

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 March 2022

Public Authority: Lewes and Eastbourne Borough Council

Address: Town Hall
Grove Road
Eastbourne
BN21 4UG

Decision (including any steps ordered)

1. The complainant has requested information from Lewes and Eastbourne Borough Council ("the council") regarding an increase to the rental rates for beach huts.
2. The council withheld some information on the basis of section 43(2) (commercial interests) of FOIA, and stated that further information was not held.
3. The Commissioner's decision is that section 43(2) was correctly applied and the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner also finds that, on the balance of probabilities, no further information is held by the council.
4. No steps are required.

Request and response

5. On 7 January 2021 the complainant requested information from the council in the following terms:

"We have just received your letter of 4th January announcing the new rental rates for Beach Huts for 2021/22.

Under the provisions of the Freedom of Information Act we are applying for information on the criteria, and any supporting report, used to decide the new rate which, for the hut we currently rent, is due to rise from £635 to £1,000 – an increase of 57%."

6. The council responded on 27 January 2021. It denied holding the requested information, and provided the following explanation:

"The council does not holding any supporting documentation which was used to decide the new rates for beach huts. The effects of the pandemic have resulted in the Tourism department, along with all other council departments, being asked to make savings or improve revenue from resources. The beach huts, which are in prime beach spots in one of Britain's top resorts, have only had minimal annual rental increments in the last ten years and were considered to be below their true market value and this review has sought to address that shortfall."

7. The complainant requested an internal review on 28 January 2021.

8. The council provided the outcome of its internal review on 5 February 2021. It revised its position to disclose an email dated 14 November 2019 named "Fee income review", and advised that 2 further documents were withheld on the basis of section 43(2) of FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 12 March 2021 to complain about the way their request for information had been handled. Specifically they dispute the application of section 43(2) to withhold information. Furthermore, they contend that the council has not identified nor disclosed any information about the decision making criteria used for establishing the rent increases.

10. The scope of the case is to determine whether the council is correct to withhold information on the basis of section 43(2), and whether it holds any further information which is within the scope of the request.

Reasons for decision

Section 43(2) – Commercial interests

11. Section 43(2) states that:

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

12. The term ‘commercial interests’ is not defined in the FOIA; however the Commissioner has considered his guidance on the application of section 43¹ which clarifies that:

“A commercial interest relates to a legal person’s ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent.”

Does the information relate to a person’s commercial interests?

13. The withheld information comprises three spreadsheets named:

- (a) Fees and Charges Review
- (b) CMT savings and one-off growth items from 20-21 for 21-22
- (c) Appendix 2 Savings and Growth

14. The spreadsheets are internal working documents created for departmental heads in order to facilitate a financial review of cuts, savings and increased revenues. They include the incomes from various departments and predicted future income.

15. The Commissioner notes that the majority of the information contained within the spreadsheets does not relate to the rates for beach huts and therefore is out of scope of the request:

- Spreadsheet (a) presents budget information for the “2019/20 Original Budget” for all departments in the council, including four lines of financial information regarding the expected income in 2019/20 from the hire of beach huts.

¹ [Section 43 - Commercial interests | ICO](#)

- Spreadsheet (b) lists by budget item the value of savings identified for 2020/21 for all of the council and holds a comment on how the saving will be achieved. There are 5 lines of information regarding the beach huts which are mainly financial.
 - Spreadsheet (c) lists the 2020/21 Budget Changes, Savings and Growth. It presents the same budget information in a different format.
16. The Commissioner considers that the withheld spreadsheets offer very little insight into the decision making for the rental increases apart from the savings and increases to revenue that the council needs to make to improve on its budgetary position.
17. The council advises that whilst there is no other commercial body offering beach hut rentals in Eastbourne, it is in competition with the provision of beach huts in neighbouring resorts. Therefore information on revenue, costs and charges is commercial information.
18. The Commissioner therefore accepts that the withheld information is commercial in nature.

The likelihood of the prejudice occurring

19. In order for the exemption to be engaged it is necessary for it to be demonstrated that disclosure of information would result in some identifiable commercial prejudice which would, or would be likely to, affect one or more parties.
20. The Commissioner has been guided on the interpretation of the phrase "would, or would be likely to" by a number of First-tier Tribunal (Information Rights) ("the Tribunal") decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; either prejudice "would" occur, or prejudice "would be likely to" occur.
21. With regard to "would be likely to" prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk" (Tribunal at paragraph 15).
22. With regard to the alternative limb of "would prejudice", the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that "clearly this second limb of the test places a stronger evidential burden on the public authority to discharge" (Tribunal at paragraph 36).

The council's position

23. The council advises that its own commercial interests would be likely to be prejudiced by disclosing the information for the following reasons:
- The requested information contains confidential commercial information which would be likely to be of interest to their competitors.
 - The disclosure of the requested information could cause reputational damage which would be likely to damage the commercial interests of the council.
 - Disclosure of the requested information would be likely to result in other beach hut tenants questioning or appealing against rent increases. It would provide information to assist in such appeals which would damage the council's commercial interests.
24. The council advised that it had to make the savings and rental price increases to maintain its income in the financial circumstances that currently face local government. It stated that in such circumstances, it is highly important that its commercial interests are not prejudiced.
25. The complainant states that "To define competitors as other seaside resorts is flawed as long term rentals are only available to residents of the towns concerned. Daily rates would be the only issue in this regard but these are a tiny proportion of the total in Eastbourne, so there is no case in this regard."
26. The Commissioner put this argument to the council. It advised that whilst it acknowledges there is no other commercial body offering rentals in Eastbourne, the council is in competition over the provision of beach huts with other seaside resorts such as Bexhill, Hastings and Brighton.

Is section 43(2) engaged?

27. The Commissioner must be satisfied that the nature of the prejudice is "real, actual or of substance" and not trivial or insignificant. He must also be satisfied that some causal relationship exists between the potential disclosure and the stated prejudice.
28. The Commissioner carried out some research on the internet and found that beach huts are available to hire to non residents in neighbouring resorts. He therefore accepts that disclosure of revenue and cost information could be of use to other providers of beach hut rentals and this could be prejudicial to the council.

29. The Commissioner also accepts that the withheld information could encourage other tenants to appeal rent increases which would be prejudicial to the council's commercial interests.
30. The Commissioner therefore finds that the section 43(2) exemption is engaged as prejudice to commercial interests would be likely to result through disclosure. As the exemption is engaged, the Commissioner must consider the balance of the public interests for and against disclosure.

Public interest test

31. The exemption under section 43(2) is subject to the public interest test. This means that, even when a public authority has demonstrated that the exemption is engaged, it is required to consider the balance of public interest in deciding whether to disclose the information. The public interest is not a tightly defined concept, and can cover a range of principles including, but not limited to: transparency and accountability; good decision-making by public bodies; upholding standards of integrity; ensuring justice and fair treatment for all; securing the best use of public resources and in ensuring fair commercial competition in a mixed economy.

Public interest in favour of disclosure

32. The council states that it recognises the public interest in openness and transparency and the use of public resources.
33. The complainant states that they have ascertained the rates of increase in different locations which vary from 20% to 57%. They state that despite the age and upkeep of their beach hut it has been placed in the highest increase bracket. Therefore there is public interest in understanding the criteria used to decide the increase.

Public interest in favour of maintaining the exemption

34. The council states that:
 - disclosure of the income projections and how the costs are managed would be of use to commercial competitors. This would have an adverse affect on the council's ability to compete in the market.
 - disclosure could cause further disputes regarding the increases and the savings identified.
 - in the interests of the openness and transparency, the council has already published publicly the General Fund Revenue Budget 2021/22 and Capital Programme.

Balance of the public interest

35. The Commissioner is cognisant of the complainant's reasoning that "all along we have been asking for the decision making criteria regarding the rent increases. These in themselves do not raise issues under section 43(2) as they are only the basis for commercial decisions and not the outcome."
36. The Commissioner considers that whilst the council's budgetary information is within scope of the request, it does not address the root of what the complainant was seeking and what their reasoning in favour of disclosure relates to, which was the decision making criteria used to decide the new rates for beach huts.
37. The Commissioner also considers that the council's public interest arguments are quite weak when applied to the few lines of information within the budget spreadsheets that can be considered to be in scope of the request. Whilst acknowledging that there could be a competitive threat from neighbouring resorts, he is also sceptical of how damaging that could be in terms of the provision of beach huts to residents in Eastbourne who presumably would like to rent local huts.
38. On balance, considering the limited value of the information in meeting the stated public interest, the Commissioner finds that the transparency arguments are outweighed by the need of the council to protect itself from competition and further rate disputes.
39. The Commissioner therefore finds that the section 43(2) exemption is engaged and that the public interest favours maintaining the exemption on this occasion. The council was not, therefore, obliged to disclose this information.

Section 1 – General right of access to information

40. Section 1(1) of the FOIA states that: Any person making a request for information to a public authority is entitled—
 - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.
41. Section 1(1) requires that any person making a request for information to a public authority must be informed in writing by the public authority whether it holds information within the scope of the request, and if so, to have that information communicated to them. This is subject to any exclusions or exemptions that may apply.

42. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
43. In other words, in order to determine such complaints, the Commissioner must decide whether on the balance of probabilities a public authority holds any, or additional, information which falls within the scope of the request.

The complainant's position

44. The complainant contends that it is not credible that the council holds no written record of the study and conclusions which formed the basis for the change in the beach hut rental rate increase.
45. The complainant is concerned that the assessment "does not compare like with like" and therefore the council do not wish to release details so that they can be subject to scrutiny.
46. The council states that the market values of huts and chalets has been reassessed, and the complainant argues that this indicates that some record of criteria must exist.
47. The complainant argues that it is not credible that no record of the management oversight, discussion and approval process exists.

The council's position

48. The council advised:
 - in the internal review it was explained to the complainant that the relevant departments were asked to review their pricing and to set it at market rates. The review response states "the seafront team were instructed to research beach hut hire prices at competitor resorts and come back with suggested increases for Eastbourne... it became clear that all of the beach stock was under-priced compared to competitors...the beach huts had also had no increase in charges for over twenty years...As a general approach the more popular and higher end huts and chalets were subjected to higher increases based on the fact that they had the longer waiting lists..."
 - regarding the review process, the council operates on a cascade system whereby the Head of Tourism liaises with Heads of Service in the department after the Corporate Management Team and/or Finance have made requests to them. They then ask the Heads of Service to follow the instructions with their direct reports. These

internal meetings are not normally minuted and e-mail records would only be kept for more strategic matters. Pricing is delegated to the heads of each service.

- The Tourism and Enterprise Team looked at other seaside towns to compare rental prices. This was completed by an online search. Whilst the council acknowledges that further documents may have been expected to be held relating to this comparison exercise, no such documentation was produced.
49. The council confirmed that email and file searches took place, with the following key words: "beach hut price increase, price increase, beach huts prices, review of beach hut prices, rent review of beach huts." Searches were undertaken on staff laptops, emails and files saved on the council's systems.
 50. The council advised that it had also contacted relevant members of staff to identify records of any decisions the Corporate Management Team had taken in regard to the beach hut rental increase from minutes and none were found. The Head of Business Planning and Performance was also contacted to see if they held any documents that could have been relevant to the request.
 51. During the Commissioner's investigation the council contacted the Seafront Team and the council's Chief Financial Officer to carry out further searches, and no information was found.
 52. The council advised that the decision to increase the beach hut rents was taken by the Head of Tourism, during a one to one meeting with the Head of Tourism and Enterprise, and that this meeting was not minuted.
 53. The council confirmed that no information in scope of the request had been destroyed or deleted.
 54. The council stated that there are no statutory requirements for keeping information in scope of this request.

The Commissioner's Conclusion

55. The Commissioner has considered the complainant's position, in conjunction with the council's response.
56. The complainant makes logical arguments regarding why the information requested should be held. The Commissioner considers it entirely reasonable to expect the council to hold information that informs its own decision making on matters that impact the public. However as the complainant has also recognised previously, the FOIA is only concerned with what information is actually held.

57. The council has provided an explanation as to how the decision was made and it has described satisfactory searches for minutes and documents enabling that decision. It has confirmed that no information was deleted.
58. There is no contradictory evidence available to the Commissioner that indicates that the council is withholding any information in scope of the request.
59. On this basis the Commissioner has concluded that, on the balance of probabilities, the requested information is not held.

Right of appeal

60. 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

61. 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.
62. 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

Janet Wyles
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