

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 October 2019

Public Authority: Adur & Worthing Councils
Address: Worthing Town Hall
Chapel Road
Worthing
West Sussex
BN11 1HA

Decision (including any steps ordered)

1. The complainant has requested information relating to Adur & Worthing Councils' (the Council) acquisition of two buildings.
2. The Commissioner's decision is that the Council has correctly applied section 43(2) to the withheld information.
3. The Commissioner does not require the Council to take any steps as a result of this decision notice.

Request and response

4. On 27 February 2019, the complainant wrote to the Council and requested information in the following terms:

"I would like to request some documents from the council I believe I should be allowed access to under the Local Government Act 1985.

The first three relate to HofMP&I/009/18-1. I understand it relates to the council's decision to acquire the Matchtech building in Fareham on a freehold basis for £9.6 million on 31st October 2018. I would like to request access to the Risk Matrix Report, Financial Analysis, and Officer Decision Report referenced at the bottom of this document.

I would also like to request any Risk Matrix Reports, Financial Analyses, and Officer Decision Reports relating to the council's acquisitions of:

1. *The Beta Building in Fareham, purchased on a 999-year lease for £11.24 million on 15th January 2019, and*
2. *Building One in Abingdon-on-Thames, purchased on a head lease of 250 years for £9.6 million in July 2018."*
5. The Council responded on 26 March 2019 and refused to provide the requested information citing section 43(2) of the FOIA as its basis for doing so.
6. Following an internal review the Council wrote to the complainant on 29 April 2019 and maintained its original position.

Background

7. Worthing Borough Council has a programme to invest £125m over 5 years in commercial property in the UK. This is matched by its sister Council Adur District Council who has a similar programme in place. The reasoned justification for this, the investment strategy, and objectives are set out in the Council's adopted Commercial Property Investment Strategy adopted in March 2019. This is available on the Council's website <https://www.adur-worthing.gov.uk/media/media,152857,en.pdf>
8. The Council's strategy sets an approach to build a blend of property holdings with investments being spread geographically, in terms of lot size (in terms of value), type of asset (retail, office, industrial etc), and covenant type (the strength of the occupier).
9. The core objective of this approach is to minimise risk, ensure value is achieved when spending public money, and ensure that the council is taking a prudent approach to property investment.
10. With a total fund of £250m available the Council are one of the more active purchasers in the market at present and have been involved in over 15 transactions since April 2018. In each case the Council have been negotiating with a private vendor whose aim is to maximise their return, and the Council is seeking to purchase the property at the best available price. Importantly, when purchasing these properties the Council are operating in a competitive market. It is competing with other public sector and private sector purchasers both from the UK and globally.

Scope of the case

11. The complainant contacted the Commissioner on 1 May 2019 to complain about the way his request for information had been handled.
12. During the course of the Commissioner's investigation the Council re-considered its previous response. It determined that due to the passage of time, some information could be disclosed in full and some further information in a redacted form. It maintained that the remaining information was exempt from disclosure by virtue of section 43(2).
13. The Commissioner therefore considers the scope of this case to be to determine if the Council has correctly applied section 43(2) of the FOIA to the remaining withheld information.

Reasons for decision

Section 43 – commercial interests

14. Section 43 of the FOIA provides that if the disclosure of information would prejudice the commercial interests of any person including the public authority that holds the information, then the information is exempt from disclosure. This is a prejudice-based exemption and is subject to the public interest test.
15. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met.
16. First, the actual harm that the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.
17. Second, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice that is alleged must be real, actual or of substance.
18. Third, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – e.g. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
19. In relation to the lower threshold of 'would be likely to', the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and

significant risk. With regard to the higher threshold of 'would', in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.

20. The Council consider that the lower threshold of 'would be likely' to be relevant in this regard.
21. 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 43¹. 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".
22. The Commissioner accepts that the Council operates in the commercial market of purchasing or selling land and property.
23. The Commissioner has been provided with all the relevant information and is satisfied that it relates to a commercial activity, that is, the acquisition of property.
24. In order for section 43(2) to be engaged it must be shown that the disclosure of specific information will result in specific prejudice to one of the parties. In demonstrating prejudice, an explicit link needs to be made between specific elements of the withheld information and specific prejudice which disclosure of these elements would cause.

The complainant's position

25. The complainant believes that though they are marked as exempt, under the Local Government (Access to Information) Act 1985, exempt material must be on matters 'in the process of being negotiated' or 'commercially sensitive'. Now that the acquisition has been made by the council, he feels that neither of these conditions apply as the deal has been done and the fact that it has been bought for freehold or long leases means that disclosing these documents won't have a negative impact on the council's future ability to negotiate value for money.
26. According to the Local Government Act 1985 and the Local Government Transparency Code 2005, these transactions should be public.

¹ <https://ico.org.uk/media/fororganisations/documents/1178/commercial-interests-section-43-foiaguidance.pdf>

27. Accountability for public funds also applies here, as the public money that funds the council is being used on potentially risky business investments. Openness in public spending is vital, so the public has a right to know where their money is going.

The Council's position

28. It is the Council's position that disclosure of the information would be likely to prejudice its own commercial interests.
29. The Council has explained that the information contained in the Risk Assessment Matrix contains sensitive commercial information that goes directly to the core of how it makes decisions in this competitive environment.
30. It gives insight into how the Council assesses the suitability of a purchase, how it assesses the risk of a potential covenant, the risk of the property market in an area, and how the purchase fits in with its existing portfolio of properties (bearing in mind the objective is to have a variety of assets to minimise risk). This matrix has been used for every purchase and is intended to be used in the future for purchases.
31. The information contained in the financial appendix contains sensitive commercial information that goes to heart of how the Council appraises its purchases in financial terms, giving insight into borrowing rates, assumptions around re-letting, financing, and future capital funding required to maintain and refurbish the building.
32. The combination of releasing these sets of information into the public domain would result in vendors having an insight into how the Council assess its properties, how it would fit with its wider portfolio, and how the Councils (as the evaluation methodology applies to both Worthing Borough and Adur District) work up its financial offer for the properties. The information goes to the heart of how the Council operate in a competitive commercial environment.
33. The Commissioner accepts that the withheld information is relevant to the applicable interests within the commercial interests exemption and therefore the first part of the test above is met.
34. She is also satisfied that the Council has evidenced how its commercial interests could be affected. The Commissioner also considers that the Council has demonstrated sufficient support for the lower level of prejudice. As she is satisfied that disclosure would be likely to prejudice the commercial interests of the Council, and that section 43 of the FOIA applies, she will now go on to consider the public interest test.

Public Interest Test

35. Section 43 is a qualified exemption and therefore the Commissioner must consider the public interest and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information

Arguments in favour of disclosing the information

36. The Council recognised that there is a general public interest in favour of disclosure of commercial information to ensure transparency and accountability of public funds and the effective use public money.

Arguments in favour of maintaining the exemption

37. The Council stated it had balanced disclosure and the argument for maintaining non-disclosure of the exempt documents on a weighting exercise in which it considered the following factors. Disclosing the information would benefit third parties and prejudice the Council by : -
- Giving insight as to how the Council assess its suitability of a purchase
 - How the Council assess a risk of a potential covenant
 - How the purchase fits with the Councils' existing portfolio
 - Provides insight into borrowing rates, assumptions around re-letting, financing, and future capital required to maintain and refurbish the buildings
 - Giving insight into how the Council assess its properties and how the Councils' evaluation methodology applies
 - Providing information as to how the Council operates in a competitive commercial environment
38. Disclosure of the information would also be likely to prejudice its future operation. To confirm above, the matrix is used on every property transaction thus releasing it would put the Council at a disadvantage.
39. If vendors or competitor buyers were party to this information, this would be advantageous to them. This could result in vendors holding out for a higher price (increasing public expenditure, and reducing public value) or competitors being able to outbid the Council. This would benefit third parties and prejudice the Council.
40. The above prejudice would inhibit the Council's ability to compete in a commercial environment and the Council submitted that the lack of ability to use public funds efficiently is not in the public interest.

Balance of the public interest

41. The Commissioner notes the complainant's references to the Local Government Act, however it does not fall within her remit to determine whether other legislation may permit disclosure of the requested information. It is her role to determine if the Council has correctly applied section 43(2) of the FOIA to the withheld information.
42. In her guidance, the Commissioner recognises that:

"There will always be a general public interest in transparency. There may also be a public interest in transparency about the issue the information relates to".
43. The Commissioner has taken into account the strong case for openness and transparency when balancing the public interest arguments in this case. In that respect, the Commissioner acknowledges that the Council provided the complainant with some disclosable information.
44. Although the requested information relates to acquisitions that have already been completed and therefore would have lost its commercial sensitivity once the purchase was completed, the Commissioner is satisfied that the assessments of these properties reveals approaches that would help other parties estimate what the Councils' would be prepared to bid for other properties in the near future.
45. In this case it is clear the information is of a commercial nature. Disclosure of the remaining information would be likely to be of detriment to the Council in what is a competitive market as it would reveal details of how the Council assesses and evaluates properties. It would also provide insight into a range of financial matters relating to it as outlined above.
46. She recognises the legitimate public interest in the Council being able to compete in a commercial environment and that disclosure of the withheld information, which would be likely to prejudice that ability to compete, would undermine that public interest.
47. On balance, the Commissioner considers that the public interest in disclosure of the withheld information is outweighed by the public interest in maintaining the section 43(2) exemption.

Right of appeal

48. 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

49. 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.
50. 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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