



FREEDOM OF INFORMATION ACT 2000 (SECTION 50)

DECISION NOTICE

Dated 6 April 2006

Name of Public Authority: Boston Borough Council

**Address of Public Authority: Municipal Buildings
West Street
Boston
Lincolnshire
PE21 8QR**

Nature of Complaint

The Information Commissioner (the "Commissioner") has received a complaint from the above person (the "complainant") which states that on 14 January 2005 the following information was requested from Boston Borough Council ("Boston BC") under section 1 of the Freedom of Information Act 2000 (the "Act"):

"a report delivered to Boston Borough Council on the 12 January 2005 from Boston Sports Initiative which details the progress on the construction of the Princess Royal Sports Arena in Boston. "

It is alleged that:

Boston BC initially refused the request on the grounds that section 43 of the Freedom of Information Act 2000, (commercial interests) was applicable. Upon request for a review of this decision Boston BC provided a copy of the report with sections redacted which the Boston BC argued were still subject to section 43.

The Complainant alleges that the exemptions were applied incorrectly and that the information should have been supplied to him under section 1 of the Act.

It should be noted that when the Commissioner contacted Boston BC regarding this issue they had changed their view and were now stating that the information was exempt under section 41, (that disclosure would create an actionable breach of a duty of confidence), as well as section 43.

The Commissioner's Decision

Under section 50(1) of the Act, except where a complainant has failed to exhaust a local complaints procedure, or where the complaint is frivolous or vexatious, subject to undue delay, or has been withdrawn, the Commissioner is under a duty to consider whether the request for information has been dealt with in accordance with the requirements of Part I of the Act and to issue a Decision Notice to both the complainant and the public authority.

The Commissioner's decision is as follows:

The information in question is exempt from disclosure under section 41 of the Act on the grounds that a disclosure of the information in question would create an actionable breach of a duty of confidence owed by Boston BC to the providers of the information.

A full statement of reasons is provided with this document.

Action Required

In view of these matters, the Commissioner hereby gives notice that, in exercise of his powers under section 50 of the Act, he does not require any remedial steps to be taken by Boston Borough Council.

Right of Appeal

Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process can be obtained from:

Information Tribunal	Tel: 0845 6000 877
Arnhem House Support Arena	Fax: 0116 249 4253
PO Box 6987	Email: informationtribunal@dca.gsi.gov.uk
Leicester	
LE1 6ZX	

Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

Dated the 6th day of April 2006

Signed:

Graham Smith
Deputy Commissioner

Information Commissioner
Wycliffe House
Water Lane
Wilmslow Cheshire SK9 5AF

Statement of Reasons.

Boston Sports Initiative (“BSI”) is a charitable company set up by Boston Borough Council (“Boston BC”) to develop and manage the Princess Royal Sports Arena. Boston BC has no link to BSI nor its management of the Arena project save that a single Councillor sits on the board of BSI and another Councillor acts as an observer to proceedings. BSI operates on a “not for profit” basis. However, it carries out commercial transactions in a competitive environment, and leases the land and Arena from Boston BC, on a long term lease. Should BSI ever be wound up then ownership of the land and the buildings would revert to Boston BC. BSI is not a public authority for the purposes of the Act.

Bladerunner are the company contracted to manage the day to day running of the Health and Fitness centre at the Arena. They are a private company who are also not designated as a public authority for the purposes of the Act.

The Complainant’s request was for a copy of a report issued by BSI to Boston BC on the 12 January 2005. The report relates to BSI’s work in initiating the project and Boston BC’s continuing financial support of BSI and the Arena in its initial stages. The report highlights the financial status of the Arena, provides an overview of the intentions of BSI and Bladerunner in the near future, and details the history of the project to date.

Audit Commission report, BO0005, Annual Audit and Inspection Letter, dated December 2004, highlights Boston BC’s financial stake in the project as well as general information regarding the overall cost of the project to that point. It also highlights some of the options available to Boston BC if BSI requests further funding to cover any further financial needs in the initial years of trading. This letter is in the public domain and is available at <http://www.audit-commission.gov.uk/aal/lq2004.asp>.

When the request was reviewed under the Council’s internal complaints procedure a redacted version of the document was disclosed to the requestor. Initially, Boston BC claimed that the report was subject to redaction as parts of the information fell within the exemption at section 43 of the Act. The Council has since confirmed to the Commissioner its wish to rely upon the following exemptions in relation to the redacted information:

1. Section 41 – the report was provided to Boston BC in confidence and disclosure would create an actionable breach of the duty of confidence owed by Boston BC to BSI, and
2. Section 43 – the information redacted from the document is commercially sensitive to parties involved in the Arena, and its disclosure could, or would be likely to prejudice the commercial interests of those parties.

The Commissioner has reviewed the application of these exemptions and has decided that section 41 of the Act is applicable to the information for the following reasons.

Section 41, Confidentiality claim

1. The Information Commissioner is satisfied that the report itself was supplied to Boston BC on the mutual understanding that the information was confidential and should not be passed beyond the immediate recipients or used for purposes beyond those it was initially supplied for. The information itself has the necessary quality of confidence in that it highlights commercial, legal and financially sensitive information and was supplied to the Council in the expectation that it would remain “in confidence”. Although not a compelling factor in itself, the report was marked “private and confidential”.
2. It is recognised that in applying this exemption Boston BC contacted BSI and reviewed the status of the document with them, including which elements of the report could be supplied without causing damage or potential prejudice to the parties involved in the Arena. BSI have therefore consented to the disclosure of information within the report which they felt did not undermine the commercial interests of those involved, in spite of the duty of confidentiality owed to them which covers the whole of the report.
3. The report contains, amongst other things, details of BSI’s plans for reclamation of some of the costs of the construction of the Arena. These plans are commercially sensitive in that their disclosure would, or would be likely to prejudice the viability of these plans to the detriment of both BSI and Boston BC. The Commissioner is satisfied that disclosure at this time might prejudice the viability of these plans and has therefore decided that the section 41 exemption has been applied correctly in redacting information pertaining to this.
4. Other information pertains to the forecasted growth of the Arena and associated forecasted returns, discussions around third party funding of the Arena such as charitable donations received to date, and discussions around ongoing pre-contractual discussions and negotiations. This information pertains to the historic and forecasted performance of BSI and the contracted managers of the health and fitness centre - Bladerunner - rather than the actions and deliberations of Boston BC itself. It is noted that neither BSI nor Bladerunner are public authorities for the purposes of the Act. The report is essentially an update on the current status of the Arena under BSI, and is akin to a debtor’s report to a creditor. The information has the potential to be prejudicial to the commercial interests of both BSI and Bladerunner in their management of the Arena.

5. Therefore, the Commissioner is satisfied that the application of section 41 to the redacted information is correct in the circumstances.

One of the requirements for s. 41 to apply is that the information would, if disclosed, constitute an actionable breach of a duty of confidence. Given that the Commissioner accepts, in this case, that a duty of confidence exists, the question of whether a disclosure would, in fact, be actionable has to be addressed.

In common law, a number of Defences against the disclosure of confidential information exist, and include: whether the information is not, in fact, confidential as it is already widely known or distributed; if disclosure is required by law; that the information pertains to the commission of a crime; that a disclosure is in the greater public interest; or, that the confider consents to the disclosure of the information.

There are no issues surrounding consent, law, or crime in this case. The report itself has not been widely distributed or published in its unredacted form and the detail held within it is not common knowledge. Therefore, it is not considered that this limited distribution of the information establishes that confidence has been waived. This leaves a consideration of the public interest.

The public interest may override any breach of a duty of confidence, if the greater public interest lies in the disclosure of the information, i.e. if there is an overriding public interest in disclosing the information, the courts will not find that a duty of confidence is owed. The Commissioner must, therefore, consider the public interest in disclosing the information against the public interest in maintaining the duty of confidence, with a view to deciding if any duty exists.

The central tenet for the public interest in disclosing information, in this case, surrounds the creation of transparency and accountability of public bodies in their decisions and actions. This includes the spending of public money and the public interest in the disclosure of information which would highlight or inform issues of public debate. It is recognised in this case, that there is considerable local interest in the construction and management of the project. Information within the report may highlight such issues, allowing for a more informed public debate about the actions of Boston BC in setting up and providing continued support for this project. In addition, disclosure would allow for a greater degree of transparency and accountability of Boston BC in its past actions and decisions in this matter.

Given that there has been debate in the community regarding the construction and management of the Arena there is considerable public interest in the disclosure of the information at the current time. This is particularly the case as any cost incurred by the Council associated with the construction of the Arena potentially removes funds from Boston BC's reserves which would weaken Boston BC's financial position. This may have a detrimental effect on the local community as a whole.

However, disclosure of the information may have direct consequences on the viability of the Arena, thereby depriving the local community of a valuable resource to the area, and preventing the planned reclamation of some of the public funds already used in support of this project. Disclosure could prejudice potential legal action, and the development of future arrangements for the Arena. This could have the effect of damaging the ability of the Arena to gain further funding, dissuade further usage of the Arena by the community and produce financial difficulties for the managers of the Arena. Boston BC may then need to act as a further guarantor to BSI or need to provide additional funding to support the Arena in its early trading years. This additional burden could weaken Boston BC's financial position which would have a detrimental effect on the local community.

Given that the information is commercially or financially sensitive and that disclosure has the potential to undermine the future planning of BSI and/or prevent the reclamation of funds, the Commissioner considers that the public interest reasons for maintaining the exemption are more compelling than the public interest reasons for overriding the duty of confidence.

Further, certain information relates to third party private information which impacts upon the running of the Arena, but which does not directly impact upon the actions taken by Boston BC in its construction. This includes: forecasts on membership and the projected returns likely to be generated by the Arena, (which are of commercial interest to both Bladerunner and BSI); information specifying the amounts of charitable donations or loans made by private organisations to BSI; and, information relating to negotiations and potential contracts with other commercial bodies.

In considering this information, the Commissioner has considered it important that neither BSI nor Bladerunner are a public authority for the purposes of the Act. Although Boston BC currently provides financial support to the project it is recognised that this support is only of limited duration. It is intended that BSI will run the Arena on a purely commercial basis when the initial development stage is complete, and the building has become established as a location for the provision of leisure services to the local and greater community.

Disclosure of the remaining information would not increase the accountability of Boston BC, nor would it provide for a more informed debate as to the support of the project by Boston BC other than in an indirect fashion. It would impinge upon the normal commercial and financial interests of private or charitable organisations who are directly associated with the development and success of this project on a continuing basis.

It is in the public interest for Boston BC to be able to obtain such information because of its stake in the project, through funds previously provided, through its status as guarantor to BSI, through its continuing financial support for future development, and in the general interests of providing leisure services to the local community. In providing support for this project, it is only right that

that Boston BC are able to scrutinise both the management of the Arena by BSI, and its likely future prospects for sustained viability and growth, much as any creditor may require to see the financial details of a potential borrower in order to assess the level of risk involved in continuing relations. In order for Boston BC to be able to do this, it is essential that it is able to receive information pertaining to these matters on a confidential basis, without fear that such information would be disclosed as a result of an FOI request.

Consequently, the Commissioner concludes that the public interest does not override the duty of confidentiality owed by Boston BC to BSI. As such, a disclosure would, in the Commissioner's view, constitute an actionable breach of a duty of confidence. Section 41 of the Act therefore applies to the information in question.

Section 43.

Although some of the information will fall within the exemption provided in section 43 of the Act, because the Commissioner finds in favour of the application of section 41 to this information, section 43 has not been considered further in this decision.