

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 11 October 2010

Public Authority: Bury Council
Address: Town Hall
Knowsley Street
Bury
BL9 0SW

Summary

The complainant requested information relating to civic suites owned by Bury Council. The council had carried out a review of the sites and had produced recommendations relating to the future of the sites. The complainant requested a copy of the review document, together with the sites income and expenditure records.

The council disclosed some of the information from the review however it withheld the remainder of the information under section 43(2)(commercial interests). The Commissioners decision is that the information does engage section 43(2) as a disclosure would be likely to be prejudicial to the commercial interests of the council. However he has also decided that the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information in this instance.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 4 November 2009 the complainant requested from the council

"1: The minutes for Bury Council Executive meeting held on Wednesday, 14th October 2009, at Bury Town Hall, Meeting Room A and B.

2: A copy of the summary and decisions relating to the Service Improvement Review on Civic Halls (submitted at above meeting).

3: A copy of the report by the Head of Improvement (submitted at above meeting).

4: A full copy of the Service Improvement Review on Civic Halls (submitted at above meeting).

5: A copy of the income and expenditure for Civic Halls (submitted at above meeting)."

3. The council responded on 26 November 2009. It provided the following responses to the questions asked (as numbered above):

1. It provided the requested information.

2. It provided a copy of the review, but with some redactions on the basis that section 43(2) of the Act applied; (Commercial interests).

3. It confirmed this was the same report highlighted at point 2.

4. It provided a redacted copy of the review and stated that section 43(2) applied to the redacted sections.

5. It refused to provide the information on the basis that section 43(2) of the Act applied.

4. On 30 November 2009 the complainant wrote back to the council and asked it to reconsider its use of section 43 and supply the following information:

1: A full copy of the summary and decisions relating to the Service Improvement Review on Civic Halls. Submitted at Bury Council Executive meeting held on Wednesday, 14th October 2009, at Bury Town Hall, Meeting Room A and B.

2: A full copy of the income and expenditure for Civic Halls. Submitted at Bury Council Executive meeting held on Wednesday, 14th October 2009, at Bury Town Hall, Meeting

Room A and B.

5. The Council wrote back on 21 December 2009. It informed her that it was maintaining the exemption in section 43(2) and that no further information would be disclosed.

The Investigation

Scope of the case

6. On 5 January 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider whether the information she had requested should have been disclosed to her.
7. Given the correspondence outlined above the Commissioner has limited his consideration to the information held as described in paragraph 4 above.

Chronology

8. On 11 January 2010 the Commissioner wrote to the council informing it that a valid complaint had been received.
9. On 27 January 2010 the council responded to the Commissioner. It provided a copy of the withheld information to him.
10. On 22 February the complainant contacted the Commissioner to confirm details about her complaint.
11. On 29 June 2010 the Commissioner wrote to the council and asked it to clarify its arguments, given the level of detail which had already been disclosed within the redacted reports.
12. On 9 July 2010 the council wrote the Commissioner and asked him to extend the deadline for it to respond to the 4 August 2010. The Commissioner agreed to that extension.
13. On 4 August 2010 the council responded providing a clarification of its arguments.

Background

14. Bury Council holds 4 civic suites which are venues suitable for hire for meetings, conferences, exhibitions, dinners, dances and wedding receptions, and family celebrations. The suites therefore provide a useful service for many different family and commercial events, in competition with private providers of similar services such as pubs and clubs.
15. The Service Improvement Review was initiated by the council to report on the current standing of the suites, their long term prospects for the future and to make recommendations to the council as to what action it may take with the suites for the future, such as leasing them to private management companies, selling them or continuing their use into the future.

Analysis

Exemptions

16. The council applied section 43(2) to the information. Section 43(2) provides 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).”

17. The Commissioner applies a three tier test to ascertain whether the exemption is engaged.
 1. Are the interests which will be prejudiced commercial?
 2. What is the nature of the prejudice in question?
 3. What is the likelihood of the prejudice occurring?

Interests in question?

18. The Commissioner has considered the information in question. It relates to the financial and commercial activities of the sites in question, and the report makes recommendation as to the council's management of the suites in the future. The council has highlighted that the sites operate in a competitive market, with other providers seeking to increase their size of that market compared to the civic sites. The Commissioner is therefore satisfied that the information is relevant to the commercial interests of the council.

What is the nature of prejudice?

19. The nature of the prejudice which the council envisages is that private providers will use the information to compete more effectively with the sites, thereby decreasing the civic sites' competitiveness.
20. It argues that if this type of financial and operating information was to be made public it would provide its competitors with significant advantages in the market place in terms of being able to understand the Council's cost base and operating models.
21. It further argues that a disclosure might affect its future proposals for various sites given that specific information would be available showing whether individual sites were loss making or that it viewed the long term prospects of a particular site poorly. At the time of the request the council states that it was in the process of market testing the sites – essentially advertising that the sites may be made available and asking for expressions of interest from third parties interested in managing, leasing or purchasing some of the properties. By this method the Council would find out what deals may or may not be available. Only when approaches have been made by other commercial bodies and the current commercial conditions have been assessed, will the Council know when and who to approach and the best decision to make for each individual site.
22. It argues that if this information were to be disclosed then that market testing would be prejudiced. Companies or voluntary groups would have open access to figures showing the financial performance of the individual site, and this may dissuade them from expressing an interest in the property in the first instance if they demonstrate a very poor outlook. This would reduce competition for taking over the sites, and may potentially lead to no expressions of interest being received for individual sites. The council's argument is that if this information is not disclosed those expressions of interest are more likely to be received. The council can then manage its relationship with the interested party and negotiate with it in order to persuade it to make a bid to run or buy the property. This opportunity would be lost if the immediate disclosure of the figures dissuaded such groups from expressing an interest in the first instance.
23. The council further argued that where prospective partner businesses decide to negotiate with the council regarding particular sites they are likely to try to negotiate lower rents/leases if the figures do not provide good prospects for profits making from a deal. This would lessen the public money which can be obtained from such deals. Without those figures they would not be able to make such specific arguments.

24. The council also submitted an argument that disclosing the information is likely to lead to issues of fairness during the tender process if some companies have obtained the information and others have not.
25. In summary, the council provides the following arguments describing the nature of the prejudice it foresees:
 - Disclosure would highlight costs etc which might be used by prospective purchasers or management companies to their advantage in any contractual negotiations.
 - A disclosure to one company under FOI might lead to unfairness in the tendering process.
 - The release of this information would be likely to limit expressions of interest being made.
 - This would be likely to hinder the Council's decision making powers in terms of its potential options.

What is the likelihood of that prejudice occurring?

26. In considering the likelihood of the prejudice the Commissioner has firstly considered the nature of the prejudice which the council has identified.
27. The prejudice test is not a weak test, and a public authority must be able to point to a causal link between the potential disclosure and the prejudice.
28. The council's refusal notice stated that a disclosure of the information would be likely to prejudice its commercial interests. The First-tier Tribunal (Information Rights) which was formerly the Information Tribunal has previously indicated that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote.
29. The Commissioner would therefore expect the council to be able to point to a real and significant risk of prejudice occurring through a disclosure of the information.
30. The information relates to the ongoing viability, the profit levels, the usage levels and the cost levels associated with running the civic halls, both as a whole and individually. It considers the venues' business status and analyses their potential for development, closure or continuance. It then provides a recommended approach to the decision makers for each site. It does not however provide detail of the running costs of particular areas of each part of the business so that particular loss making areas at the sites might be identified by competitors.

31. The information also details the council's financial commitment to the sites, plus the likely ongoing commitment which would be required in the future if they are left to continue as they are into the future.
32. The Commissioner notes that in response to the request the council disclosed a redacted copy of the report to the complainant. That disclosure included the majority of the information from the reports with fairly minimal redactions made to the document. For instance, the entire section of the recommendations was disclosed to the complainant, other than one figure.
33. However the redacted information is vital in order to understand the prospects for each site and the recommendations which the council made.
34. The redactions concentrate on specific figures from the information, together with the likely prospects for the sites in the future. For the most part they relate to utilisation figures, overall loss or profit figures and comments on the viability of the particular site looking to future years. The redactions also include comments on the likelihood of the individual sites being attractive to third party commercial companies or supporters groups.
35. The Commissioner questioned whether the figures which have been withheld would, in any event be requested by any potential partner or purchaser prior to them agreeing final figures on a deal. The Commissioner considers that commercial operators would be extremely likely to require these figures prior to entering into any sort of arrangement with the council, and that they would then make their offers in light of these findings. The Commissioner therefore questioned how severe any damage would be in this regard were this information to be disclosed.
36. The council responded to this suggestion. It agreed that third parties would, during the tendering or negotiating stage ask for the information and that it would be likely to provide the figures to them. However it would do so under a contractual duty of confidence. This would prevent any wider damage to the commercial interest of the site, for instance by divulging commercially sensitive profit and loss information to its competitors in the area.
37. The Commissioner notes that where the council is considering selling a site it is likely that prospective purchasers would obtain their own valuations and business prospects for the site based on the current circumstance locally around the site. With detail of the profit and losses which the site has made over recent years, third parties could formulate the basis of their tender based on all current circumstances

- and the current demand within the market. The Commissioner does not therefore accept that a disclosure of this information would be particularly prejudicial in this respect because the council confirmed that it would supply the details if asked to do so, albeit under the duty of confidence.
38. The Commissioner was not persuaded by the concerns expressed by the council that a disclosure under the Act may lead to unfairness in the tendering process. A disclosure under the Act is considered global and so the information should be provided to any interested party. The council could therefore provide the same information to all tendering parties in order to be sure that the tenders were submitted on a fair and level basis.
 39. However the Commissioner accepts the argument that commercial operators may be drawn into discussion where figures are withheld, and that once they have expressed their interest to the council it can begin to negotiate with them to achieve the best possible deal for the public. If specific figures are disclosed the figures might deter potential partners from engaging with the council in the first instance. This would prevent the council from making initial presentations to the organisation in order to more fully engage its interest in the site.
 40. The Commissioner has also considered whether supporters groups would be deterred from seeking to get involved if these figures were disclosed. Supporters groups have in the past agreed to take over sites such as this, to ensure their ongoing viability. Supporters groups often seek charitable donations and members provide their own time to renew, renovate and reinvigorate sites in order to return them to a viable and well utilised establishment.
 41. The Commissioner considers that it is possible that disclosing this information would in fact give such groups a much better indication of their likelihood of success in such a venture. If the figures show marked losses then it becomes less likely that such groups would risk involvement. Again therefore the risk is that the figures deter potential partners from entering into conversations with the council over the sites in the first instance.
 42. On balance, the Commissioner agrees that prejudice would be likely to occur to the commercial interests of the council if specific figures were disclosed. Therefore the Commissioner considers that section 43(2) is engaged by this information.
 43. Section 43 of the Act is subject to a public interest test to decide whether the information should be disclosed in spite of the prejudice which is likely to occur. The test is whether the public interest in

maintaining the exemption outweighs the public interest in disclosing the information.

The public interest

Public interest arguments in favour of disclosing the requested information

44. The main public interest in favour of disclosing the information lies in allowing scrutiny of the council's recommendations for the individual sites, and on providing information to the public on the current status of those sites. Many, if not all the sites have their supporters and/or 'friends of' groups within the community and this is recognised in the document itself.
45. The council's decisions on the future of the sites will be controversial. As established venues within the community, normally in halls and centres with long histories to them, there are many who believe that the council should retain ownership and management of the sites as an amenity to the community. On the counter side, the increasing costs of retaining and managing such sites when they cease to be fully utilised or profitable is a burden on tax payers within the community. The ongoing debate on such sites is then whether to change or amend their usage, outsource to a private company or to any viable 'friends of' groups which step forward, or to sell the building. This tends to be an emotive issue within communities, and the loss of some of these buildings is often lamented by many individuals within the community.
46. The disclosure of this information would inform that debate. The options available to the council regarding such sites will always tend to be grey rather than simply black and white. Councils are often faced with a range of options, from maintaining the status quo and bearing the costs to selling the land for redevelopment. In each case the council must make its choices based on the best value option to the community. It is worth noting that 'best value' does not always lie with the 'cheapest' option, but to the option which provides the best value to the community in all ways.
47. The Commissioner considers that it is in the public interest for that debate to be as open and transparent as possible given the often historical (at least locally) importance of the buildings in question, which have often served the community for many years. Such openness increases public participation in the democratic process which the Act was intended to encourage.
48. In order for those who wish to be fully informed about the options available in this case it is necessary for them to have full knowledge of

the facts, particularly the costs, profits, usage and likely future prospects of the sites. They can then put forward their own suggestions to the future, or make their voice heard within the community by beginning or joining a 'friends of' group to campaign for a particular choice to be made.

49. It is very difficult for such organisations to know the viability of particular options if they are not able to see the costs and profits of the individual sites. To say that a building is a cost to the community does not provide adequate information for the public to be able to consider the situation from an informed position. Many questions arise which cannot be answered from the disclosure of the review without the redacted figures being disclosed. Examples of questions which might arise in such occasions might include
- Does the building only cost minor amounts per annum or does it create a significant burden on taxpayers within the community every year?
 - From the above information, would the appropriate decision be to sell, lease or seek a private management company for the building?
 - Could the prospects of the building be changed relatively easily by supporters and voluntary groups agreeing to aid in regeneration projects?
 - Would an increase in usage generated by such clubs be enough to renew the fortunes of the building?
 - Has the council done enough to establish the reasons for falling usage? For instance is it due to restricted opening hours, the building requiring redecorating or renovation, increased competition etc...
 - If that is the case, there may be rumours that the council is allowing the building to run down in order to justify its sale? A disclosure would provide information which might help to alleviate such rumours.
 - Would the initial capital made by the sale of a site make sense when considered against the possible long term future of the site? Alternatively is the authority simply choosing to consider a site surplus to requirements simply because of the short term capital injection a sale would make? Again disclosure would allow third parties to scrutinise this prior to the buildings being sold or leased in order that they can make better representations to the council over the buildings' future.
 - When council funds are low, would it make sense to sell the site in order to bolster the immediate funds available, or is such a move depriving the community of a long term future for the site and the benefits that could bring in favour of the short term injection of funds?

- Is the site such an onus on the community that its sale price should be as high or low as is eventually agreed?
 - Clearly at a time when authority budgets are under such great pressure to establish efficiency savings the risk is that the most viable, and therefore the most valuable sites are those which provide the greatest attraction to the council's financial interests. Greater transparency in respect of this would boost confidence in respect of the council's decision making.
50. The Commissioner also considers that the disclosure of such information acts as a protection to allegations of fraud, or insider trading at an authority. With the disclosure of the losses, profits and likely future prospects of particular sites there can be no claim that particular organisations or individuals purchased sites with knowledge that was not available to others. Such claims can undermine democracy within a particular community, decreasing trust in authority decision making and honesty. An open disclosure of the true value of each site and an open discussion about the options available ensures that such claims cannot be made and believed so easily. This increases trust in government and in public authority decision making. The Commissioner considers that this was an important driver behind the introduction of the Act in the first instance.
51. There are many such questions which cannot be considered by the public without the ability to have access to specific information such as that withheld here, and there is therefore a very strong public interest in such information being disclosed much more openly.

Public interest arguments in favour of maintaining the exemption

52. The public interest arguments in favour of maintaining the exemption rest mostly in the arguments put forward in support of the exemption applying in the first instance. The authority should obtain best value for its use, sale or lease of the properties and it argues that a disclosure of the information may affect its ability to do that.
53. If this occurs the council might unnecessarily lose additional funds which could otherwise have been put to bolster council services in other areas, or reduce the tax burden on the local community.
54. It argues that a disclosure would weaken its position when negotiating with other organisations if they are able to obtain details of the council's views and financial figures for particular sites. The Commissioner considers the strength of this argument is lessened given the councils admission that it would disclose these figures in confidence to organisations it is negotiating with.

55. The council argues particularly that a disclosure of the information may dissuade organisations from expressing an interest in particular venues, and that the resulting loss of overall competition may either prevent it from carrying out its agreed course of action, or prevent it from gaining the best value it could for the site. Such a loss could reduce the options available to the council in its management of the sites.
56. There is an argument that councils should be able to manage the public's property portfolio to its best ability, and that interference in the form of a disclosure of this sort of information can inhibit or prevent it doing that. If public land is surplus to requirements then there is a public interest in that being disposed of to prevent additional costs to the community and to allow private interests to move in to regenerate the building or the land.

Balance of the public interest arguments

57. The Commissioner has considered the above arguments. There is a strong public interest in allowing the council to manage facilities and land in the best interests of the public it serves. If a disclosure of information results in the benefits which the council might have achieved not being gained, or being diminished then there is a significant public interest in allowing the council to maintain those figures from disclosure until such time as the benefits are realised, and then disclose the information. This provides the necessary scrutiny of the council's decisions, and provides transparency on its actions.
58. However the central concern with that approach is that by that time the buildings have been sold or let the council actions are complete and the public are unable to reverse the situation. If the buildings are sold then they are lost from public ownership to private organisations, whose interests will lie with profit rather than with the interests of the community as a whole. Transparency and scrutiny "after the fact" do not allow fully informed representations to be made to the council to make a real difference to the decisions it needs to take. The Commissioner is mindful that a loss of such a venue from the council's estate can rarely be replaced.
59. The Commissioner makes no judgement on what the outcome of that debate should be, other than to consider that that debate is far better informed by a disclosure of the detailed financial state of the sites at the current time.
60. The Commissioner is also mindful of the emotive aspect with which communities often consider public venues of this nature. Evidence of this is available through the many 'Friends of' and supporters clubs

which have arisen to protect such venues in the past. The council report itself recognises the public support for the retention of the venues, but qualifies this by stating that that support does not manifest itself with public use of the venues to any great degree.

61. On the counter side, where the use of the venue has dropped to the extent that the site becomes a burden on taxpayers and/or requires significant renovation then there may be a much stronger argument for the sale or lease of the buildings in order that private industry can take over that burden and renew the area.
62. The Commissioner accepts this, but does not consider that this latter argument requires the maintenance of the exemption in order to facilitate it. In fact a full disclosure of the facts may lead to supporters clubs and private industry having a much clearer idea of the ability to renew the site, and deciding that it may be worthwhile taking this forward, whereas otherwise that may not be the case. A disclosure of the figures would allow a clearer picture of the likelihood of turning the fortunes of a particular site around. This would prevent third parties, including supporters groups agreeing to take over the running of the building when it has little realistic prospect of reviving the fortunes of the site. It must be considered that the ultimate failure of a site being run as a civic amenity could ultimately result in the loss of the amenity to the community forever to developers. Ultimately the drive for profit could result in planning applications for redevelopment to housing or other more short term profitable solutions. The Commissioner does recognise however that planning approval would be needed for such drastic moves and that, to an extent, the nature of such buildings can be protected in many scenarios. He also recognises that a development of that sort may also be appropriate within the community. His point is merely that a disclosure would ultimately make such options more transparent and allow a more informed public debate on the future of the sites.
63. The Commissioner's decision is therefore that the public interest in maintaining the exemption in this instance does not outweigh the public interest in disclosing the information.

The Decision

64. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act:

- The council breached section 1(1)(b) of the Act in not providing a copy of the information to the complainant and incorrectly withholding it under section 43(2).
- The council breached section 10(1) in not providing the information to the complainant within 20 working days.

Steps Required

65. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

To disclose the information to the complainant

66. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

67. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

68. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

69. 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.
70. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 11th day of October 2010

Signed

**Anne Jones
Assistant Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1(1) provides 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."

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Section 43(2) provides 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)."