

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 March 2023

Public Authority: Lichfield District Council
Address: District Council House
Frog Lane
Lichfield
Staffordshire
WS13 6YU

Decision (including any steps ordered)

1. The complainant requested from Lichfield District Council (“the Council”) information relating to the selection of an event organiser. The Council withheld the requested information under section 43(2) (Commercial interests) of FOIA.
2. The Commissioner’s decision is that the Council has failed to demonstrate that section 43(2) is engaged.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information, ensuring that any personal data is redacted subject to the terms of the Data Protection Act 2018.
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.

Request and response

5. On 24 May 2022, the complainant wrote to the Council and requested information in the following terms:

"I ask for the following information to be released to me under the Freedom of Information Act 2000:

- 1. A copy of the process adopted by LDC for the selection of the event organiser for the Spring Food Festival**
 - 2. A summary of the evaluations used to award the contract.**
 - 3. A copy of the Construction Phase Plan as per the Construction (Design and Management) Regulations 2015.**
 - 4. Copies of the Health & Safety Risk Assessments and Method Statements (RAMS), reviewed by LDC, in particular those relevant to residents' safety, including access for emergency vehicles.**
 - 5. A copy of any Safe Systems of Work**
 - 6. A copy of accident history**
 - 7. A copy of the Event Management Plan specific to the Spring Food Festival and including emergency procedures.**
 - 8. A copy of the city centre layout plan outlining the position of all stalls, refuge areas and emergency points**
 - 9. A copy of the Highways Closure Notice and the requirements for access for residents and businesses.**
 - 10. A copy of any security and operational briefs reviewed by LDC in considering the application.**
 - 11. A summary of the potential income to LDC from the event."**
6. The Council responded on 1 July 2022. It disclosed information and withheld some under section 43(2) - specifically that sought by parts 4, 7 and 10 of the request.
7. Following an internal review, the Council wrote to the complainant on 5 August 2022. It maintained the application of section 43(2).

Reasons for decision

Section 43(2) – Commercial interests

8. 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).”

9. 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?

10. The information withheld in this case is various documents relating to a third party’s application to manage an event. The Commissioner accepts that such information is commercial in nature.

The likelihood of the prejudice occurring

11. 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.

12. 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; i.e., either prejudice ‘would’ occur, or prejudice ‘would be likely to’ occur.

¹ <https://ico.org.uk/for-organisations/foi-guidance/section-43-commercial-interests/>

13. 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).
14. 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

15. In this case the Council has stated that disclosure of the information 'would be likely' to prejudice the commercial interests of the third party.
16. The Council has provided the Commissioner with a copy of the withheld information, which comprises the following documents:
 - Sectional plans (7 pages)
 - Event risk assessment (21 pages)
 - Event safety management plan (41 pages)
 - Safety Advisory Group minutes (9 pages)
17. The Council has informed the Commissioner that it considers that disclosure of the information would prejudice the commercial interests of the third party, because it would reveal detail about each aspect of their running the event. Disclosure of the information would therefore distort competition in the market and prevent fair competition between the third party and other local businesses offering the same type of service.

The Commissioner's conclusion

18. The Commissioner has reviewed the withheld information, in conjunction with the Council's arguments. The Commissioner notes that the Council has applied section 43(2) to a significant volume of information spread across 78 pages.
19. The Council has seemingly applied section 43(2) to the information simply on the basis that it relates to the third party's management of the event. No distinction has been made between the content and sensitivity of the information, and no clear explanation has been

provided in respect of the claimed prejudice and how, in the circumstances of this matter, that prejudice would be likely to occur in respect of the various information that the Council has applied the exemption to.

20. It is also relevant for the Commissioner to note that the Council has not provided any evidence to indicate that it has consulted with the third party, or that its arguments are based on knowledge of the third party's concerns.
21. It is evident to the Commissioner that, due to the subject matter (the engagement of the third party to manage an event) some of the information may cause prejudice to the commercial interests of the third party. However, having had regard to the simplistic arguments made by the Council – in conjunction with the Council applying the exemption so widely to a substantial volume of information – the Commissioner is not satisfied that the Council has demonstrated the claimed prejudice.
22. For the above reasons, the Commissioner does not consider that the Council has provided compelling evidence that prejudice would be likely to occur. As this test is not met, there is no requirement for the Commissioner to proceed any further. On this basis he finds that the exemption is not engaged.

Other matters

23. The Commissioner has previously issued a range of similar decision notices (e.g., FER0771845, IC-40526-Y9V6, IC-42754-K5L1, IC-176115-R6W6, etc.) finding that a public authority has sought to apply an exemption in a 'blanket' approach, without considering the differing content and sensitivity of information.
24. The Commissioner reminds the Council that in cases where a public authority seeks to withhold information, this should be done with careful consideration of the actual content of the information, at a granular level if necessary. Should a public authority consider that such consideration would place a grossly oppressive burden upon it, due to the request seeking a substantial volume of information, from which the potentially exempt information cannot be easily isolated, then section 14(1) provides an exclusion from the duty to comply with the request.

Right of appeal

25. 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

26. 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.
27. 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

Daniel Perry
Senior Case Officer
Information Commissioner's Office
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