that the information has been publicly available on the Council's website since February 2017 when the decision was made.
51. The Council stated that it does not believe that following the publication and subsequent disclosure relating to its financial commitment to the programme, an additional disclosure of the fee paid to an individual artist within the programme would further the public interest.
52. The Council further argued that it cannot be in the public interest that third parties gain a perception that working with the public sector is likely to be detrimental to them. Nor is it in the public interest, the Council said, that those potential partners that wish to protect their commercial interests, through confidentiality clauses, are discouraged from working with the public sector because the Council cannot be relied upon to maintain their confidence in relation to commercially sensitive matters.

53. The Council stated that the opening of The Box has generated considerable media attention for the museum itself, the city of Plymouth and also for the Council. It explained that the Council is the lead organisation for The Box and that their reputations are inextricably linked just as Look II is associated with both the Council and The Box. Therefore, the Council considers disclosure of the requested information will likely be detrimental, to The Box and also to the Council.
54. The Council believes it is likely that there will be a resultant loss of confidence in it by other business partners who would also require confidentiality clauses in their contracts as a condition of doing business with the Council, and not confined to only its cultural activities and artistic endeavours. The Council argued that if it is seen to break its legally binding promises to business partners, then quality suppliers of goods and services are unlikely to want to conduct business. It stated, *"The Council, legally bound to achieve Best Value for the citizens of Plymouth through "arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness" will be unable to negotiate, effectively to achieve value for money for the city if its bargaining power is diminished by a reduced pool of suppliers willing to work with the city."*
55. The Commissioner recognises that there is a public interest in preventing prejudice to the commercial interests of the Council. As covered above at paragraph 52, the Council is the lead organisation for the cultural centre (The Box) and plays an important part in planning programmes for cultural activities. Disruption to that role would be likely to have an impact well beyond the Council, which would contradict the public interest.

Balance of the public interest

56. The Commissioner accepts that there is a strong and legitimate public interest in the openness and transparency of public authorities with regard to their decision-making processes. 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.

57. In this case, the information is the price which the Council paid for a sculpture by Antony Gormley. Details of the price and the associated documentation was made in a confidential process. The Commissioner recognises that the complainant has concerns that the Council will not disclose the information requested, and he believes that the actual costs are part of the "*public information arena*". Disclosure of the withheld information would provide an insight into the Council's business, including the price of a piece of artwork.
58. The Commissioner acknowledges that the Council has been transparent about the purpose of the project which the artist's work is part of, and the budget from Council funds that was committed to this. Therefore, she does not consider that there is a need for disclosure of this single line of expenditure that would justify interfering with the artist's right to privacy.
59. The Commissioner accepts that disclosing the information would undermine Mr Gormley's future negotiating position with other businesses. It would also disadvantage the Council to secure future grant funding for similar works or art programmes, or third parties in future pricing negotiations.
60. The Commissioner considers that there is a strong and inherent public interest in ensuring fairness of competition, and in her view it would be firmly against the public interest if the commercial interests are harmed. She also considers that protecting the Council's ability to operate effectively within a competitive market, by not disclosing information that competitors could use to its commercial disadvantage, outweighs the public interest arguments for the information's disclosure. The Council was given the contract which included a confidentiality clause covering all of the contractual terms.
61. The Commissioner is of the view that it would not be fair to disclose information that would disadvantage the Council in future negotiating processes. She considers this to have significant weight in balancing the public interest.
62. The Commissioner has considered whether disclosure of the information would add significantly to the public and understanding of the decision made. She has also considered the harm that would be likely to occur to the Council and third parties should the price regarding the sculpture be released into the public domain.

63. The Commissioner has taken into account the arguments presented by the complainant and the Council. She accepts that disclosure of the withheld information would erode the competitive advantage in similar and future procurement exercises. The Commissioner is therefore satisfied that the greatest weight must be given to the potential harm to the commercial interests of the Council and third parties, should the withheld information be disclosed.
64. Given the level of likelihood that commercial harm would occur should the information be disclosed, the Commissioner has decided that the balance of public interests currently favours maintaining the exemption.

Conclusion

65. The Commissioner's conclusion is that the public interest in disclosure of the withheld information is outweighed by the public interest in maintaining the section 43(2) exemption. Therefore, the Council was not obliged to disclose the requested information.
66. As the Commissioner has decided that the information requested is exempt from disclosure under section 43(2) of the FOIA and that the public interest favours maintaining the exemption, it has not been necessary to go on to consider the application of section 40(2) of the FOIA.

Right of appeal

67. 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

68. 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.
69. 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

Phillip Angell
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