

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 November 2022

Public Authority: Cornwall Council
Address: New County Hall
Treyew Road
Truro
Cornwall
TR1 3AY

Decision (including any steps ordered)

1. The complainant has requested details of a finance agreement between Cornwall Council (the council) and Greenwich Leisure Limited (GLL).
2. It is the Commissioner's decision that the council is entitled to rely on section 43(2) of FOIA as its basis for refusing part 1 and part 2 of the complainant's request.
3. However, as the council failed to cite an exemption in its refusal notice, or at the internal review stage, the Commissioner has found a breach of section 17(1) of FOIA.
4. The Commissioner does not require the council to take any steps as a result of this decision notice.

Background

5. In April 2017, Cornwall Council awarded its leisure management contract to GLL. The Commissioner understands that there are a number of other leisure providers who have different agreements with the council to provide leisure services to the local community.

6. Following the Covid-19 pandemic, the council agreed to provide support packages, which included loans, to its leisure service providers in order to "avoid supplier failure or the continued closure of [leisure] centres."
7. The request that is under consideration within this decision notice relates to the loan which the council agreed to provide to GLL.

Request and response

8. The complainant has raised concerns about the council's handling of part 1 and part 2 of their four part request dated 5 November 2021, which was for the following:

"Please tell me,

1. Of the £3.4m loaned to GLL, how much has been repaid as of 1st November 2021, and what the remaining payment schedule is, indicating when the loan will be fully repaid.
2. What interest rate or rates is being charged to GLL over what term."

9. The council's response confirmed that it regarded the information relevant to parts 1 and 2 of the complainant's request to be commercially sensitive under 'the concession agreement'.
10. The council, in its internal review response, then maintained its original position with regard to parts 1 and 2 of the request.

Scope of the case

11. The council has acknowledged in its response to the Commissioner that it should have confirmed to the complainant that it was relying on section 43(2) of FOIA as its basis for refusing parts 1 and 2 of the request.
12. The Commissioner will decide whether the council is entitled to rely on section 43(2) of FOIA as its basis for withholding the information relevant to part 1 and part 2 of the complainant's request.

Reasons for decision

13. Section 43(2) states that a public authority may refuse to disclose information if its disclosure would, or would be likely, to prejudice the commercial interests of the public authority itself and/or a third party.
14. As section 43 is a qualified exemption, the council must also demonstrate that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.
15. In this case, the Commissioner accepts that the withheld information, which relates to a finance agreement between the council and GLL, is commercial in nature.
16. The council claims that the release of the withheld information would be likely to cause prejudice to the commercial interests of both itself, and GLL.
17. The Commissioner intends to consider whether the information is exempt under section 43(2) on the basis that its disclosure would be likely to prejudice the council's commercial interests.
18. If necessary, the Commissioner will then go on to consider whether the release of the information would be likely to prejudice the commercial interests of GLL.
19. The council has argued that its ability to negotiate competitively with other service providers and business could be undermined, should information relating to the terms of certain finance agreements that it has previously negotiated be placed in the public domain.
20. The council has also said that disclosure of the terms of the loan agreement may discourage both GLL and other business to enter into further contracts with the council, if there was a fear that their financial position would be made public. The council goes on to say that this could prevent it from being able to secure best value for money in relation to future finance agreements, and that this might then affect both services and the public purse.
21. The Commissioner understands that the council has not published the financial details of its loan agreement with GLL (or its other service providers); this includes the amount of the loans. Therefore, whilst a figure of £3.4 million has been cited by media sources, this has not been verified by the council.

22. The Commissioner accepts that the disclosure of the withheld information is likely to have a detrimental effect on the commercial position of the council. It would put businesses who negotiate finance terms with the council in the future at an unfair advantage; they would have an insight into the council's previous negotiations and the agreements made, and could then use this knowledge as a 'bargaining tool'. This could then prevent the council from getting the most competitive deals.
23. The Commissioner is also mindful that it is highly likely that the council currently has other finance agreements in place. If the terms of the council's loans were found to differ, then this could lead to other service providers, or other businesses, trying to renegotiate lower interest rates and/or terms with the council.
24. The Commissioner concludes that there is a causal link between the disclosure of the information and the harm to the council's commercial interests which has been described, and that the exemption at section 43(2) is engaged. As a result, the Commissioner will go on to consider the public interest test.

Public interest test

25. The complainant has argued that the council should be in a position to provide an answer to the questions that they have asked, and that it is in the public interest to do so. They state that as the agreement between the parties is costing the taxpayers in Cornwall millions of pounds, the council should be open and transparent about the terms of the loan.
26. The Commissioner considers that there is always some public interest in the disclosure of information. It promotes the aims of transparency and accountability which, in turn, promotes greater public engagement and understanding of the decisions taken by public authorities. He is also mindful that the disclosure of the withheld information could improve the wider public's confidence about the way in which the council is spending public money.
27. However, it is the Commissioner's opinion that there is a very strong and inherent public interest in ensuring fairness of competition, and it would be firmly against the public interest if the council's commercial interests are harmed. If service providers, or other business, were to gain an unfair advantage in future negotiations following disclosure of the information, then this would weaken the council's position and have a negative impact on its ability to obtain value for money, achieve the best commercial position, and protect public funds.

28. As a result, the Commissioner considers that any public interest benefit which would be served by the disclosure of the withheld information, would be outweighed by the harm which would be caused to the council's ability to achieve the best value when negotiating the terms of future finance agreements.
29. Furthermore, disclosure of the information could cause damage to the council's reputation; service providers and other businesses may lose trust in the council as a result of the disclosure of their financial position, and may decide not to compete within the market place to deliver services for the council. This may then negatively impact on the council's ability to obtain good quality services at a competitive price, which, in the Commissioner's view, would not be in the public interest.
30. Therefore, it is the Commissioner's decision that the public interest in maintaining the exemption at section 43(2) of FOIA outweighs the public interest in disclosure in this case. As a result, the council is not obliged to disclose the information relevant to part 1 and part 2 of the complainant's request.
31. Having determined that the requested information is exempt from disclosure under section 43(2) of FOIA on the basis of the prejudice to the commercial interests of the council, the Commissioner does not regard it to be necessary to consider whether section 43(2) is applicable to the potential prejudice to the commercial interests of GLL.

Procedural matters

32. In this case, the council failed to state to the complainant in both its original response, and at the internal review stage, that it was relying on section 43(2) of FOIA as its basis for refusing part 1 and 2 of the request. The Commissioner therefore finds a breach of section 17(1) of FOIA.

Right of appeal

33. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

34. 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.
35. 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

Suzanne McKay
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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Wilmslow
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